

SOUTH AFRICA / JUDGMENT

Smith v Road Accident Fund (21523/19)

[2025] ZAWCHC 157 (3 April 2025)

[2025] ZAWCHC 157**COURT**

Western Cape High Court, Cape Town

BEFORE

Bhoopchand

CASE / FILE NUMBER

21523/19

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 21523/19

In the matter between

TERRY CAMERON SMITH

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Date of hearing: 19 March 2025

Date of judgment: 3 April 2025

BHOOPCHAND AJ:

1. The Plaintiff is a 48-year-old male. He was involved in an accident

when the motorcycle he was driving collided with a car, making a turn in front of him. The accident occurred on 24 April 2019. The Plaintiff was rendered paraplegic as a result of the accident. The Defendant is the statutory body established under the Road Accident Fund Act, 56 of 1996 ('the RAF Act') to pay compensation for loss or damages wrongfully caused by driving motor vehicles.

2. The issue of liability was apportioned in the ratio of 90/10 in favour of the Plaintiff. The Plaintiff's claims for general damages and future medical expenses have been settled. The Court is required to adjudicate the Plaintiff's claim for loss of earnings and past medical expenses. The parties agreed that all expert reports would be supported by affidavits and tendered as evidence under Rule 38(2) to determine the Plaintiff's claim for loss of earnings. Additionally, under Rule 39(20), the parties would present the essential evidence and provide written and oral arguments, after which the Court would decide the matter based on papers, expert reports, oral testimony, and the arguments raised.

PAST MEDICAL EXPENSES

3. The Plaintiff testified and closed his case. The Defendant did not lead any witnesses, nor did it challenge any of Plaintiff's

vouchers, medical aid statements, the content of the affidavit submitted on behalf of the medical aid, or the composite schedules of past medical expenses, a bundle of which was handed up at the hearing for the Court's consideration. The Plaintiff claimed

R2 002 053.40 for past medical expenses. Plaintiff's counsel provided a comprehensive review of the case law relating to the Defendant's recent stance on paying past medical expenses already settled by medical aids.[1] None of these submissions need to detain the Court, as Defendant did not raise any objection in its plea or written and oral argument

regarding the Plaintiff's claim for past medical expenses. In the premises, the order shall reflect that the Court has granted

Plaintiff R1 801 848 (R2 002 053.40 less 10%) in settlement of his claim for past medical expenses.
[2]

LOSS OF EARNINGS

4. The Plaintiff sustained extensive injuries, including a concussive

head injury, a C6/C7 disc herniation with spinal cord compression, a unifacet fracture of the 7th cervical vertebra, fractures of the 5th, 7th, and 8th thoracic vertebrae, a complete spinal cord transection, a right femur fracture, a deep laceration of the right knee, a fracture of the right tibial plateau, a nasal fracture, fracture of the 3rd metacarpal of the left hand, and multiple abrasions and contusions.

5. The Plaintiff submitted reports from an Orthopaedic Surgeon, a Neurosurgeon, a Counselling Psychologist, an Occupational Therapist, an Industrial Psychologist, a Forensic Accountant, and an Actuary. The Defendant filed the report of an Industrial Psychologist alone. The Industrial Psychologists participated in a joint minute.
6. The Neurosurgeon assessed the Plaintiff on 14 September 2020. He noted the severity of the Plaintiff's cervical and thoracic spinal cord injury, which left the Plaintiff with mid-thoracic paraplegia, a C7 facet fracture with associated spinal cord and nerve root injury, and poor left-hand function. The Plaintiff underwent surgery on his spine, right femur, and right tibia. He was discharged home in July 2019 after undergoing rehabilitation.
7. On discharge from the hospital, the Plaintiff was wheelchair-bound but able to transfer. He had no motor or sensory function in his legs. He had to catheterise himself to pass urine and manually empty his bowels. He had difficulty straightening the fingers of his left hand and had dysaesthetic pain and altered sensation in both hands.[3] He experienced leg spasms and required assistance with all other activities. The Plaintiff had to adapt his house to cope with his daily activities.
8. The Orthopaedic Surgeon noted that the Plaintiff experienced constant pain in his arms and hands. He is unable to use his left hand and grip normally with his fingers. The legs go into spasm when he has been active. The fracture to the Plaintiff's right femur had healed. The right tibial plateau fracture damaged the articular surface of the knee and would cause slow degeneration of the joint. The Plaintiff is at risk of developing infected wounds and pressure sores from the trunk downwards. He has an appreciable risk of developing contractures, disuse osteoporosis, heterotopic ossification, and overuse of his upper limbs. The Plaintiff's life expectancy has been adversely affected by the accident.
9. The Occupational Therapist outlined the surgical interventions the Plaintiff required. In addition to those already noted, the Plaintiff required a reconstruction of his nose. He requires daily medication for muscle spasms, urinary incontinence, depression, constipation, and bladder infections. She noted further limitations suffered by the Plaintiff, including reduced sitting balance, difficulty with coughing, and sleeping difficulties, as he needs to turn around every three hours to avoid pressure on the denervated areas. He can drive his vehicle with adaptations. The Plaintiff was an outdoor enthusiast, and his accident-related injuries have adversely impacted his activities.
10. The Counselling Psychologist found that the Plaintiff suffered from mixed anxiety and depressive disorder secondary to a general medical condition, which was severe chronic pain and ongoing physical disability.

11. The Industrial Psychologists provided a joint minute. They compiled their reports almost contemporaneously. The Plaintiff-appointed Industrial Psychologist, Dr. Richard Hunter ('Hunter'), suggested two uninjured scenarios. The first was that Plaintiff would have continued working as a member and manager at Interjoin CC until

he had taken control of the entire corporation. He would have probably continued to work in this capacity until retirement at 70.

In the second scenario, Hunter suggested that Plaintiff would have worked as a chief draftsman for an employer at a job grade of D1 to D3. He would have continued to work in this capacity until the age of 65, with the possibility of working on a freelance basis for another 5 years thereafter. Hunter also envisioned that the Plaintiff would have continued to buy, renovate, and sell properties until approximately the age of 70.

12. The Defendant-appointed Industrial Psychologist, Faith R. Chamisa-Maulana ('Maulana'), suggested that Plaintiff would have continued working as a contract manager, partner, or in a similar skilled capacity, earning in line with his pre-accident earnings until he took over the business. She suggested a retirement age of 70. The Plaintiff would have, in addition, continued to buy, renovate, and sell properties.
13. For the injured state, the Industrial Psychologists agreed that as the Plaintiff is wheelchair bound, his wide spectrum of physical difficulties and challenges continuously, and his emotional difficulties, he is, for all practical purposes, entirely and permanently unemployable in the open labour market.
14. The Plaintiff also obtained a forensic accountant's report. The Forensic accountant proposed a past loss of income as well as the basis for the future loss of income. The Industrial Psychologists relied upon this expert's report to formulate, or more properly emulate, their formulations for the Plaintiff's career projections.
15. Plaintiff's Counsel submitted it was common cause that:

But for the collision, the Plaintiff would likely have continued working as a manager/partner at Interjoin CC ('Interjoin'), the family business at which he had worked for many years before the collision, or in a similarly skilled capacity until retirement, and as a result of the collision, he is, for all practical purposes, entirely and permanently unemployable in the open labour market.

16. The Court accepts that the Plaintiff's submission accords with the tenor of the evidence before the Court. The report of the forensic accountant bears closer scrutiny.
17. The Forensic Accountant viewed the Plaintiff's salary documents, which included the remittance advice from Interjoin for 2017 to 2020, copies of payslips for February 2017 to 2020, IRP5 certificates issued by Interjoin for the tax years 2017 to 2020, and his South African Revenue Services ('SARS') income tax assessments (TA 34) for the tax years 2018 to 2020. He, in addition, had access to Interjoin's SARS income tax assessments (TA 34) for the tax years 2018 to 2020, Interjoin's annual financial statements for the financial years ending

28 February 2018 to 2022,

and Interjoin's CIPC disclosure certificate as at 21 April 2023.

18. The Plaintiff acquired a 30% member's interest in Interjoin on 17 March 2009.
19. His father, who was the founding member, retained the remaining interest. On 19 December 2022, Plaintiff resigned as a member and relinquished his member's interest back to his father. The Plaintiff was an employee of Interjoin and received regular monthly member remuneration from the business until May 2019. The expert failed to explain what he meant by 'member remuneration' or whether it was distinguishable from 'remuneration' as a form of compensation for a paid employee. The SARS returns would suggest the latter.
20. The Plaintiff was the natural successor to his father at Interjoin, and he had been groomed to take over, a process that had begun years ago. The father had begun to reduce his involvement in the business. The accident had a devastating effect on Interjoin, and the father had to resume his role but was unable to manage. Many projects were cancelled, and clients were lost. Interjoin's revenue dropped from R10.1 million in the financial year ending 28 February 2019 to R5.1 million in 2021. The business has been in financial distress since the accident and may need to be liquidated. The father stated that he paid the Plaintiff R40 000 per month after the accident. The Covid 19 pandemic had its toll on the business as well. Still, the expert stated that it was difficult to isolate and quantify its impact from, among other factors, those affecting the father and the Plaintiff. In a follow-up interview in April 2023, the expert was informed of an upswing in Interjoin's revenue.
21. Load shedding impacted the business in 2022 and 2023. The father began downsizing the business but committed to remaining at work to support the Plaintiff. The plaintiff earned a variable annual salary, as reflected in the SARS declarations. He earned R552 027 in the 2017 tax year, R612 772 in the 2018 tax year, R564 771 in the 2019 tax year, and R192 203 in the 2020 tax year. The accident occurred early in the 2020 tax year. The Plaintiff received his final salary in May 2019.
22. The Plaintiff did not receive any distributions from his member's interest he held in Interjoin since the 2017 tax year.[4] The Plaintiff did not declare any capital gains tax from the sale of property for the 2018 to 2020 tax years, meaning that the Plaintiff did not pursue this avenue of potential income.
23. The Plaintiff's income, which had followed an increasing trend from 2016, dropped in 2018. The forensic accountant considered the average gross earnings between 2017 of R64 683 per month and R73 115 per month in 2020. As the Plaintiff was 42 years old at the time of the accident, the expert suggested the Plaintiff had not reached his ceiling salary. He allowed for a real increase of one percentage point per year to account for further career growth. He recommended that the amount of R73 115 per month be used as the Plaintiff's uninjured salary, escalating annually from 2020. He suggested that a contingency deduction be applied

for the 2021 and 2022 financial years to accommodate the downturn during the COVID-19 pandemic. He suggested a 25 percent deduction for the 2021 financial year and a 10 percent deduction for the 2022 financial year with a return to the trend in the 2023 financial year.

23. As an alternative, anticipating the Plaintiff's inability to earn an income from Interjoin, the Forensic Accountant suggested that the Plaintiff would have sought other employment in the open labour market. He deferred to the Industrial Psychologists to define the career prospects, projections, and applicable earnings.

EVALUATION

24. The Forensic Accountant foresaw the Plaintiff's uninjured career progression at Interjoin despite the corporation being unable to pay any distributions to its members for at least three years before the Plaintiff's accident. There is no account of the distributions made before that period. The Court would have expected the Forensic Accountant to have investigated the corporation's finances over a longer period, as he linked the Plaintiff's future career pathway to the corporation's sustainability. The father told the expert that the handing over of the business had begun in earnest. The father had reduced the time he spent at Interjoin, and client relationships were being transitioned to the Plaintiff.
25. The expert suggested that the Plaintiff effectively took over the helm of the business as his father's involvement decreased. The Plaintiff had ideas for rejuvenating the business, including implementing more effective marketing strategies, utilising technology, and opening a showroom. The expert did not consider the capital investment that these plans might have required but did express his uncertainty in predicting Interjoin's future profits based on the available evidence. He elaborated further, stating that profits would be highly dependent on the success of the transition from father to son and the future performance of the business under the Plaintiff's management.
26. The Forensic Accountant referred to the plaintiff's drop in earnings over the six months of 2018. The Court calculated this as a 27% reduction from the previous marginal increase in January 2018, representing a decrease of less than 1% from the amount paid in November 2017. The increase in October 2018 reverted to the amount paid in June
2017. The Plaintiff's earnings over three years suggested three reasonable deductions. The Plaintiff's earnings had plateaued from about June 2017 to May 2019. He was earning marginally less at the time of the accident than in November 2017. The Plaintiff's earnings had dropped significantly for six months in 2018. Interjoin was unable to make any distributions for at least three years before the accident, and the expert did not account for distributions before the three years.
27. The forensic expert considered the Plaintiff's average gross earnings for the 2017 financial year, which were R64 683 per month, and his average of R73 115 per month for the 2020 financial year. He

concluded that this reflected an average compound growth rate of 4.2% per annum over the entire pre-accident period. He stated that this calculation ignored the higher level of earnings achieved during the period from November 2017 to March 2018. The Court cannot understand why the expert omitted the 2018 salary drop. He states that the consumer price index over the same period, as reported by STATSSA, had averaged 4%. He suggested that the Plaintiff would have achieved real earnings growth above inflation in the future. The Court is not convinced that the Plaintiff's future salary income from Interjoin would have exceeded inflationary growth by at least 1%, nor that it was proved that a further percentage point was justified to account for the Plaintiff's further career growth and development. Scrutiny of the salary payments made to the Plaintiff from period to period since 2016 does not lend itself to allowing for this adjustment.

28. The forensic expert found support for the uninjured career projection that kept Plaintiff at Interjoin from both the Plaintiff and Defendant-appointed industrial Psychologists. The Plaintiff-appointed Industrial Psychologist suggested a second career alternative rather cursorily. He stated that alternatively, Plaintiff "would have worked in the open labour market as a chief draftsman or in a similar field for an employer at a Paterson job grade of D1 to D3." He projected the Plaintiff retiring from employment at age 65 but considered further employment as a freelancer for a further five

years. This career scenario is not motivated. The basis for it has not been interrogated.

29. The Forensic Accountant suggested that if the Plaintiff were unable to earn a salary income from Interjoin for any reason, it would be reasonable to assume that the Plaintiff could find alternative employment in the open labour market. The Plaintiff-appointed Industrial Psychologist did not motivate how Plaintiff would have secured immediate employment at a D1 to D3 job grade. The Court would have expected him to consider the relevant qualifications required, the potential employer's questions regarding why the Plaintiff wished to make the transition from co-owner to employee, the demand for employment of someone with the Plaintiff's skills, and the specific responsibilities and decision-making authority of the role that Plaintiff could potentially secure.

30. The Forensic Accountant did not consider the alternative source of income the Plaintiff generated from property sales, as he was not provided with relevant documents, and there was no documented information relating to the payment of capital gains tax. In the premises, the Court is not persuaded that either of the alternative scenarios suggested by the Industrial Psychologists deserves serious consideration. That leaves Plaintiff's employment at Interjoin

as the only credible career progression available for the Court's consideration.

31. The Plaintiff submitted two actuarial reports computing his claim for loss of earnings. The Plaintiff testified that he intended to retire between the ages of 70 to 75. This was elicited under cross-examination. The Plaintiff's attorney used that as an opportunity to instruct the Actuary to incorporate additional career scenarios into the actuarial reports, including retirement at age 72.5. The Court rejects these scenarios as none of the earnings experts

record the Plaintiff's intention to retire at this age in their reports. The Plaintiff-appointed Industrial Psychologist was constrained in suggesting that the Plaintiff would have worked at Interjoin until the age of "at least 70". The Court has also rejected alternative employment in the open labour market. The Court was also not persuaded to allow for increases of 1% above

earnings inflation per year to uninjured earnings.

32. That then left the Court with just one of the four scenarios to consider. In this scenario, the Actuary was instructed to apply contingency deductions of 3% to past uninjured earnings, probably using the ½ percent per year sliding scale for the application of contingencies, as almost six years had elapsed since the accident.

A deduction of 12% was applied to future uninjured earnings to calculate the future loss of earnings in the injured state. The Court does not consider these deductions to be either reasonable or appropriate in this case. The Court is of the view that these

deductions are optimistic for the reasons already canvassed earlier in this judgment. In summary, they include Interjoin's failure to make any distributions for at least three years before the accident, the Plaintiff's variable salary picture since 2016, the increased role that the Plaintiff would have assumed as his father reduced involvement in Interjoin, and the unquantified costs of capital injection that would be required to turn the business around. The loss of earnings in this scenario totalled R7,775,300.

33. As contingencies are deducted before the statutory "cap," introduced by way of legislative amendment to the Road Accident Fund Act 56 of 1996 with effect from 1 August 2008, is applied to claims for loss of income, the Court had to instruct the Actuary on the deductions it considered reasonable and appropriate. The Court considered that a 5% deduction should apply to past uninjured earnings, 0% to past injured earnings, and a 25% deduction to future uninjured earnings. The 1% addition to inflation-linked growth in uninjured earnings was rejected. The retirement age for the new calculation was set at 70. An insurance payout of R225 293 had to be deducted, and Defendant was liable for 90% of the Plaintiff's claim.
34. The Actuary allowed for 90% of the Plaintiff's loss of earnings in the calculation provided. The Court has deducted 10% of the claim it has granted under Plaintiff's claim for past medical expenses. The Plaintiff sought a punitive costs order against the Defendant primarily due to the Defendant's stance and delay in settling the Plaintiff's claim for past medical expenses. The Court is not convinced that an adverse costs order is necessary in this case. The matter was enrolled, set down, and finalised as scheduled. The Defendant did not pursue any defence against the payment of the Plaintiff's claim for past medical expenses in this case.
35. The new calculation yielded a past loss of earnings of R1 672 500,

a future loss of R5 923 900, and a total loss under this head of damages of R7 596 400. The calculation of loss is marginally less than the initially calculated amount, but the Court is satisfied that the appropriate considerations were identified and applied in this calculation. In the premises, the Court awards the Plaintiff the amount of for his claim for loss of earnings.

ORDER

1. Defendant shall pay Plaintiff the sum of R1 801 848 and R7 596 400 in settlement of his claims for past medical expenses and loss of earnings, respectively, in full and final settlement of his claims arising from an accident that occurred on 24 April 2019. The capital sum of R9 398 248 (nine million, three hundred and ninety-eight thousand, two hundred and forty-eight rand) shall be paid into the Plaintiff's attorney's trust account,
2. The Plaintiff's attorney's trust account details are as follows:

NAME OF BANK: NEDBANK LIMITED

BRANCH:

CPT CENTRAL SUBURBS NCB

NAME OF ACCOUNT: SOHN AND WOOD TRUST ACCOUNT

ACCOUNT NO.: 1[...]

BRANCH CODE NO.: 198765

3. The Defendant shall pay the capital within 180 calendar days and interest at the legal rate of interest on the capital from 14 days of this order,
4. The Defendant shall pay the Plaintiff's party and party costs and Counsel's fees on scale B, strictly for the costs incurred over and above those already provided for in the Court's previous order to complete this matter, as taxed or agreed upon, within 180 days from its finalisation or agreement, and interest from 14 days thereafter.

Bhoopchand AJ

Acting Judge

High Court

Western Cape Division

Judgment

was handed down and delivered to the parties by e-mail on 3 April 2025

Appellant's Counsel: A Branford

Instructed by Sohn and Wood

Respondent's Attorney: M Mothilal, State Attorney

- [1] See e.g., Machi v Road Accident Fund (2020-12687) [2025] ZAGPJHC 78 (3 February 2025), Discovery Health (Pty) Limited v Road Accident Fund and Another (2022/016179)
- [2022] ZAGPPHC 768 (26 October 2022), Discovery Health (Pty) Ltd v Road Accident Fund and Another (2023/117206) [2024] ZAGPPHC 1303 (17 December 2024), Van Tonder v Road Accident Fund (1736/2020; 9773/2021) [2023] ZAWCHC 305 (1 December 2023), Moss v Road Accident Fund ZAWCHC (18326/2019) [2025] (17 March 2025, Jaffer; Rudman v Road Accident Fund ZAWCHC (8418/2020; 4092/2021) [2025] (20 March 2025)
- [2] Liability was apportioned 90/10 in favour of the Plaintiff
- [3] Dysaesthetic pain refers to unpleasant or abnormal sensations caused by nerve damage or dysfunction. It can feel like burning, itching, stabbing, or electric shock-like pain and may occur without any external trigger.
- Cervical nerve root injury causes pain and is described as neurogenic, often accompanied by abnormal sensations such as burning
- or tingling. However, these sensations are more commonly referred to as paraesthesia rather than dysaesthesia pain.
- [4] The expert acknowledges that Interjoin was not generating profit from at least 2016, i.e., three years before the accident occurred, as evidenced by it not paying the Plaintiff and his father, who held the member's interest in the CC.

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Prepared on 9 October 2026 · Esheria