

SOUTH AFRICA / JUDGMENT

# Nichol v Road Accident Fund (11779/22) [2025] ZAGPJHC 113 (10 February 2025)

**[2025] ZAGPJHC 113****COURT**

South Gauteng High Court, Johannesburg

**BEFORE**

Van Tonder

**CASE / FILE NUMBER**

11779/22

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**Policy****REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****Case****Number: 11779/22****(1)****REPORTABLE: YES****/ NO****(2)****OF INTEREST TO OTHER JUDGES: YES/NO****(3)****REVISED: YES/NO****10****February 2025****In**

the matter between:

NICHOL:                      ZWELAKHE  
                                 Plaintiff  
                                 and  
                                 ROAD  
                                 ACCIDENT  
                                 FUND  
                                 Defendant

## JUDGMENT

VAN TONDER AJ

### Introduction

- [1] The plaintiff instituted action against the Road Accident Fund (“the RAF”) claiming 100% liability for damages arising from injuries sustained by him as a pedestrian in an accident with a vehicle that occurred on 30 November 2020 at approximately 00h40 near Jerusalema, Cosmo City. The claim is prosecuted in terms of section 17 of Road Accident Fund Act, 56 of 1996 (“the RAF Act”).
- [2] The total amount claimed in the amended particulars of claim (Caselines 002-34 - 37) is R1 539 325 made up as follows:
- a) Past hospital expenses: R20,000
  - b) Past medical expenses: R20,000
  - c) Past loss of earnings: R100,000
  - d) Future loss of earnings: R899 325
  - e) General damages: R500 000
- [3] In paragraph 8.1.3 of the particulars of claim, the plaintiff also seeks an undertaking from the RAF for future hospital/medical expenses in terms of section 17(4)(a) of the RAF Act. In paragraph 17 of the Pre-Trial Minutes of 10 February 2023 (CaseLines 003-20), the defendant undertakes to provide it if (presumably, liability) is proven.
- [4] The plaintiff's case is that he was a pedestrian who, after exiting a parked vehicle, was standing at the edge of the road when he was struck by a silver Astra motor vehicle with registration letters and numbers BC 00 LP GP (“the insured vehicle”), driven by an unknown driver (“the insured driver”). The plaintiff alleges this driver was speeding, driving negligently close to the sidewalk on the wrong side of the road, and then struck him from behind causing serious injuries to his left leg.

- [5] In its plea (CaseLines 002-19), the defendant raised two special pleas, both challenging the claim for general damages:
- a) First by raising a dispute over this Court's jurisdiction to make a finding on whether the plaintiff's claim is "serious" and whether he is entitled to non-pecuniary loss in terms of section 17(1A) of the RAF Act read with Regulation 3 of the regulations to the Act, and
  - b) Second, by disputing liability for non-pecuniary loss on the basis that the correct procedure has not been followed for an assessment on whether the injury is serious, in terms of the above section and regulations to the Act.
- [6] On the merits, the RAF denied liability and pleaded that the collision was caused by the plaintiff's own negligence in:
- a) Failing to keep proper lookout;
  - b) Failing to use his senses to ascertain approaching vehicles;
  - c) Walking with negligent disregard for other road users;
  - d) Walking/crossing at a dangerous moment; and
  - e) Obstructing the insured driver's path at an inopportune time.

The issues to be determined

- [7] In the concluding paragraphs of its heads of argument (CaseLines D41-D42), the plaintiff reframes the relief sought. It includes a request for a section 17(4)(a) undertaking for future medical expenses, and reduces the damages claim to R1,351,130.00, made up as follows:
- a) Past loss of earnings: R1,805
  - b) Future loss of earnings: R899,325 and
  - c) General damages: R450 000.
- [8] The matter came before me on 15 November 2024, with Mr Saint appearing for the plaintiff and Mr Ngomana for the defendant. It was accepted that the plaintiff's claim for general damages must first be referred to the Health Professions Council of South Africa ("HPSCA") for assessment. This issue thus falls to be separated from the other heads damages in terms of Uniform Rule 33(4), and be postponed sine dies for later determination.
- [9] The remaining issues for me to determine are therefore the following:
- a) Whether the defendant is liable for the damages caused by the accident in terms of the RAF Act, and if so whether such liability falls to be reduced through the contributory negligence by the plaintiff in terms of the Apportionment of Damages Act 34 of 1956 ("the Apportionment Act").

- b) If the defendant is liable, what the quantum is for such remaining heads of damages claimed - namely past loss of earnings and future loss of earnings.

#### Evidence

- [10] An application was filed under pocket C in CaseLines for the plaintiff's and expert testimony be presented by way of affidavit (in terms of Rule 38(2)), and for certain financial and medical records be accepted in terms of section 3(1)(c) of the Law of Evidence Amendment Act, 45 of 1998.
- [11] In commencement of the proceedings Mr Saint moved for the orders sought in such Rule 38(2) application to be granted – save that the plaintiff's evidence being led orally to allow the defendant to cross-examine him. This was met with no objection from Mr Ngomana, noting only that the accuracy of the contents of such evidence accepted on affidavit not being conceded by the defendant. I accordingly granted the application, and, following a synopsis of the merits and quantum of his claims being provided by Mr Saint, the plaintiff was called to testify.

#### The plaintiff's testimony

- [12] The plaintiff testified that he was 28 years old at the time of the accident in November 2020, and that he works, since 2018, as a cleaner (janitor) for a firm trading under the name "CCM" at the Marc Shopping Centre in Sandton. He particularised his day-to-day duties, composing of restocking toilet paper, cleaning floors, mirrors, and toilets. He elaborated to say that the upkeep imposes physical demands on him bending-over and mopping across three floors, with which he was able to cope before the accident. The explained that this is no longer the case after the accident, as he now needs to take 45-minute breaks, and that his performance level has dropped.
- [13] He stated that at the time of the accident, he was earning around R3500 and that now, though it fluctuates, he earns an average of around R5000. After the accident happened, he needed to take off in December 2020 and half of January 2021 to recover, during which period he was treated with cast and crutches. He was not paid for his off days January 2021, as his leave days had been used up. He confirmed the contents and authenticity of the bank statements and payslips filed under section 009 in CaseLines, as a true reflection of his income.
- [14] On the accident, he testified that he arrived at "Jerusalema Pub" at around 00h40 on the morning of 30 November 2024. He stated that he was "100% sober" because he had to be up early the next morning. He was transported as a passenger driven by his best friend.

- [15] After exiting the vehicle, he took 5 steps away. At this point he was struck from behind by a vehicle on his ankle. According to the plaintiff, his friend chased the vehicle and was able to catch up to it when it stopped at a crossing. Apparently, his friend saw alcoholic beverage containers in the vehicle, and when he tried to have the window opened, the vehicle drove away.
- [16] The plaintiff was then referred to an affidavit deposed to by him on 7 November 2024 appearing at D43 in CaseLines. He confirmed the accuracy of its contents and drew the Court's attention to an annexure marked "ZN1" (at D53 of CaseLines), constituting a sketch of the scene of the accident.
- [17] This annexure illustrates vehicles parked next to each-other on the pavement, perpendicular to the road. The plaintiff is depicted as having exited the passenger side of one such vehicle and then having moved along the right-hand edge of the road with the parked vehicles to his right. The insured vehicle is shown approaching in the same direction in which the plaintiff was moving, and the point of impact reflected on the plaintiff's left-hand side. The plaintiff's location is presented as next the vehicle adjacent to the one from which he disembarked.
- [18] With reference to this sketch, the plaintiff testified that had the car approached from the correct side of the road (the left-hand side) he would have seen it in front of him. He had no other space to walk other than next to the cars which covered the pavement on his right.
- [19] The plaintiff was also referred to a witness statement made by his best friend, Mr Mokatedi, filed at CaseLines 005-22, as further support of the plaintiff's version. In the plaintiff's Rule 38(2) application, this evidence was not sought to be included to be accepted by affidavit, however, and Mr Ngomana objected to its admissibility as hearsay. Mr Saint indicated that Mr Mokatedi would not be testifying in confirmation of his affidavit, and this issue was not taken further.
- [20] In denial of any contributory negligence apportionable to him, the plaintiff testified that he did not think (and by implication, could not reasonably expect) that there was a car behind him where he was walking.
- [21] On the impact of the accident, he said that his ankle is in pain in the morning, he can't run as he used to and can't pick up anything heavy. Touching on his ambitions, he stated that, as covered in the industrial psychologists' report, he hoped to become involved in the entertainment industry. Due to his injury, he may now only be suitable for a more sedentary position, such as a cashier.
- [22] Under cross examination, Mr Ngomana pressed the plaintiff, with reference to the sketch, to clarify whether, at the time of the accident, he was standing in the road, or next to the road as he had also otherwise implied. The plaintiff conceded he was standing in the road, albeit on the outer edge, as depicted in the diagram.

[23] Mr Ngomana further confronted the plaintiff's apparent contradictions where:

- a) the plaintiff suggested he only deposed to one affidavit pre-trial, whereas there are two on record – the 7 November 2024 statement, and another made on 4 February 2021, filed at CaseLines 005-31, and
- b) That he stated he was coming from home prior to the accident, on the one hand, and on the other, from a year-end function.

[24] Mr Ngomana also questioned the plaintiff whether, having not looked behind him for 5 minutes since exiting the vehicle, as he had testified, it did not amount to him not keeping a proper lookout. The plaintiff accepted that he must keep a proper lookout and that by being on the road he was not ideally positioned. He denied however that he did not act diligently as he had checked around him when he exited the vehicle. He then walked with his friends looking forward, as there was no space on the pavement.

[25] Mr Ngomana further disputed that the plaintiff could see whether the vehicle was travelling at a high speed (as he had stated), in circumstances where he was not facing such vehicle and did not see it approach him. To this the plaintiff answered that he was struck on his left leg, spun around and could see the vehicle speeding off, at a relatively high speed.

[26] The plaintiff reiterated much of what he said in his examination-in-chief regarding his employment under questioning from Mr Ngomana, including his drop in work ethic since the accident, that he was not paid for days he was on leave in January 2021 post the accident, and his earnings. He stated that he earned more at a previous employer (BMW), that the fluctuating nature of his salary was not due to the accident, and that he had not received complaints from his employer (CCM) - although the Marc Centre may not always be satisfied.

[27] To questioning of his future work prospects, the plaintiff testified that he had attended auditions for adverts in pursuit of his entertainment ambitions, and that he otherwise had dreams of investing in property but requires capital to do so. On the medical opinions the plaintiff did not dispute the findings of the experts for the kind of work that he would now be suitable and stated that he was not aware whether the various experts spoke to his employer.

[28] To Mr Saint's re-examination, the plaintiff reiterated that he was on the extreme right of the road, there was nowhere else to walk and that he gauged the relative speed of the vehicle after it struck him. He stated that he would have looked left and right on crossing the road.

[29] In concluding his evidence with questions to the Court, I asked the plaintiff to clarify whether he was in the process of crossing the road when he was struck (with his use of such wording during testimony). He said that he had not yet begun crossing the road and that their destination on foot was some way down the road in which they were still headed, before the need to cross would have arisen. He could not recall whether there was space on the pavement on the other side of the road where they could otherwise have walked.

#### Expert Evidence

[30] The plaintiff filed the following 4 (four) expert reports with supporting affidavits:

- a) Orthopaedic surgeon - Dr. G. Read (reports at CaseLines 006-3 to 006-21, affidavit at CaseLines 010-1 to 010-3);
- b) Occupational therapist - Ms N. Sibanyoni (report at CaseLines 006-22 to 006-49, affidavit at 010-4 to 010-6);
- c) Industrial psychologist - Mr. D. De Vlamingh (report at CaseLines 006-50 to 006-63, affidavit at 010-7 to 010-9); and
- d) Actuary - Munro Forensic Actuaries (report at CaseLines 006-64 to 006-68, affidavit at CaseLines 010-10 to 010-16).

[31] By virtue of the granted Rule 38(2) application, these opinions were admitted as evidence, with no oral testimony required or provided. The defendant did not file any expert reports nor lead any expert evidence disputing their findings.

#### Counsel submissions

[32] In his address to Court, Mr Saint pointed to the plaintiff's conservative earnings and the occupational therapist (Ms Sibanyoni's) report, specifically paragraph 19.3 (at CaseLines 006-43) dealing with the nature and effect of his injuries. She referred to Dr Read's findings that the plaintiff developed osteoarthritis in his left ankle and finds that he is better suited for sedentary work. In paragraph 19.4 she refers to Dr Read's recommends provision be made for left ankle fusion or replacement in approximately 10 years, and in general that the prognosis is poor.

[33] With respect to the industrial psychologist, Mr Saint highlighted paragraph 4.2 (CaseLines 006-59) where Mr Vlamingh opined that, based on his ambitions as an actor or entertainer, he may have continued as a cleaner until becoming a stagehand or a general worker in a production company (paragraph 4.2.3). Post the accident, and based on Dr Read's prognosis his career prospects have been significantly truncated (paragraph 5.2.5). Based on the recommendations to assume a sedentary position, alternative employment options (from around January 2025) such as an access controller or cashier was considered more suitable (paragraph 5.2.6).

- [34] Turning to the actuary report, Mr Saint referred to the plaintiff's calculated past loss of earnings due to the accident (injured earnings) of R1900, and his estimated future injured earnings of R 1 592 600 (CaseLines 006-66). Though not specified on the report, the past loss is ostensibly attributable to days for which the plaintiff was not paid in January 2021 following the accident. His future earnings are in turn estimated on the presumption of the plaintiff adopting sedentary working positions, as opposed to, for example, the more physically demanding role of a stagehand.
- [35] While the actuary made provision for 35% contingency to be applied for estimated future injured (post-morbid), for which a draft order was prepared, Mr Saint submitted that in the present circumstances, 25% may be more suitable. A second draft order was handed up (filed in pocket E on CaseLines) where the plaintiff accordingly seeks the following pecuniary relief:
- a) R1900 for past loss of earnings (as per the actuary report)
  - b) R740 065 for future loss of earnings (incorporating the reduced future earnings contingency to 25%).
- [36] In his answering address, Mr Ngomana contended, with reference to the plaintiff's 7 November 2024 affidavit (at CaseLines D43), that he admitted he was standing on inside of the road and he did not see the vehicle, and thus how the accident happened. He submitted further that the plaintiff's failure to check behind him for 5 minutes after alighting the vehicle, implies a failure not to have kept a proper lookout.
- [37] Mr Ngomana also reasoned that had the plaintiff not been where he was, the collision would not have occurred. He dismissed the plaintiff's contention that he did not think anything would happen as it was not a busy road, by pointing out that anything could happen inside a road, as it did in this case. He contended further that, in any event, the road must have been busy based on the surrounding establishments, amplifying such duty of care the plaintiff had for his own safety.
- [38] Mr Ngomana also pointed to the fact that the plaintiff could not say whether there were vehicles parked on the other side, insinuating that he did not exercise a diligent observation of his surroundings.
- [39] On the merits therefore Mr Ngomana submitted that the claim should be dismissed with costs, as the plaintiff was solely responsible for the accident. In the alternative, he argued, that should it be found that the insured driver was also liable, a 50% liability should be apportioned to each party in terms of the Apportionment Act.

- [40] On the issue of quantum, Mr Ngomana submitted that the additional losses suffered through the plaintiff's exhaustion of his sick leave days should not be transferred to be carried by the RAF. He further indicated that the plaintiff continues to do what he did pre-morbidly, and that there are no complaints from his employer. As such his capacity has not been affected by the accident.
- [41] Mr Ngomana further submitted that no value could be placed on his entertainment and property ambitions, because he has no experience in the former, and on the latter admitted he has no means, and thus could not be expected to generate an income from either. He stated that, in any event, even accepting the industrial psychologist's opinion, little difference could be attributed between his earnings as a cleaner.
- [42] In summary Mr Ngomana contended on behalf of the defendant that, all things considered, the post-morbid and pre-morbid projections of the plaintiff's earnings should be the same, with a 35% contingency applied.
- [43] On his calculations, the total liability for damages between the parties would be R529 430, and applying a 50% apportionment, this would mean the most for which the defendant should be held liable, is R264 715.
- [44] In reply, Mr Saint stated that the premise laid out by the plaintiff in seeking the relief is supported by the evidence. He does not rely on any projected earnings from his property ambitions, and those from the entertainment industry were based on humble positions. The interests he initially had in mind can no longer be pursued due to his injury. On the merits, he disputed the defendant's contention that any liability could be apportioned to the plaintiff, where the vehicle approached him on the wrong side of the road.

### Negligence and Causation

- [45] Section 17(1) of the RAF Act imposes liability on the RAF to compensate for damages suffered by a third party resulting from bodily injury caused by the negligent driving of a motor vehicle in the Republic. Compensation for non-pecuniary damages shall be limited to a serious injured as contemplated in section 1A and shall be paid in a lump sum.
- [46] I am not called upon to decide any claim for non-pecuniary since it's common cause that this first must be deferred to the HPSCA. It is otherwise not in dispute that there was a bodily injury to a third party (the plaintiff) which was caused by the driving of a motor vehicle in the Republic.
- [47] The question is thus essentially whether the insured driver was negligent in causing the accident, and if so:
- a) whether he was solely negligent or whether there is also any negligence attributable to the plaintiff, reducing any claim for damages he may have in terms of the Apportionment Act.

- b) Then it must be determined if there were pecuniary damages suffered by the plaintiff as a result of such bodily injury caused by the accident, and if so what the quantum of such damages are.

[48] To determine negligence, the recent case of *De Kock v Road Accident Fund*[1] serves as useful guidance for the approach to be adopted in cases of this nature, with due regard to the parties' respective onuses and considering the reduction of a plaintiff's claim:

[20] The classic test for negligence was formulated in *Kruger v Coetzee* 1966 (2) SA 428 (A) where the court stated that for the purpose of liability, culpa arises if a diligens paterfamilias or reasonable person in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and would take reasonable steps to guard against such occurrence; and the

defendant failed to take such steps. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstance of each case. No hard and fast basis can be laid down.

[21] It is trite that the onus rests on the Plaintiff to prove the Defendant's negligence which caused the damages suffered on a balance of probabilities. In order to avoid liability, the Defendant must produce evidence to disprove the inference of negligence on its part, failing which they risk the possibility of being found to be liable for damages suffered by the Plaintiff.

[22] On the other hand, where the Defendant has in the alternative pleaded contributory negligence and an apportionment, the Defendant would have to adduce evidence to establish negligence on the part of the Plaintiff on a balance of probabilities.

[23] Section 1(1)(a) of the Apportionment of Damages Act 34 of 1956 gives a discretion to the trial court to reduce a plaintiff's claim for damages suffered on a just and equitable basis and to apportion the degree of liability. Where apportionment is to be determined, the court is obliged to consider the evidence as a whole in its assessment of the degrees of negligence of the parties. Writers have opined that apportionment of liability should only generally be considered where it can be proven that the plaintiff was in a position to avoid the collision. In this instance in order to prove contributory negligence, it is necessary to show that there was a causal connection between the collision and the conduct of the Plaintiff, this being a deviation from the standard of the diligens paterfamilias.

(footnotes omitted).

[49] The defendant could not genuinely dispute that, or provide conflicting evidence against, the plaintiff's version that the insured vehicle, driven by the insured driver, was travelling on the wrong side of the road when it collided with the plaintiff who was walking away with his back turned.

- [50] In circumstances such as these, a diligens paterfamilias would have foreseen the reasonable possibility that his conduct may injure the plaintiff and cause him patrimonial loss; and would have taken steps to guard against such occurrence. The insured vehicle did not take such preventative steps and ended up colliding with the plaintiff. On the proven facts therefore, it cannot be found otherwise than that the insured driver was negligent for the purpose of establishing liability on the defendant in terms of the RAF Act.
- [51] For the defendant's liability to diminish in terms of the Apportionment Act, the defendant had to adduce evidence to prove the plaintiff was contributorily negligent in causing the accident. The defendant did not present any evidence to this effect, and seeks instead to rely on two main contentions, both emanating from the plaintiff's own testimony:
- a) that the plaintiff did not comply with his duty to keep a proper look out by only having looked back once in 5 minutes after disembarking from the vehicle, and
  - b) that the plaintiff was on the side of the road – rather than on the sidewalk – when the insured vehicle collided with him from behind.
- [52] To determine whether the plaintiff should share in any responsibility for any damages he may have suffered due to the accident owing to the above facts, the same test would have to be applied. In other words, whether a diligens paterfamilias would have reasonably foreseen the possibility of an injury leading to patrimonial damages being caused by the conduct (or in the case of
- a. above, the omission) attributable to the plaintiff in this case.
- [53] Even accepting that the accident would not have occurred had the plaintiff not been on the side of the road, through application of the sine qua non ('but for') test, this does not in itself attribute liability onto the plaintiff. The plaintiff's conduct should not only have factually been caused, or materially have contributed to, the accident occurring, but also have been sufficiently proximately connected to it, to meet the causal element of the definition of section 1 of the Apportionment Act (read with section 17 of the RAF Act).
- [54] As a general element of delict, this is known as "legal causation" and exists in addition to the requirement of negligence.[2] In the present case, to determine whether liability should be apportioned, it therefore needs to be established whether the plaintiff's failure to look behind him for 5 minutes after alighting from the vehicle, and walking on the edge of the road itself, constitutes conduct which:
- a) The plaintiff ought to have reasonably foreseen would have resulted in patrimonial loss arising from an injury due to a motor vehicle accident; and
  - b) Was sufficiently closely connected to the accident which occurred and the injury which arose from it.

[55] In *Mthembu v Road Accident Fund*[3] similar facts to the present case were considered by this division in Pretoria, to determine whether the plaintiff was contributorily

negligent in causing damages suffered from an injury she sustained. In that case, a pedestrian alighted from her vehicle to check a tyre on the side of the road, after which she was struck by an unidentified vehicle allegedly driving at an excessive speed.

[56] In answering this question, the Court considered the dictum from *Manuel v SA Eagle Insurance Co. Ltd.*[4]

"The principles to be extracted from these cases are as follows. A motorist who sees a pedestrian on the roadway or about to venture thereon, should regulate his driving so as to avoid an accident. Whether the motorist is reasonably entitled to assume or infer, from the conduct of the pedestrian, that his right of way is being recognised and respected, is a question of fact to be decided in each case. When the assumption is not justified, the motorist must regulate his driving to allow for the possibility, or probability, that his vehicle may not enjoy an unobstructed passage."

[57] In dismissing the attribution of any contributory negligence to the plaintiff, the Court in *Mthembu* concluded that:

16. There is nothing which points to the fact that at any stage, the plaintiff entered the road or crossed it, and she at all material times remained on the bus stop which was not in the lane of travel of the insured driver. There was no warning given to the plaintiff to move away from danger by the driver, and as a result, it is this court's finding that it is the sole negligence of the insured driver.

[58] There was nothing presented by the defendant to persuade me that a different view should be applied to the present case. In consideration of the duty of drivers to regulate their driving when approaching a pedestrian, and a pedestrian's reasonable expectation that the driver of an approaching vehicle would do so, the failure of a pedestrian walking towards oncoming traffic to check behind himself in 5 minutes, cannot be found to be negligent for the purposes of the Apportionment Act.

[59] The same applies to the plaintiff's position on the road. As was mentioned in paragraph 23 of *De Kock* (supra), the question of whether it can be proven that the plaintiff was in a position to avoid the collision, would also be relevant to determine whether liability should be apportioned. The plaintiff testified that he could not walk on the sidewalk because it was blocked by parked cars. The insured driver should have known this as well and adjusted his driving close to the side of the road accordingly (in addition to not being on the wrong side of the road in the first place).

[60] It is furthermore doubtful that the plaintiff's aforementioned conduct could be said to be sufficiently proximate as an event causing the accident, for him to share responsibility on the grounds of legal causation.

[61] For the above reasons, I find that the insured driver's negligence was the sole cause of the accident and resulting injury, and that any patrimonial damages suffered by the plaintiff should not be reduced in terms of the Apportionment Act.

#### Damages and quantum

[62] What remains to be determined is whether the plaintiff suffered patrimonial damages arising from the injuries sustained from the accident, and if so what the quantum of such damages are.

[63] The defendant did not lead any evidence or point to any basis to dispute the plaintiff's claim for past loss of earnings of R1 900. It was taken from the admitted evidence of the actuary report (paragraph 4.5) and appears consistent with the plaintiff's testimony that he was not paid for around two weeks he missed in January 2021 because of the accident.

[64] Paragraph 5.1 of the industrial psychologist report read with paragraph 4.2 of the actuarial report holds the figure of the loss of earnings in January 2021 (in those terms) at R 1 750. While not expressly stated, the actuary then presumably applies an inflationary adjustment to arrive at R1 900. Considering this and that I should only make a determination on the issues in dispute between the parties, on a preponderance of probabilities I find that the plaintiff's version should be accepted that an amount of R1 900 accurately reflects the past loss of earnings suffered by him.

[65] The defendant's contention that the plaintiff's exhaustion of its leave days amounts to a transfer of an undue burden of liability to the defendant cannot be accepted. Whether the plaintiff had leave does or not does not relieve the defendant on the general principles of liability discussed above, and may simply have had an impact on the loss actually suffered by the plaintiff.

[66] The main point of contention on the quantum of damages was the amount claimed by the plaintiff for future loss of earnings. This is also taken from the actuarial report, where it is estimated at R 899 325 (paragraph 4.5). It is arrived at through projecting that future earnings of the plaintiff would have been R 2 275 900 ("Future Uninjured Earnings") had he not been injured and projecting the future earnings to be reduced to R 1 592 600 ("Future Injured Earnings") as a result of the injury.

[67] The difference is essentially attributable to the difference in expected earnings between the work that the plaintiff is assumed to have undertaken in the future had he not been injured (such as a stage-hand), compared to what he is now considered to be more suitable for because of the accident (such as an access controller), and when he would have been expected to retire, as assessed by the industrial psychologist (paragraphs 4 and 5 of Dr Vlamingh's report).

[68] The actuary then applies a 15% contingency reduction to the Future Uninjured Earnings, and 35% contingency reduction to the Future Injured Earnings, and the remaining difference of these figures comes to the amount of R 899 325.

[69] Mr Ngomana argued that the Court is not bound by the expert's reports (and by implication the assumptions and conclusions on loss estimates), and relied on *Southern Insurance Association Ltd v Bailey* NO[5] in support of this position. There is some support of this contention in that case. The Court held at page 116 G- H that:[6]

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" (per HOLMES JA in *Legal Assurance Co Ltd v Botes* 1963 (1) SA 608 (A) at 614F).

[70] Earlier in the same case, however, the Court specified two approaches that can be taken in calculating damages. The Court can either rely on what it considers to be fair and reasonable (which it describes as blind guesswork) or it can make an assessment based on mathematical calculations.[7]

[71] At page 114 (paragraph C – E), Nicholas JA held that:

In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's "gut feeling" (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess. (Cf *Goldie v City Council* E of Johannesburg 1948 (2) SA 913 (W) at 920.)

[72] I agree with the above assessment. Where the Court has the benefit of actuarial calculations based on assumptions following thorough investigations, the Court would be loath to ignore them, if not irresponsible, by preferring its own sentiment of what represents fair damages. While it is true therefore that the Court is not bound by the testimony of any witness or expert opinion, to maintain rationality and legality, the Court ought not summarily depart from it without cogent reason or evidence of clear errors, or gaps in the conclusions contained in them.

[73] In the present case, the defendant did not lead evidence to dispute the validity of the assumptions relied upon or provide sufficiently convincing argument as to why they should be rejected. I therefore find no basis to second-guess their validity. The fact that the pre-injury earnings of the plaintiff may not have differed greatly to his post injury earnings, does not mean that there would have been no difference between them at all which would compound over time.

- [74] Whether the plaintiff had experience in the entertainment industry similarly does not mean that he may not have acquired it through pursuit of his stated ambitions - as would apply in any case where at someone start their careers, armed only with dreams and dedications. His hope of success in the property sector is admittedly more fanciful based on his existing resources, but no value was placed on this by any of the experts in their reports.
- [75] Mr De Vlamingh's analysis of the plaintiff's career prospects, while including reference to potential entertainment industry ambitions, was primarily grounded in conservative and achievable progression paths. His assessment that the plaintiff would have continued as a cleaner until becoming a stagehand or general worker, earning around R5,000 per month by January 2024 (in 2022 rand value), appears both reasonable and well-supported.
- [76] I agree with Mr Saint that the actuary's application of a 35% post-morbid contingency (an aspect on which the Court also enjoys a broad discretion), cannot be seen to be clearly justified by the facts. I therefore accept that a 25% contingency is more appropriate, resulting in future loss of R740,065.

## Conclusion

- [77] Based on the totality of evidence before me, I accordingly find that:
- The collision was caused solely by the negligence of the insured driver.
  - The plaintiff's presence on the road edge does not negligently deviate from the judgment of a diligens paterfamilias, and while a factual cause, does not constitute a legal cause justifying any apportionment of liability
  - The quantum claimed for past loss of earnings (R1,900) is not materially disputed and is supported by the

## facts.

- Future loss of earnings should be calculated using a 25% post-morbid contingency, resulting in an amount of R740,065.
- [78] The second draft order handed up by the plaintiff (filed at pocket E of CaseLines) appropriately addresses all aspects of the relief sought, including provisions for payment and taxation of costs. The order makes proper provision for the separation of general damages and referral to the HPCSA, while ensuring the plaintiff receives compensation for proven pecuniary losses.
- [79] The payment terms and interest provisions are in accordance with standard RAF practice, and the costs provisions appropriately reflect the expertise required in presenting this matter. I accordingly accept the suitability of the terms of the second draft order handed up by the plaintiff for the relief to be granted. For completeness, I set out its terms below.

## ORDER

- [1] The Defendant is liable for 100% of the Plaintiff's proven damages sustained as a result of the motor vehicle collision which occurred on the 30th of November 2020.
- [2] The Defendant shall pay to the Plaintiff a capital amount of R 741 965.00 (Seven hundred and forty-one thousand nine hundred and sixty-five rand only) as compensation for the Plaintiff's claim for loss of earnings and earning capacity sustained in the collision, which is calculated as follows:

Past loss of earnings:

R 1 900.00

Future loss of earnings and earning capacity: R 740 065.00

TOTAL: R741 965.00

- [3] The aspect of general damages is separated from all other heads of damages in terms of rule 33(4) and is postponed sine die to be referred to the HPCSA for adjudication.
- [4] The Defendant shall furnish the Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for 100% of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service to the Plaintiff or supplying of goods to the Plaintiff arising out of the injuries sustained by the Plaintiff in the motor vehicle collision on the 30th of November 2020 after such costs have been incurred and upon proof thereof.
- [5] The amount in paragraph 2 (two) above shall be paid directly to the Plaintiff's attorneys of record with the following particulars, which amount shall be paid within 180 (One hundred and eighty) days from the order being granted:

NAME OF ACCOUNT:

W[...] K[...] A[...] T[...] Account;

BANK:

A[...] B[...]

BRANCH CODE:

6[...]

BRANCH:

K[...]

ACCOUNT NO:

4[...]

REFERENCE:

T[...]

- [6] No interest will be payable in respect of the total capital amount referred to in paragraph 2 (two) above except in the event of the Defendant failing to effect payment within 180 (One hundred and eighty) days following this order, in which case interest will be payable on the said capital amount at the prescribed rate of interest per annum.
- [7] No interest will be payable on the cost referred to in paragraph 8 (Eight) below, except in the event of default payment of such costs, in which case interest will be payable at the prescribed rate of interest per annum.
- [8] The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale up to date, which costs shall include, but not be limited to:
- a) The reasonable costs in respect of the preparation of the medico legal reports, RAF 4 Serious Injury Assessments reports and actuarial calculations of the following experts:
    - i. Dr Read (Orthopaedic Surgeon);
    - ii. Ms. M Georgiou (Occupational Therapist);
    - iii. Mr. De Vlamingh (Industrial Psychologist);
    - iv. Munro Actuaries (Actuary).
  - b) Costs of counsel to date hereof, including the preparation for trial and attendance on the 12th, 13th and 15th of November 2024; Drafting of Heads of Argument and Exhibit A;
  - c) Cost of Counsel Scale B;
  - d) Costs of obtaining confirmatory affidavits for the above-mentioned experts for purposes of trial;
  - e) Any costs attendant upon obtaining of payment of the total capital amount referred to in paragraph 2 (two) above, as well as any costs attendant upon the obtaining of payment of the Plaintiff's agreed or taxed costs.
- [9] The cost order in paragraph 8 above is subject to the following conditions:
- a) The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorney of record; and
  - b) The Plaintiff shall allow the Defendant 180 (One hundred and eighty) court days to make payment of the taxed costs.
  - i. No interest will be payable, except in the event of default of payment of such costs, in which case interest will be payable at the prescribed rate of interest per annum from date of taxation.

BL VAN TONDER

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

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Date of Hearing: 15 November 2024

Date of Judgment: 10 February 2025

[1] De Kock v Road Accident Fund (17211/2018) [2024] ZAWCHC 86 (20 March 2024)

[2] See for example S v Mokgethi 1990 (1) SA 32 (A) at para 19.

[3] Mthembu v Road Accident Fund (Case no. 35790/2021) [2023] ZAGPPHC

[4] Manuel v SA Eagle Insurance Co. Ltd 1982 (4) SA 352 at 357A-D.

[5] Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A)

[6] See page 116 G – H.

[7] See page 113 G – H.

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