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THE HIGH COURT OF SOUTH AFRICA

FREE STATE PROVINCIAL DIVISION

Case Number 386/2021

Reportable: yes/no

Circulate to other Judges: yes/no

Circulate to Magistrates: yes/no

In the matter between:

JACOB DITABE NDWENE Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

CORAM: BERRY, AJ

HEARD ON: 17 JANUARY 2023

DELIVERED ON: This judgment was handed down electronically by email to the parties' representatives and by release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 10 February 2023.

JUDGEMENT BY: BERRY, AJ

JUDGEMENT

[1] Plaintiff was a passenger in a vehicle which was involved in an accident on 12 June 2019. The vehicle collided with a barrier on the bridge and drove off the bridge. The Plaintiff was 26 years old at the time of the accident and is currently 30 years of age.

[2] Plaintiff suffered from a fracture of the cervical spine (C5), laceration of his upper gums, a chess injury with multiple rib fractures and tenderness of his back muscles.

[3] The Defendant conceded merits and provided an undertaking in terms of Sec 17(4)(a) of Act 56 of 1996 for future medical expenses.

[4] By agreement between the parties, a Draft Order was handed to Court. In terms of which the Defendant accepted 100% liability for the Plaintiff's damages and agreed to pay the Plaintiff R450 000.00 for general damages. Other aspects, such as costs and the payment of experts are also dealt with in the Order. I do not repeat the whole of the Draft Order as it was made an order of Court.

[5] Loss of earnings is the only matter outstanding. The parties agreed that they would submit written heads of argument.

[6] The Defendant accepted the medical expert reports of the Plaintiff it was agreed that the Plaintiff did not have to testify.

[7] The Plaintiff claims R889 443.00 for past and future loss of earnings, alternatively earning capacity.

[8] The following expert reports for the Plaintiff were admitted.

- Dr RS Kahn (General Medical Practitioner)
- Dr HET van den Bout (Orthopaedic Surgeon)

- Letitia Reyneke (Occupational Therapist)
- Susan van Jaarsveld (Industrial Psychologist)
- GJ Mellet (Actuary)

[9] The Defendant did not submit any expert reports.

[10] The Plaintiff failed Grade 12 in 2015 and then went to Bible-school in 2016. He joined the Youth-Ministry at a Church and did some peace-jobs at the Ministry such as painting, building, fixing pipes and cleaning the yard for the next three years. He was not formally employed and only paid for the work that he did. He has not been able to gain employment since the accident.

[11] The Plaintiff was not previously involved in an accident.

[12] The Plaintiff was taken to hospital where X-rays indicated an anterior and posterior avulsion fracture of C5.

[13] He was put in a hard collar and put on bed rest.

[14] On 15 June 2019 a C5 cortectomy and anterior discectomy with fusion of the C4-C5 disk with the plate extending to C3, was performed on the Plaintiff. He received physiotherapy whilst he was in hospital.

[15] The Plaintiff was discharged on 25 June 2019 using a cervical collar for six weeks.

[16] The Plaintiff could not attend physiotherapy as an out-patient due to his lack of funds for transport.

[17] The Plaintiff experiences headache and pain in his neck when he performs physical strenuous tasks. The pain becomes worse when he moves his neck a lot or keep his neck in a fixed position for long periods.

[18] The neck pain prevents the Plaintiff from walking more than one mile, from sitting for more than an hour and restricts his travel to two hours.

[19] The Plaintiff cannot stand for more than one hour and struggles to lift and carry heavy objects.

[20] The pain impacts on the Plaintiff's functionality when he is required to lift heavier objects, walk some distance, run, or bend.

[21] The Occupational Therapist states that the Plaintiff is not able to participate in the same level of occupational activities as prior to the accident.

[22] Physical strenuous work aggravates his pain and contributes to poor physical endurance.

[23] The Plaintiff is not able to lift what 90% of the population is able to lift every thirty minutes during an eight-hour working day.

[24] The Plaintiff has functional difficulties walking medium distances over even terrain, going up and down stairs repetitively, crouching under low obstacles, doing repetitive squats and trunk flexion and lifting objects over 15 kg up to waist level or carrying 12.5 kg over a short distance.

[25] He can safely lift a capacity which requires light-duty work, with some tasks of medium duty work such as in a stationery position, but not all tasks of medium duty work.

[26] There is a 29% possibility that he will have to undergo a follow-up cervical spine fusion every ten (10) years. For every operation he will be off for a period of two months. The Orthopaedic Surgeon states that the Plaintiff's working life will be shortened by a period of three to five years.

[27] The Plaintiff aspired to become a firefighter. The Industrial Psychologist, Susan van Jaarsveld, is of the opinion that he would not have been able to fulfil this dream due to his socio-economic circumstances prior to the accident.

[28] The Orthopaedic Surgeon states that the Plaintiff will struggle to secure suitable employment with his qualifications, considering his physical limitations.

[29] The Industrial Phycologist states that considering the Plaintiff's qualifications and experience, that he would only be able to perform work of a light physical nature. She is of the opinion that the Plaintiff will not be able to find employment in a clerical/administrative environment.

[30] The Occupational Therapist states that the Plaintiff's ability to find future employment is limited considering the Plaintiff's qualification and limited work experience doing piece jobs.

[31] The Defendant did not submit any expert reports but presented argument based on the expert reports submitted by the Plaintiff.

[32] The main issue in dispute is the contingencies that must be applied.

[33] The Defendant submitted that the Plaintiff was 26 years old at the time of the accident and will be turning 30 years on 27 March 2023.

[34] The Plaintiff completed Grade 11 during 2014 at the age of 21 years old. He failed Grade 12.

[35] The Defendant pointed out that the Plaintiff stated to Dr Khan that he has never worked before the accident, yet he attached an Affidavit to the RAF1 form wherein he states that he worked as a gardener, doing piece jobs, and earned approximately R1000.00 per month.

[36] The Defendant referred to the report of Orthopaedic Surgeon where the Plaintiff provided information that he worked as a gardener at his local church and did not earn a fixed income.

[37] The Defendant referred to the report of Occupational Therapist wherein the Plaintiff provided the following information regarding his occupation at the time of the accident.

> Unemployed (did maintenance piece-jobs but not formally employed). He did some piece jobs at the ministry in maintenance like painting, building, fixing pipes and gardening. He was only paid for the work he did and was not formally employed.

[38] The Plaintiff informed the Industrial Psychologist that he earned R1500.00 per month as a gardener.

[39] No proof of income could be provided.

[40] The Plaintiff has not been employed or performed any work since the accident.

[41] The Plaintiff informed the Occupational Therapist that he can engage in all his recreational activities with some neck pain. He plays soccer but cannot play for the full duration of a match, due to his neck pain.

[42] The Defendant questions the report of Dr Kahn requesting that medical opinions that resort outside his field of expertise, should be disregarded.

[43] The Defendant also criticise the report of the Occupational Therapist in that the report was finalised without her seeing a report from the Orthopaedic Surgeon.

[44] The Defendant argues that the Plaintiff has a residual working capacity and is not totally unemployable, due to his continued ability to participate in sport.

[45] The Defendant argues that the Plaintiff is underweight and that this contributes to his physical weakness and inability to perform strenuous work.

[46] The Defendant criticise the Industrial Psychologist for not performing psychometric tests to assess the Plaintiff's cognitive and psychological functioning to determine potential training prospects.

<u>Loss of Earnings or Earning Capacity:</u>

[47] The Defendant submits that higher contingencies should be applied.

[48] Ms Gouws appearing for the Defendant, argued that a pre-accident contingency of 15% for Past Loss of Earnings and 30% for Future Loss of Earnings must be applied.

[49] This submission is based on the following grounds:

(a) South Africa has a high unemployment rate.
(b) South Africa suffers from low economic growth.
(c) The Plaintiff would have suffered periods of unemployment in any event may have remained reliant on piece jobs with no fixed income.
(d) The probabilities of the case justify higher contingencies.
(e) The Plaintiff could have retired earlier than 65 years.

(f) The Industrial Psychologist does not indicate why the Plaintiff would have progressed to an income level between the median and upper quartile for the income for unskilled workers.

(g) On Koch's sliding scale of 0.5% from the date of accident, there is 39 years left until the Plaintiff would retire at sixty-five years of age, thus bringing the pre-morbid contingency deduction to 19.5%.

[50] Ms Gouws then argued that a further 30% contingency must be applied to the post morbid figure as provision must rather be made for a loss of earning capacity, rather than a loss of earnings.

[51] This will equate to a 60% contingency on post morbid loss of earnings.

[52] The Defendant argued that Plaintiff's loss of earnings, before the application of contingencies, should be calculated using the past pre-morbid income of R43 606.00 and a pre-morbid future income of R1 021 797.00, as calculated by the Plaintiff's actuary.

[53] The Defendant contends that to calculate Plaintiff's probable pre-morbid income, the following contingencies should apply:

- a 15% contingency should be applied to the past pre-morbid income, and
- a 60% contingency should be applied to future pre-morbid income.

[54] The Defendant did not present any evidence to lay a basis for this argument.

[55] Applying these contingencies give the following result:

Past pre-morbid income (before contingencies)		R43 606.00
Minus: 15% contingency deduction	R 6 540.90	
NETT:		R37 065.10

Future Pre-morbid income	R1 021 797.00
Minus: 60% contingency	R 613 078.20
NETT:	R 408 718.80

[56] The Defendant further argues that to determine the Plaintiff's loss of income, now that the accident has occurred, a further 30% contingency should be applied to future income as the additional contingency (to make provision for the eventualities such as stints of unemployment and the like, because of the injuries) resulting in a nett future loss of income of R306 539.10 calculated as follows:

Pre-morbid future income, less 60% contingency	R 408 718.80
Less: 30% normal contingency	R 102 179.80
TOTAL	R 306 539.10

[57] The calculations in the Plaintiff's actuary report are based on, *inter alia*, the assumption that Plaintiff would work until retirement age of 65 and the fact that Plaintiff never returned to his pre-morbid employment and has remained unemployed since.

[58] The actuary took into account that the Industrial Psychologist reported that Plaintiff may be "*functionally unemployable*" and, for purposes of determining his loss of income in the unemployable state, he assumed that Plaintiff would remain unemployed and incur a total loss of income.

[59] The actuary considered the alternative scenario presented by the Industrial Psychologist, that there is a possibility that Plaintiff may secure employment in the non-corporate sector, earning an income equivalent to the lower quartile income for unskilled workers, but would be most likely be subjected to stints of unemployment which would increase in duration as he gets older and that this would ultimately result in permanent unemployment at the age of 35, with a total loss of income thereafter.

[60] He used this as the basis for an alternative calculation, of loss of earnings in the

event of employment in the non-corporate sector until the age of 35.

[61] Based on the aforesaid – and various other assumptions contained in his report, he calculated Plaintiff's possible pre-morbid income, before the application of contingencies, as follows:

Past pre-morbid income	R 43 606.00
Future pre-morbid income	<u>R1 021 696.00</u>
TOTAL (pre- morbid past and future income)	R1 065 301.00

[62] Based on the report of the Industrial Psychologist, the actuary, calculated that if Plaintiff was employed in the non-corporate sector until the age of 35, he would have post-morbid future income of R105 647.00.

[63] The actuary provided calculations with illustrative contingency deductions, using the following contingencies:

Past pre-morbid income (both scenarios) - 5%
Future pre-morbid income (both scenarios) - 17%
Future post-morbid income (scenario 2) - 6%

[64] The result of the aforesaid is that in respect of the partial employment scenario, the total contingency for future post-morbid income is a total contingency of 23% being applied (17% + 6%).

[65] The net result of the calculations done by Plaintiff's actuary are as follows.

(a) If the Plaintiff is totally unemployable Plaintiff would suffer a total loss of earnings in the amount of R889 433.00.

(b) If the Plaintiff is employed in the non-corporate sector, until the age of 35, he will suffer a total loss of R790 112.00.

[66] Because of the strong positions adopted by both legal representatives, I deem it necessary to deal with some of the principles underlying the application of contingencies.

[67] In **Southern Insurance Association Limited v Bailey N.O. 1984 (1) SA 98 (A)**, it was held:

> "Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future … 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. This is entirely a matter of guesswork, a blind plunge into the unknown.
>
> The other one 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 … There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages."

[68] In **Goliath v MEC for Health ZASCA 2014 182 para. [11]**, the Court held that it is important to bear in mind that in a civil case it is not necessary for a Plaintiff to prove that the inference that she asked the Court to draw is the only reasonable inference. It suffices for the Plaintiff to convince the Court that the inference that he advocates is the most readily apparent and acceptable inference from several possible inferences.

[69] Contingency deductions allow for the possibility that the laintiff may have less than normal expectations of life and that he/she may experience periods of unemployment by reason of incapacity due to illness, accident or labour unrest or even general economic conditions.

[70] Contingencies are the “hazards of life that normally beset the lives and circumstances of ordinary people” (**Corbet & Buchanan, The Quantum of Damages, Vol II 360 at 367.1**), and should therefore, “by its very nature, be a process of subjective impression or estimation rather than objective calculation” (**Shield Ins. Co. Ltd v Booysen 1979 (3) SA 953 (A) at 965G-H)**.

[71] In determining contingencies the age of the Plaintiff is one of the factors to consider. The younger the victim, the longer the period over which the vicissitudes of life will operate and the greater the uncertainty in assessing the Plaintiff’s likely career path.

[72] Normal contingencies for which allowance should be made when calculating pre-morbid income, would usually include the following:

(a) the possibility of illness which would have occurred in any event.
(b) inflation or deflation of the value of money in future.
(c) other risks of life such as accidents or even death, which would have become a reality, sooner or later, in any event; (**Corbett & Buchanan, The Quantum of Damages, Vol I at 514**)

[73] In **Phalane v Road Accident Fund (48112/2014) [2017] ZAGPPHC 759** (7 November 2017), the Court held:

> "[18] In the Quantum Yearbook (by Robert Koch, 2017 Edition, p 126) the learned author points out that there are no fixed rules as regards general contingencies. However, he suggests the following guidelines:
>
> 'Sliding scale: 0.5% per year to retirement age, i.e., 25% for a child, 20% for a youth and 10% in the middle age…"

[74] In **G N v Road Accident Fund (13/30599) [2018] ZAGPJHC 691** (4 December 2018), Justice Opperman expounded the concept of contingencies as follows:

> "[16] Where a party contends for a higher than normal contingency, that party must, of course, adduce facts which render a higher than normal contingency factor applicable. The contrary is also true – where a party contends for a lower than normal contingency, no contingency or a positive contingency, the onus would rest on such party. This follows the trite principle that he who alleges must prove.
>
> [17] Insofar as past loss of earnings is concerned, it is generally accepted, and the norm to apply, is a 5% contingency deduction. No argument was advanced to deviate from this norm.
>
> [18] Support for what can be considered to be a normal contingency applicable to future loss of earnings, would be half a percent for every working year. Thus, in this instance, a 20% contingency deduction would constitute the norm over a 40 year period i.e. to a retirement age of 65.
>
> [19] This formula should not be followed rigidly in each and every case. The assessment remains largely arbitrary and dependent on the Court's impression of the case. It is but a starting point.

> [20] Contingencies are not to be viewed as always operating adversely to the plaintiff. There is often the lost prospect of a marked improvement in his or her lot."

[75] In **Burger v Union National South British Insurance Co 1975 4 SA 72 (W) 75D-G**. at para. [21], the honourable Colman J explains, as quoted with consent by Corbett JA in **Blyth v Van den Heever 1980 1 SA 191 (A) 225**, that:

> "How the court should take account of an uncertain future event in the assessment of future loss: 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 when it cannot be said to have been proved, 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 per cent chance that an injury to a leg will lead to an amputation, that possibility is not ignored because 30 per cent is less than 50 per cent 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 would be a certainty. That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure."

[76] The pre-morbid contingencies (past – and future) of 5% and 17% applied by Plaintiff's actuary are appropriate. The normal contingency reduction of 5% for past pre-morbid income and 17% represents the application of the sliding scale of 0.5% per annum until date of retirement.

[77] There is no reason why I cannot accept the calculations of the actuary pertaining

to pre-morbid income (**R1 065 301.00**).

[78] Counsel for the Plaintiff argued that the following contingencies should be applied.

- Past pre-morbid - 5%
- Future pre-morbid - 15%
- Future post-morbid - 15%

[79] Applying the above contingencies will result therein that the post-morbid contingency deduction is 30% in total, giving the following result:

Pre-morbid income	R43 606.00
<u>Minus</u>: 5% normal contingency	<u>R 2 180.30</u>
SUBTOTALA	<u>R41 425.70</u>
Future pre-morbid	R1 021 696.00
<u>Minus</u>: 15% normal contingency	<u>R 153 254.40</u>
SUBTOTAL	<u>R 868 441.60</u>
<u>Less</u>: 15% future post-morbid contingency	<u>R 130 266.24</u>
SUBTOTAL B	<u>R 738 175.36</u>

[80] The result of applying the aforesaid contingencies is as follows:

Net past loss of income (subtotal A)	R 41 425.70
<u>Plus</u>: net past loss of income (subtotal B)	<u>R738 175.46</u>
TOTAL	<u>R779 601.06</u>

[81] In **I E v Road Accident Fund (39925/2016) [2018] ZAGPJHC 559 (21 August 2018)** the Court applied a 30% contingency in respect of post-morbid earnings in similar

circumstances for a Plaintiff of similar age and with similar limitations in his future employment.

[82] In **Minnie v Road Accident Fund (5617/2016) [2018] ZAGPPHC 459 (29 March 2018)** the Court also applied a 30% contingency in respect of post-morbid earnings in similar circumstances for a Plaintiff who was 38 years of age and with similar limitations in his future employment.

[83] In **Khoza v Road Accident Fund [2019] JOL 46382 (GP)**, the Plaintiff was a Grade 11 at the time of the accident. He failed Grade 11 examinations, but the reason was unconnected to the accident. He also failed Grade 1. He embarked on a N2 course in electrical engineering but suspended his studies and felt that he preferred mechanical engineering which he did eventually complete. He took up employment and resigned after a month because he could not cope with the physical demands working above shoulder height. From a cognitive perspective, the accident had no effect on the Plaintiff. His physical functioning was affected, and he was no longer a competitor for physical heavy work and there was a possibility of degenerative changes. The Defendant argued for a higher than normal pre-morbid contingency, because of the Plaintiff's cognitive disabilities and a lower post-morbid contingency because it had been said that from a cognitive perspective the accident had no effect on the Plaintiff.

[84] The Court held that the normal pre-morbid contingencies should be applied because the Plaintiff's physical functioning had been affected and applied a 30% post-morbid contingency.

[85] I agree with the submissions of counsel for the Plaintiff.

[86] In the premises, the following order is made:

1. The Defendant is ordered to pay the Plaintiff the sum of R779 601.06 in respect of loss of earnings and earning capacity.

2. The Defendant shall pay the abovementioned amount into the account of the Plaintiff's attorney.

BL KRETZMAN INC TRUST ACCOUNT
Nedbank
Branch Number: [....]
Account Number: [....]
Reference: J6498

3. Is the Defendant does not make payment within 180 days from the date of this order the Defendant will be liable to pay interest on the capital amount at the moratory rate, compounded and calculated 14 days from the date of this order.

4. The Defendant is ordered to pay the Plaintiff's costs for the preparation of written heads of argument.

AP BERRY, AJ

APPEARANCES:

For the Plaintiff: **Adv. M Louw**
Instructed by: BL Krestzman Attorneys
c/o McIntyre & Van Der Post Inc
Bloemfontein

For the Defendant: **J Gouws**
Instructed by: State Attorney
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