

SOUTH AFRICA / JUDGMENT

Shaviri v Road Accident Fund (74274/2018) [2025] ZAGPPHC 544 (19 May 2025) [2025] ZAGPPHC 544

COURT

North Gauteng High Court, Pretoria

BEFORE

Domingo

CASE / FILE NUMBER

74274/2018

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 74274/2018

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE

19 May 2025

SIGNATURE

In

the matter between: ELIAS
SHAVIRI
Plaintiff
and
ROAD
ACCIDENT
FUND
Defendant

JUDGMENT

DOMINGO, AJ

Introduction

- [1] This is an action for damages where the plaintiff claims damages from the defendant, as a result of injuries sustained in a motor vehicle collision which occurred on 22 July 2017.
- [2] The issues to be determined by this Court are the merits of the plaintiff's claim and the quantum of damages to be awarded, should the claim be successful.
- [3] At the time of the proceedings, the defendant was not represented before court, no appearance was made. The court satisfied itself that the defendant had due knowledge of the proceedings as the notice of set down was served on the defendant and defendant was aware of the proceedings. The proceedings went ahead in the absence of the defendant.
- [4] On the day of the hearing the plaintiff tendered viva voice evidence. The plaintiff requested that the affidavits of the medical experts and actuary be accepted by this Court as evidence in terms of Rule 38(2) of the Uniform Rules of Court.
- [5] I made a ruling that the affidavits and actuarial report are accepted in terms of Rule 38(2).

Factual

Background

- [6] The plaintiff is an adult male and he is 49 years old. On the 22 July 2017 in the vicinity of D1344 and Beest Kraal Street, Lethabong, Rustenberg, the plaintiff was involved in a motor vehicle collision whereby he was the passenger. The said motor vehicle's driver lost control of the vehicle, the vehicle had hit a rock, and the vehicle overturned. At the time of the accident the plaintiff was a passenger seated at the back of the vehicle, and he sustained injuries as a result of the vehicle overturning.

- [7] The plaintiff provided testimony that he was thrown from the vehicle, landed on the ground on his side and injured his shoulder. He was taken from the accident scene by a private vehicle to Pholosong Hospital and later to a private hospital run by medi-clinic (Impala) by ambulance.
- [8] The hospital report notes that the plaintiff sustained a fracture to his left clavicle (the plaintiff is right hand dominant). It is submitted that the plaintiff received clinical and radiological examinations; and he underwent an operation. He was treated with a left arm sling till he was pain free. The plaintiff was given pain management and was admitted in hospital for four days.
- [9] The accident report, Road Accident Fund form (RAF1 form), medical certificates, ambulance report, hospital records, expert reports and the plaintiff's 19(f) affidavit were all submitted as evidence, filed on record and confirmed by the plaintiff on the day of the hearing.

Merits

- [10] The fact that the plaintiff was a passenger is supported by his statutory affidavit filed in terms of section 19(f) of the Road Accident Fund Act 56 of 1996.
- [11] On the basis that the plaintiff was a passenger, he needs to prove 1% negligence by the insured driver in support of his claim. As found in *Groenewald v Road Accident Fund*[1] on a finding that the insured driver was 1% negligent, the defendant is liable for 100% of the plaintiff's proven damages.
- [12] The accident report reflects that the insured driver caused the motor vehicle collision.
- [13] In the premises, having read the totality of evidence and heard the plaintiff and plaintiff's counsel, I am satisfied to grant merits 100% in favour of the plaintiff as such is fair and reasonable.

Quantum

- [14] In respect of quantum, this matter only deals with the determination of the issue of loss of income and future medical expenses in terms of Section 17(4)(a) of the Road Accident Fund Act. The plaintiff testified that he was examined by various experts and the reports thereof were filed on record.
- [15] The plaintiff appointed the following experts:
- 15.1 Industrial Psychologist (Mrs B Selepe)
 - 15.2 Occupational Therapist (Ms SD Mogola)
 - 15.3 Orthopaedic Surgeon (Dr P Kumbirai)
 - 15. 4 Radiologist (Drs Mkhabele & Indunah)

15.4 Actuary (Mr J Sauer)

- [16] The defendant has not appointed any experts. In the circumstances, the plaintiff's expert reports were not contested.

Work Background

- [17] It is submitted by the plaintiff that he went to school up to grade 8 in Mozambique and never thereafter furthered his studies.
- [18] Before the accident the plaintiff reported that he was working as a farm worker at Red Bank from 1997-2006. His duties and responsibilities were to do general farm work, including watering, ploughing and trimming trees. His monthly earning at that time was approximately R750.00 per month. He stopped working at Red Bank after receiving a better job offer.
- [19] The plaintiff stated that he was able to secure another post at Hernic mine as a drill operator from 2007-2011. His duties and responsibilities were to drill rocks in the mine, and he earned approximately R6000.00 per month. He managed to secure a better job offer at Impala Platinum Mine.
- [20] At the time of the accident in 2017, the plaintiff was employed as a waterjet operator at Impala Platinum Mine. His duties and responsibilities were to drill rocks and clear the tunnel underground. The plaintiff stated that his job involved sitting, bending and crawling sometimes. The plaintiff submitted that he was earning approximately R14 000 per month and his deductions included tax, UIF and a provident fund. It is submitted that the plaintiff started working at Impala Platinum mine from 4 December 2012 to July 2017.
- [21] It is submitted by the plaintiff that after his accident, he could not return to work, and he was given disability payment from a disability fund from the 31 August 2017 till March 2018. The plaintiff was provided with a medical incapacity certificate on the 26 April 2018. The plaintiff has been unemployed since; at the time of his expert assessments, he was unemployed and dependent on his partner.

Medical Reports

a) Orthopaedic surgeon

- [22] Dr P Kumbirai, the plaintiff's Orthopaedic surgeon noted the following in regard to the plaintiff's employability:

"[T]he claimant sustained a fracture of the left clavicle that was treated conservatively. The fracture has united. The claimant still complains of pain. It is my opinion that this pain may be managed by analgesia. No future surgery is foreseen. The pain in the left shoulder will limit his choice of occupation as occupations which require lifting of heavy weights will aggravate his symptoms. He will not be able to compete fairly for jobs on the open labour market. Although, I have calculated his WPI at 3%, it is my considered opinion, considering the factors mentioned above, that the injuries have resulted in serious long-term impairment/loss of body function."

b) Occupational Therapist

[23] The plaintiff's occupational therapist is Ms SD Mogola noted the following in regard to the plaintiff's employability:

"At the time of the accident, Mr Shaviri was employed as a Waterjet Operator. He never returned to work and was declared medically unfit to work. At the time of the evaluation, he was unemployed. His job falls within heavy strength work; the assessment test findings indicate that he can cope with light strength work frequently (34-66%) and not constantly (67-100%). This, from a physical

perspective point of view, Mr Shaviri has not retained the physical capacity to cope with his pre-accident job demands as a Waterjet

Operator, as the job core requirements are constant use of upper limbs, doing forward reaching, and handling +-35kg heavy weights,

which he cannot do because of the injury in the left upper limb. The writer also notes that Mr Shaviri relied on his physical abilities to secure employment since he does not have higher formal qualifications, thus it will be difficult for him to secure any employment that is below his current strength of sedentary to light strength work, as he is disadvantaged to do all the jobs that are above his current strength.

Taking into account the clinical findings, his poor socioeconomic background, his age and his vast work experience in the mining sector. It is therefore evident that the injuries sustained from the accident have disadvantaged Mr Shaviri's employment prospects as already mentioned thus, he is considered an unequal and unfair competitor in the open labour market. The writer opines that Mr Shaviri should receive the recommended treatment in the body of this report, such as the implementation of ergonomics principles at home, training on pain alleviation of his daily living and enjoy the quality of life as far as his symptoms allow thus counterfeiting any further deterioration and aggravating the pain."

c) Industrial Psychologist

[24] The plaintiff's Industrial Psychologist, Dr Selepe provided the scenario that Mr Shaviri before the accident would have been expected to continue working as a Waterjet Operator/Rock Drill Operator without challenges or limitations. Considering his educational background, working experience, and skills it is clear that the Mr Shaviri relied on his physical aptitude and expertise to perform his duties. His income could have been expected to increase and still be able to function as expected.

[25] At the time of the accident the plaintiff was 41 years old with a Grade 8 schooling and a Jet Operator/Rock Drill operator certificate. The industrial psychologist opined that with more experience and on the job training, Mr Shaviri would have enjoyed upward mobility, and his earnings would have likely reached a career ceiling at Paterson B5/C1 Median basic salary within the formal sector around the age of 45 years. Thereafter, his earnings would most likely have increased through annual inflationary pressures until normal retirement age of

65 years.

[26] In conclusion, the Industrial Psychologist submitted that given the above-mentioned scenarios, in the absence of serious health impairment and with his willingness to study further, personal work capacity and strength intact, the plaintiff would have been able to exercise his career choice, moving from one job to the next, depending on the availability of jobs, academic background and work experience in the field. The industrial psychologist further opined that this means that the plaintiff's career options would not have been impacted upon, suggesting that the plaintiff would have been able to exercise his career choice the same way as his peers. This would have been dependent on his aspiration, motivation, drive to study and acquire skills and education.

Furthermore, availability of jobs in his field would have played a significant role in employment prospects. It is submitted that the plaintiff would have been able to function as expected until such time as he reached normal retirement age or even working beyond, with his strength intact.

d) Current conditions and main complaints

[27] It is submitted by the plaintiff that the injuries suffered by the plaintiff in the motor vehicle collision have led to him sustaining consequences that have affected his general functioning in daily life, inclusive of the amenity of the enjoyment of life. The following complaints are noted:

27.1 pains on the left arm with prolonged usage;

27.2 short temper;

27.3 anger and stress;

27.4 he is forgetful;

27.5 cannot carry heavy weights due to left shoulder pain;

27.6 cannot do heavy duties;

27.7 inclement weather causes pain in the left shoulder;

27.8 lower back pains;

27.9 cannot sleep on both sides;

27.10 can do maintenance tasks, however with difficulties;

27.11 he feels useless as he is no longer able to provide for his family;

27.12 he cannot do the pleasurable activities that he used to do.

Future medical expenses

- [28] The plaintiff's occupational therapist submitted that it is recommended that the plaintiff in the future do two to three hours of occupational therapy; do an ergonomic assessment at home to aid in correct postures to use during task participation and relevant assistive devices to be used; and to educate the plaintiff regarding pain-alleviating strategies and joint protection principles.
- [29] The plaintiff's orthopaedic surgeon submitted that the plaintiff continues to suffer the inconvenience and discomfort of chronic pain from the left shoulder. In the opinion of the orthopaedic surgeon, the plaintiff's pain may be managed by analgesia and no future surgery is foreseen.
- [30] In the premises, I am satisfied that the plaintiff shall be entitled to an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act in respect of all accident related medical treatments and services rendered.

Loss of income calculations

- [31] The plaintiff's Actuary, Mr JJC Sauer calculated the plaintiff's potential and actual post-collision earning contingencies. He applied a 5% pre-morbid contingency and a 5% post-morbid contingency. When the plaintiff received his disability payment from August 2017, it is noted by the Actuary that the plaintiff received 50% percent of his salary. After applying contingencies above, the plaintiff's Actuary submitted the following calculations:

31.1 Past Loss of Income: Estimated at R1 284 258 based on pre-collision earnings. Past loss of income, post morbid is R 58 175. The total in the difference of the loss is R1 226 083.

31.2 Future Loss of Income: Plaintiff's future earnings would have been R3 791 261 but are now estimated at zero leading to a total loss of R3 601 698.

31.3 The total Loss of Income is R4 827 781 and the total loss minus the effect of the RAF cap (given the contingency values applied) is R4 812 262.

Legal Framework

- [32] In *Southern Insurance Association v Bailey N.O*[2] the court stated:

"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. All that the court can do is to make an estimate, which is often a very rough estimate, of the present values of the loss. It has been open 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 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.

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.”

[33] Taking into account the above statement of the court, I have before me in this matter material on which an actuarial calculation has been made; I am supportive of the actuarial approach because the actuarial approach has the advantage of an attempt to ascertain the value of a loss of income on a logical, mathematical and informed basis as opposed to a judicial robust approach or guesswork. Thus, I will be guided by the actuarial approach.[3]

[34] A detailed approach on the determination on contingencies was set out in the case of *Ralph v Road Accident Fund*[4] as follows:

“The court in Oosthuizen v Road Accident Fund 2015 JDR 1717 (GJ) gave a useful summary of case law on contingencies, and I refer extensively as follows:

‘Matters which cannot otherwise be provided for or cannot be calculated exactly, but which may impact upon the damages claimed, are

considered to be contingencies, and are usually provided for by deducting a stated percentage of the amount or specific claims. (*De Jongh v Gunter* 1975 (4) SA 78 (W) 80F).

Contingencies include any possible relevant future event which might cause damage or a part thereof or which may otherwise influence the extent of the plaintiff’s damage. (*Erdmann v SANTAM Insurance Co Ltd* 1985

(3) SA 402 (C) 404-405; *Burns v National Employers General Insurance Co Ltd* 1988 (3) SA 355 (C) 365).

In a wide sense contingencies are described as “the hazards that normally beset the lives and circumstances of ordinary people.” (*AA Mutual Insurance Association Ltd v Van Jaarsveld* 1974 (4) SA 729 (A); *Southern Insurance Association v Bailey* 1984 (1) SA 98 (A) 117). Contingencies have also been described as “unforeseen circumstances of life.” (*De Jongh v Gunther* 1975 (4) SA 78 (W) 80F).

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. (*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 Insurance Co Ltd* 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).

Contingencies are usually taken into account over a particular period of time, generally until the retirement age of the plaintiff. (Goodall v President Insurance Co Ltd 1978 (1) SA 389 (W) 393; Rij NO v Employers' Liability Assurance 1964 (4) SA 737 (W); Sigournay v Gillbanks 1960

(2) SA 552 (A) 569; Smith v SA Eagle Insurance Co Ltd 1986 (2) SA 314 (SE) 319).

Often what is described as a "sliding scale" is used, under which it is allocated a "1/2% for year to retirement age, i.e 25% for a child, 20% for a youth and 10% in middle age." (Goodall v President Insurance Co Ltd 1978 (1) SA 398 (W) and Road Accident Fund v Guedes 2006 (5) SA 583 (A) 588D-C.) Likewise, see Nonwali v Road Accident Fund (771/2004) [2009] ZAECHMHC 5 (21 May 2009) para 23).

Coleman J provided a useful exposition of Burger v Union National South British Insurance Co 1975

(4) SA 72 (W) 75 of the approach to be adopted by the court:

"A related aspect of the technique of assessing damages is this one; it is recognised as proper, in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in the future. Even which it cannot be said on a preponderance of probability that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind. If, for example, there is acceptable evidence that there is a 30 percent change that an injury to the leg will lead to amputation, that possibility is not ignored because 30 percent is less than 50 percent and there is therefore no proved preponderance of probability that there will be an amputation. The contingency is allowed for by including in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty, That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure."

But the difficulty with this approach was appreciated by Margo J in Goodall v President Insurance Co Ltd 1978 (1) SA 389 (W) at 392H:

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

[35] In the present matter the determination of contingencies includes factors such as the plaintiff's age, the extent of injuries, the prospect of him finding employment suitable to his diminished employment capacity, retirement age should he have continued with his employment, his qualifications and his mental health.

[36] The plaintiff in this matter has sustained a left clavicle injury which has resulted in him losing his employment permanently. After the motor vehicle collision, he was placed on disability payment by his previous employer for a year. What is common cause throughout the expert reports is that the plaintiff has no tertiary education and only achieved a grade 8

schooling which meant he relied on his physical strength to gain employment. He was thus dependent on his physical strength which he no longer has after the motor vehicle collision which has impeded his ability to find work. At the time of the accident the plaintiff was 41 years old, at the time of this hearing he is 49 years old, with only about 16 years to the retirement age of 65 years old; the age he most likely would have worked to. He presently has limited opportunities to find work as he has no matric certificate. Taking into account the plaintiff's injury he would no longer be able to function in his previous employment capacities or field of employment. He was expected to reach his peak earning capacity at the age of 45 years old. The injuries sustained by the plaintiff will leave him in pain frequently. The plaintiff also suffers from mental health injuries which include stress, anger and short temper.

- [37] A total loss of income of R4 812 262 is submitted by the plaintiff to be a reasonable compensation to the plaintiff for the loss of income as a result of the motor vehicle collision.
- [38] Having regard to the totality of evidence and the individual circumstances of the plaintiff, I am satisfied that plaintiff's claim for loss of income be upheld. However, regarding the contingency application for future loss of income, for the reasons set out above, I find that an application of a 15% contingency would be more appropriate. This leads to a quantum of R4 448 654.

Costs

- [39] It is submitted by the plaintiff that the defendant be ordered to pay all the plaintiff's party and party costs on a High Court scale which shall include the costs of one Counsel on Scale B; the costs of all medico-legal reports, the costs of plaintiff's attorneys and the plaintiff's cost of attending all medico-legal experts.
- [40] The general principle is that a party that is successful in litigation, is entitled to its costs occurred in the litigation proceedings. I find no reason to deviate from this general principle. Thus, the defendant is to pay the costs of the plaintiff on a a scale B.

Order

- [41] In the premises, I make the following order:

41.1 The plaintiff's merits claim is upheld, and merits are found 100% in favour of the plaintiff.

41.2 The defendant is liable to pay 100% of the plaintiff's proven damages arising from the motor vehicle accident which occurred on 22 July 2017.

41.3 The plaintiff's claim for loss of income is upheld.

41.4 The defendant shall pay the sum of R4 448 654 (Four Million Four Hundred and Forty-Eight Thousand Six Hundred and Fifty four Rand) for loss of income to the plaintiff's attorneys, payable by direct transfer into their trust account.

41.5 The defendant is directed to furnish the plaintiff, within 14 days of this order, with the undertaking in terms of Section 17(4)(a) of Act 56 of 1996, for the payment of 100% of the costs of the plaintiff's for future accommodation in a hospital or nursing home or treatment of or rendering of a service to him or supplying goods to him, unlimited to the the expenses incurred thereunder, arising out of the injuries sustained by him in the motor vehicle collision which occurred on 22 July 2017, after such costs have been incurred and upon proof thereof.

41.6 The future of general damages is postponed sine die.

41.7 The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs on a High Court Scale B, which costs shall include cost of counsel and experts.

41.8 The defendant is ordered to pay the plaintiff's taxed and/or agreed costs within 180 days from the date upon which the accounts are taxed by the taxing master and or agreed between the parties.

41.9 There is no contingency fee agreement.

W DOMINGO

ACTING JUDGE OF THE HIGH COURT

PRETORIA

Delivered: This judgment was prepared and authored by Judge whose name is reflected in the and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. This matter was heard in open court on the 19 February 2025. The date for hand down is deemed to be 19 May 2025.

APPEARANCES

For the Plaintiff: MS EZ MAKULA instructed by MAKULA ATTORNEYS For the Defendant: NO APPEARANCE

[1] (74920/2014)

[2017] ZAGPPHC 879 (5 October 2017) at para 3.

[2] 1984

(1) SA 98 (A) at 113F-114A and 113H-114E.

[3] Mashaba v Road Accident Fund 2006 JOL 16926.

[4] (3069/2018)

[2023] ZAFSHC 102 at para 20.

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