

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no: 3069/2018

Reportable: NO
Of Interest to other Judges: NO
Circulate to Magistrates: NO

In the matter between:

K RALPH

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT BY: MOLITSOANE, J

HEARD ON: 11 OCTOBER 2022

DELIVERED ON: 03 FEBRUARY 2023

This judgement was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand-down is deemed to be 10H00 on 3 FEBRUARY 2023.

[1] This is an action for damages arising out of bodily injuries suffered by the plaintiff in a motor vehicle collision on 30 December 2017. The issues in dispute have been narrowed to one unresolved issue as will become apparent later in this judgment.

[2] At the inception of the trial I was informed that the following issues are no longer in dispute:

- a) The defendant conceded the merits and accepted liability for negligence at 100% in favour of the plaintiff;
- b) The defendant undertook to provide an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act in respect of the plaintiff's future medical expenses;
- c) The parties agreed to accept all reports and the opinions of the experts including all collateral information obtained by experts from different sources as well as the factual evidence contained therein including hearsay;
- d) With regard to the contingencies to be applied the parties agreed as follows:

Past loss of income (relying on the report of Johan Sauer, the actuary, as a basis for agreeing on different contingencies to be applied).

- i. A contingency deduction of 10% for both pre-morbid as well as post-morbid past loss of income was to be applied;*
- ii. A total amount of R75 402.60 was in terms of the above calculation agreed upon for the pre-morbid scenario. The parties agreed that this calculation translates in the total loss of past earnings of R760 524.00. I however disagree with their agreement as according to me the calculation should translate to a total loss of R678 623.40. [R754 026.00 – R75 402.60= R678 623.40]*
- iii. A total amount of R39 792.20 was in terms of the above calculation agreed upon for the post-morbid scenario which translates to a total loss of past earnings of R 358 129.80.*
- iv. The total past loss is therefore R320 493.60.*

Future loss of earnings (relying on the report of Johan Sauer, an Actuary, as a basis for agreeing on different contingencies to be applied.)

v. A contingency deduction of 15% for the pre-morbid loss of future income was to be applied;

vi. A total amount of R931 932.75 was in terms of the above calculation agreed upon for the pre-morbid scenario. The parties agreed that this calculation translates in the total loss of future earnings for the pre morbid scenario of R5 280 952.25.

[3] In these proceedings this court is only called upon to adjudicate the issue of contingencies to be applied for future loss now that the accident has happened as well as the claim for general damages. The Counsel for the plaintiff is of the view that this court should apply a contingency deduction of 25% post morbid while Counsel for the defendant submits that the proper contingency deduction to be applied on the post morbid scenario was 15%.

[4] The following background information is relevant: The plaintiff was 36 years old at the time of the accident. He was a mechanic. On 30 December 2017 when the accident happened he was a passenger. According to the orthopaedic surgeon, Dr Oelofse he sustained spinal injuries (cervical and thoracic spine), non- orthopaedic injuries (head and chest injuries and lower leg injury).

[5] Dr Oelofse also noted the following upon studying the radiological report of Burger Radiologist Inc. dated 18 July 2019: A disc space narrowing in respect of the cervical spine at C5-C6 level. In respect of the dorsal spine there is a burst fracture present of T11 vertebral body with mild retropulsion and narrowing of the spinal canal and widening of the pedicles. He also noted compression fractures of T7 vertebral body. He opines that there was also adjacent level disc damage to the affected fractures. He diagnosed a C5-C6 disc injury with chronic headaches, pain, spasms, radicular symptoms on both arms and C5-C6 spondylosis. He further

diagnosed a united T7 and T11 fracture with chronic pain and spasms, chronic pain syndrome and adjacent level spondylosis.

[6] Dr Oelofse is of the opinion that a high probability exist that the plaintiff would endure chronic pain for the rest of his life. He opines that the plaintiff had a probability of more than 50% to require neck surgery and a probability of 25% to 35% to require adjacent level surgery. He is convinced that the plaintiff has a definite possibility to require thoracic surgery.

[7] With regard to the impact of the injuries on the day to day life of the plaintiff, Dr Oelofse opines that the thoracolumbar spine injuries have had a profound impact on the plaintiff's amenities of life, productivity and working ability and will continue to do so in the future. With reference to employment, he is of the view that the plaintiff must be accommodated in a permanent light duty or spinal friendly environment. He also opines that in this environment, provision must be made for ten years' early retirement.

[8] In his report Dr Labuschagne, a neurosurgeon, confirms that the claimant informed him that he sustained a back, facial and head injury. He classified the head injury "as a mild diffuse traumatic brain injury without focal components". According to him, the plaintiff reported cognitive and neuropsychological symptoms following the injury that may change his employability.

[9] Luna Greyling, an occupational therapist noted that the plaintiff presented with consistent protective behaviour. According to her, the plaintiff limited trunk flexion and rotation to guard his spine. As a result, he places additional strain on his lower limbs. His thoracolumbar back pain and adjusted movement patterns impeded him from reaching his maximum capacity during performance of tasks. According to her the plaintiff presented with postural abilities and mobility to sit on a frequent basis with intermittent rest periods to alleviate the strain on his thoracolumbar back by alternating between postures.

[10] Ms Greyling opines that when one considers the plaintiff's level of education, skills training and working as a specialised mechanic, and his work experience in predominately manual work environment, plaintiff is not an equal competitor in the open labour market within his residual category of work as opposed to his uninjured peers.

[11] Mr Ben Moodie, an industrial psychologist sketched the career history of the plaintiff as follows: He was a semi-skilled mechanic employed by Jet Sport at the time of the collision. He earned R10 000 per month. He was entitled to a 13th cheque. After the accident, he returned to his work. At the end of February 2018 he resigned as he was no longer able to perform his work.

[12] He also generated additional income by doing private jobs over the weekends. In May 2020 he was retrenched due to the impact of Covid 19. On 4 January 2021 he secured employment as a Store Manager. He opined that taking into account the plaintiff's age as well as the collateral information obtained from his current employer, a possibility existed that the plaintiff "would still have been able to enjoy career progression in his work life."

[13] Ben Moodie further opines that the plaintiff's functional work capacity to perform physically demanding work has been greatly compromised and like all other experts, accepts that he would never be able to return to his pre-accident levels of functioning. According to him, "his job choices have been truncated and he would always be significantly impaired. He can, therefore, be regarded as an unequal competitor in the open labour market".

[14] In the assessment for damages the court may have regard to past awards. The previous awards may serve as useful guides in awarding damages but they can hardly be solely relied upon. In this instance the correct approach is to have regard to all the facts of the case and determine the quantum of damages for such facts. In *Road Accident Fund v Marunga*¹ the court said the following:

¹ [2003] 2 All SA148 (SCA) at 23.

“This court has repeatedly stated that in cases in which the question of general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life arises a trial court in considering all the facts and circumstances of a case has a wide discretion to award what it considers to be fair and adequate compensation to the injured party...”

[15] In *Mashigo v Road Accident Fund*² the following was said:

"[10] A claim for general or non-patrimonial damages requires an assessment of the plaintiff's pain and suffering, disfigurement, permanent disability, and loss of amenities of life and attaching a monetary value thereto. The exercise is, by its very nature; both difficult and discretionary with wide-ranging permutations. As will be illustrated herein later, it is very difficult if not impossible to find a case on all four with the one to be decided. The oft-quoted case of *Southern Insurance Association v Bailey* NO **1984 (1) SA 98** AD confirmed that even the Supreme Court of Appeal had difficulties in laying down rules as to how the problem of an award for general damages should be approached. The accepted approach is the "flexible one" described in *Sandler v Wholesale Coal Suppliers Ltd* **1941 AD 194** at 199, namely: the submissions were "The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending on the Judge's view of what is fair in all the circumstances of the case"."

[11] Of course, awards in cases that show at least some similarities or comparisons are useful guides, taking into account the current value of such awards to accommodate the decreasing value of money. See inter alia: *SA Eagle Insurance Co v Hartley* [\[1990\] ZASCA 106](#); [1990 \(4\) SA 833](#) (A) at 841 D and the practical work of *The Quantum Yearbook* by Robert J Koch which

² 2120/2014[2018] ZAGPPHC 539(13 June 2018).

includes tables of general damages awards annually updated to cater for inflation.

[12] In respect of the issue of comparable cases and the guidance provided thereby, the Supreme Court of Appeal has stated in *Protea Assurance co Ltd v Lamb*³ at 536 A - B: "Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time, it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration".

[16] The parties referred me to various case law to bolster their respective cases. In particular the plaintiff relied heavily on *Mkhonta v RAF*.³ The claimant in that case sustained an injury of the lumbar spine, cervical spine, intra articular fracture of the left wrist and left crista iliaca as well as a minor concussive head injury. The court awarded the claimant R950 000.00 (according to Counsel an equivalent of R1 166 000.00 in 2022) as fair and reasonable compensation. It is submitted by Counsel for the plaintiff that based on this decision and other case law referred to me, a fair and reasonable compensation for the plaintiff would be an award of R800 000 for general damages.

[17] On the other hand it is submitted on behalf of the defendant that a fair and reasonable compensation to award in this case was an amount of R400 000 for general damages. Counsel for the defendant also referred to a plethora of authorities in this regard. All the cases Counsel for the defendant relied upon deal with soft tissue injuries. The cases referred to by Counsel for the defendant offer little

³ (20703/12)[2018] ZAGPPHC 471(29 March 2018).

guidance to this court. Apart from dealing with soft tissue injuries and not fractures similar to those of the plaintiff, the case law referred to, does not deal with the mild brain injury sustained by the plaintiff.

[18] Having regard to the past awards and the facts and circumstances of this case an amount of R600 000 will be adequate compensation for general damages herein.

[19] The enquiry into damages for loss of earning capacity is by its nature speculative. ⁴As indicated above the parties are in agreement that a 15% contingency deduction should be applied for the past loss. Mr Sauer, whose report is relied upon as a basis for the contingency deduction to be applied prepared a report based on 20% and 30 % of such deduction.

[20] The court in *Oosthuizen v Road Accident Fund*⁵ 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); *Van der Plaats v SA*

⁴ Southern Insurance Association v Bailey N.O. 1984(1) SA 98(AD) on page 113G.

⁵ 2015JDR 1717 (GJ).

Mutual Fire & General Insurance Co Ltd 1980 3 SA 105 (A); Southern Insurance Association Ltd 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 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 (Goodal 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 Company Limited 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))

Colman J provided a useful exposition 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 recognized 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 when 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 chance 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 Goodwill 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”.

The advantage of applying actuarial calculations to assist in this task was emphasised in the leading case of Southern Insurance Association Ltd v Bailey 1984 1 SA 98 (A) 113H-114E , where the Court stated :

“Any enquiry into damages for loss of earning capacity is of its nature speculative

.....

All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions

resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award.

.....

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."

[21] It is undisputed that the plaintiff sustained serious injuries. It is also undisputed that before the accident, as a mechanic he performed physically demanding work which required inter alia, the ability to carry heavy objects, to stand long hours and to bend every now and then. The experts agree that his work functionality has been greatly impaired. The undisputed evidence before court is that he can no longer return to his previous job as a mechanic.

[22] His job choices have been truncated. Post the accident he is currently a Store Manager. This can be understood that he would never be able to perform work as a mechanic due to his diminished work capacity. It is settled that contingencies are an important control mechanism to adjust the loss suffered to the circumstances of the individual claimant in order to achieve equity and fairness to the parties.

[23] The submissions of Counsel for the defendant reminds one of the remarks of Robert Koch in his Newsletter,⁶ where he says that he is often requested to apply 'normal contingencies'.... *'that in theory there is no such a thing'* as normal contingencies. He, however, says the RAF claims handlers;

⁶ (No 50, June 2003) page 2.

“do have a predilection for deducting 5% for past loss and 15% for future loss, regardless of the realities. This formula they apply to both claims for loss of earnings and claims for loss of support. It seems fair to say that if there is such a thing as ‘normal contingencies’ then it must be 5% for past and 15% for future loss.”

*Kubushi J in Radebe v Road Accident Fund*⁷ also says:

“Contingencies are normally calculated at 5% for past loss and 15% for future loss”

[24] The question of contingencies falls squarely in the discretion of the court as to what is fair and reasonable. Every case is to be judged on its own merits. In my view, regard being had to the injuries and the sequelae thereof, the proper contingencies to be applied for future loss would be 20% which will represent an amount of R475 545.00. The total future loss would thus be R3 698 506.85.

[25] Costs are in the discretion of the court. Counsel implored this court to grant the Plaintiff costs for the submission of settlement proposal. According to him, he has a standing agreement with the RAF that they would bear costs for the settlement proposals sent. Ms Booysen, for the defendant knew nothing of this agreement. I will not grant this request. In my view the costs should follow the cause.

ORDER

[26] The following order is issued:

1. The defendant is liable to pay 100% (Hundred percent) of the plaintiff's proven or agreed damages;

⁷ 2013(6a4) QOD220(GNP) para 17.

1.2 The defendant shall pay the plaintiff the sum of **R4 298 506.85**[**Four million two hundred and ninety-eight thousand five hundred and six Rands and eighty-five cents**]; set out as follows:

LOSS OF EARNINGS:	R 3 698 506.85
GENERAL DAMAGES:	R 600 000.00
TOTAL:	R 4 298 506.85

1.3 The defendant shall pay the abovementioned amount into the plaintiff's Attorneys trust account:

The plaintiff's attorney's trust account details are as follows:

ACCOUNT HOLDER:	VZLR INC
BRANCH:	ABSA BUSINESS BANK HILLCREST
BRANCH CODE:	632005
TYPE OF ACCOUNT:	TRUST ACCOUNT
ACCOUNT NUMBER:	[...]
REFERENCE:	MAT92603

1.4 In the event that the defendant does not, make payment of the capital amount, the defendant will be liable for payment of interest on such amount at the prescribed rate compounded and calculated fourteen days from date of this order.

2.

2.1 The defendant shall furnish the plaintiff with an Undertaking, in terms of Section 17(4)(a) of Act 56 of 1996, in respect of future accommodation of the plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods of a medical and non-medical nature to the plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained in the collision which occurred on **13 December 2017**.

3.

3.1 The Defendant to pay, the Plaintiff's taxed or agreed party and party costs.

3.2 The reasonable qualification and reservation fees of all the plaintiff's experts of whose reports had been furnished to the defendant:

1. Dr. LF Oelofse – Orthopaedic Surgeon
2. L Greyling - Rita van Biljon – Occupational Therapists
3. B Moodie – Industrial Psychologist
4. Dr J.J. Labuschagne – Neurosurgeon
5. L Grootboom - Neuropsychologist
6. J Sauer – Actuarial Scientist.

P.E. MOLITSOANE, J

Appearances:

For the Plaintiff:	Mr Marx
Instructed by:	Du Plooy Attorneys BLOEMFONTEIN

For the Defendant:	Ms Booysen
Instructed by:	The State Attorney BLOEMFONTEIN