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

Case No: 893/2021
REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

JOE SCHEEPERS	**PLAINTIFF**
And	
ROAD ACCIDENT FUND	**DEFENDANT**

CORAM:	**NAIDOO J**
HEARD ON:	**8 MARCH 2023**
DELIVERED ON:	**20 JUNE 2023**

JUDGMENT

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[1] The plaintiff, Joe Scheepers (the plaintiff), issued summons against the defendant, the Road Accident Fund (RAF) for damages arising out of injuries suffered by him, in a motor vehicle accident which occurred on 20 March 2019, on the N1 South at the point described as N1-15: 47.05, Bloemfontein, in the Free State Province. The plaintiff was the driver of a Toyota Hilux vehicle, which was involved in a collision with another vehicle. The driver of the latter mentioned vehicle lost control of her vehicle and collided head on with the plaintiff's vehicle. RAF had previously conceded merits and negligence at 100% and the matter in respect of liability became settled on 6 November 2020. By the time the matter came before me for the hearing of the trial in respect of quantum, general damages became settled (on the morning of the first day of trial on 7 March 2023), as well as future medical and hospital expenses. RAF furnished an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of those expenses. The only issues for this court to adjudicate were the past medical expenses and the past and future loss of earnings, particularly the percentage of the contingency deduction. Adv (Mr) H De La Rey represented the plaintiff and Ms M Booysen represented RAF.

[2] The parties advised the court that RAF admitted all the expert reports filed by the plaintiff, and the truth of the contents thereof. RAF did not file any expert reports. Ms Booysen confirmed this and also that general damages were settled in the amount of One Million Three Hundred Thousand Rand (R1 300 000.00), that the undertaking in respect of future medical expenses has been furnished to the plaintiff, and that the only issues for adjudication were the past medical expenses and the loss of earnings. With regard to the past medical expenses, Ms Booysen indicated that there is pending litigation regarding an internal memorandum issued by RAF saying they will no longer make offers on past medical expenses. The memorandum was successfully reviewed and set aside by the High Court. RAF is now appealing that decision in the Supreme Court of Appeal (SCA). She requested that the issue of past medical expenses stand over pending a decision by the SCA. I will deal further with this issue later.

[3] The plaintiff was three months away from his 39th birthday at the time of the accident and was employed as an Operational Director at African Mining and Crushing prior to the accident. After a six-month absence from work to recuperate

from his injuries, he returned to work and continued to be employed in the capacity of Operational Director, with no change in his remuneration The injuries he suffered are recorded as right open midshaft tibia fracture, right neck of femur fracture, as well as a midshaft comminuted femur fracture and left ankle fracture. He also appears to have sustained lacerations on both arms and an open wound on his left foot/heel. He was hospitalised, initially in the intensive care unit and thereafter transferred to a general ward. He was transferred to a Stepdown facility for rehabilitation and discharged from hospital on 7 May 2019. He underwent further surgery during November 2020. By the time he was seen by Drs Oelofse and Deacon, the Orthopaedic Surgeons, on 31 March 2021, most of his orthopaedic injuries were healed and the doctors recorded that he had no current complaints in respect of those injuries. However, there were orthopaedic challenges that would affect the plaintiff negatively for the rest of his life. I will deal with these later.

[4] The plaintiff was examined and interviewed by various medical experts, between March 2021 and June 2022. Where necessary, I will deal only with those experts reports and/or opinions which have a bearing on the issues to be adjudicated by this court. As mentioned, RAF did not engage any experts, and appears to rely on the reports of the experts engaged by the plaintiff. They, however, take issue only with the contingency deduction applied to future loss of earnings, which I will deal with later. The following is gleaned from the medico-legal reports filed, and is accepted to be common cause as no issue has been taken with same:

4.1 The plaintiff was unable to work for six months after the accident;

4.2 The plaintiff suffered restrictions on his ability to participate in vigorous activity and outdoor hobbies after the accident;

4.3 By June 2022, the Neurosurgeon records the plaintiff’s main complaints to be right leg pain, headaches, change in behaviour forgetfulness and anxiety symptoms;

4.4 He suffered mild neurophsychological alteration, which did not affect his ability to assume normal roles or perform tasks and activities of daily living;

4.5 His cognitive functions were not significantly impacted by the accident;

4.6 the plaintiff suffered multiple scarring and disfigurement to his left hand and to lower limbs, which are permanent, as plastic surgery for these scars is not recommended.

4.7 The plaintiff has continued to be employed in his pre-accident position and continues to earn the same salary and financial benefits.

[5] The orthopaedic surgeons, Drs Oelofse and Deacon, recorded that

The plaintiff still experienced pain in his right femur, right knee, right lower leg and left foot, with occasional swelling of the left foot. The pain in his right and left legs becomes more pronounced in inclement weather or when he engaged in physical activity. Long periods of mobility also increased the pain. The pain in his left foot is aggravated by ascending and descending stairs, and the foot becomes stiff with extended periods of sitting. The doctors diagnosed that the plaintiff's pain and/or disability was due to a number of factors, such as a malunited femur fracture, ligament injury of the right knee, requiring ligament reconstruction, united tibia/fibula fractures, plantar fasciitis of the left foot and a leg length discrepancy of about 2cm, which contributes to an uneven gait and hence increases pain.

[6] The orthopaedic doctors concluded that the plaintiff sustained serious injuries requiring multiple future surgeries in the short, medium and long term. They recommended a wide range of medical interventions, and the cost thereof, to reduce the plaintiff's disability and improve his quality of life. The doctors also opined that there is a high probability of the right hip and right knee degenerating and progressing to osteoarthritis. The recommended treatment included total replacement of the right hip and right knee. In consulting the relevant medical literature, they stated that even with improved surgical techniques and advancement

in the development of artificial joints, it is a fact that such joints will only last between 12 and 15 years, requiring replacement upon the effluxion of that period. The doctors also indicated that the plaintiff would need extended periods of sick leave, depending on the type of surgery that he undergoes, which would impact on his productivity at work. It will also affect his amenities of life and may impact on his retirement age.

[7] It is not in dispute that the plaintiff sustained serious injuries and that he would, in all probability, be forced to retire earlier than the normal retirement age of 65 years. To this end the parties agreed on a retirement age of 57 years and 6 months. On 24 February 2023, the Industrial Psychologist, Ms Carina Steenkamp prepared an update on her initial report. She took into account what the other medical practitioners had said in their reports, and also that of the Occupational Therapist, Ms Frizelna Steyn. The latter indicated that the plaintiff's pre-accident work as an Operational Director is classified as sedentary and light work. However, prolonged static positions such as standing or sitting, as well as activities that require stooping, climbing stairs and walking will exacerbate his symptoms. He is permanently unsuited for manual occupations. In view of his work as an Operational Director being classified as sedentary, Ms Steyn opines that the plaintiff retains the physical capacity to engage in most of the inherent job requirements, although he will require reasonable accommodation such as frequent breaks and position changes. It is further her opinion that the plaintiff may be able to cope with work demands for some years to come

[8] Ms Steenkamp records that while the plaintiff recuperated for 6 months after the accident, he received his full salary but missed out on benefits such as performance bonuses. She obtained collateral information from the HR Director at the plaintiff's place of employment, which indicated that as a majority shareholder and Director, there is no scope for progression and the plaintiff's earnings remain subject to the performance of the Division. The company pays a 6-monthly incentive bonus, depending on the performance of the company and a 13th cheque, but these are not payments the company is contractually obliged to make.

[9] Ms Steenkamp also records that after his return to work following his 6-month recuperation period, the plaintiff was placed on light duty and was office-based. He

reported to her in the course of her compiling her updated report, that he had started to travel again (as required by his job) and had also started undertaking site visits which is a further requirement of his job. He is still working in his pre-accident position as a Director. Ms Steenkamp concludes, on the basis of all the information at her disposal, that the plaintiff should be able to continue in his accommodated position for the foreseeable future. However, if his anticipated early retirement comes to pass, she postulates that his fixed salary will increase in line with annual inflation, until he retires. She further postulates that although the plaintiff should be able to continue in his present position, there may be factors which would negatively impact his occupational performance and which cannot be quantified. She suggests that a higher-than-normal post-accident contingency deduction be applied, to cater for these factors.

[10] As indicated, the issues between the parties appear to be the payment of past medical expenses and RAF's disagreement with the percentage of the contingency deductions applied to the future loss of earnings. It is trite that the percentage of the contingency deduction is in the discretion of the court, which discretion must be exercised judiciously, taking into account all relevant factors. The parties made their submissions in respect of their respective cases during oral arguments in court. RAF is in essence in agreement with the findings of the various experts who filed reports in this matter. With regard to past medical expenses, Ms Booysen even indicated that while there is no dispute as to the content of the schedule of payments submitted by the plaintiff, she was of the view that it would be prudent to wait for the ruling of the SCA with regard to whether RAF should pay the past medical expenses, which were paid by the plaintiff's medical aid fund.

[11] Mr De La Rey argued that the internal memorandum issued by RAF is not law, so even if the SCA finds that it could issue such a memorandum, the position in law is not affected. The court is still empowered to make an order for the payment of past medical expenses. It seems that the relief sought by RAF goes a little further than simply an order as to whether its decision to reject claims for past medical expenses, which the plaintiff has not paid, but which were paid for by a medical aid fund, was unlawful and reviewable. Ms Booysen handed up a copy of the application for leave to appeal to the SCA, in the matter of *Road Accident Fund v Discovery*

Health (Pty) Ltd. In that matter the issues in dispute between the parties, and which the SCA is called upon to adjudicate in order to grant the relief sought by RAF, are whether:

> "3.3.1 a road accident victim has a claim against the Fund for past medical expenses which he or she did not incur and did not in law become liable to pay;
>
> 3.3.2 medical schemes have a reimbursement claim against their members where their past medical costs incurred as a result of a motor vehicle accident have been paid by medical schemes in discharging their obligations towards their members' medical services providers; and
>
> 3.3.3 the Fund's decision to reject claims for past medical expenses in circumstances where the claimant did not in fact and in law incur and become liable for such expenses is unlawful and reviewable."

[12] It would appear that the issues mentioned affect the public interest. If leave is granted to RAF to prosecute the appeal in the SCA, a decision in favour of RAF would have a significant impact on the offers it would in future make in respect of claims lodged with RAF. A decision in favour of Discovery Health would, likewise, be determinative of how RAF would in the future, deal with such claims. I am in agreement with Ms Booysen's proposal that the plaintiff's claim for past medical expenses stand over, pending a decision by the SCA on whether leave to appeal will be granted to RAF

[13] I turn now to deal with the claim for loss of earnings. Apart from RAF's disagreement with the contingency deduction which was applied to the future loss of earnings, Ms Booysen argued that the amount of R84 099.00 (an incentive bonus) taken as past loss of earnings in the actuarial calculations, is not a peremptory payment and depends on the performance of the division. The plaintiff, therefore, did not suffer a loss of earnings. I mentioned earlier that the HR Director at African Mining and Crushing (where the plaintiff is employed) confirmed to Ms Steenkamp

that the incentive bonus as well as the 13th cheque were dependant on the performance of the division.

[14] It is trite that the plaintiff bears the onus to prove on a balance of probabilities that the injuries he sustained have reduced his earning capacity, which will result in actual loss. [*See Rudman v Road Accident Fund 2003(2) SA 234 (SCA); Road Accident Fund v Kerridge 2019(2) SA 233 (SCA)*]. The court in Kerridge said at para 25 "Indeed, a physical disability which impacts on the capacity to earn an income does not, on its own, reduce the patrimony of an injured person. There must be proof that the reduction in the income earning capacity will result in actual loss of income…" Put differently, there must be proof that the disability gives rise to patrimonial loss. The latter of course is dependent on the nature of the work that the plaintiff had done prior to the accident or would have done had the accident, giving rise to the disability, not occurred.

[15] It is not in dispute that the plaintiff sustained serious injuries in the accident relevant to this matter and that he still suffers from the sequelae of those injuries. It is also common cause that he continued to receive his full salary for the 6-month recuperation period after the accident, while he was away from work. On his return to work, he resumed his duties as Operational Director, albeit that he was place on light duty and was mostly office-based. He continued to earn the same salary and enjoyed all his pre-accident remuneration benefits. His physical ability to perform all the work-related tasks required of him was limited by his injuries. By February 2023, when Ms Steenkamp interviewed him, it appears that the plaintiff's physical condition improved enough for him to resume travelling and to undertake site visits, which are requirements of his job. He is apparently still hampered by his injuries, but continues to perform his duties on a daily basis.

[16] It is accepted that the plaintiff's life has changed both from a physical as well as an emotional point of view. He clearly endured pain and suffering as well as a loss of amenities of life, which, according to some of the experts, has resulted in a change in his personality and behaviour, in that he is less active socially and personally, and is unable to participate in many activities that he enjoyed pre-accident. RAF has settled the claim for general damages, which covers these

aspects of the damages suffered, agreeing to pay an amount of R1 300 000.00. The orthopaedic doctors anticipate that there will be a deterioration in the plaintiff's physical condition requiring various medical interventions, for which they have recommended what type of interventions would be necessary. The costs of these interventions have also been secured by way of an undertaking furnished by RAF to pay for future medical treatment, assistive devices and the like.

[17] The plaintiff's earning capacity does not appear to have been affected, as he continues to be employed in his pre-accident position and continues to earn his pre-accident salary and benefits. Had the accident not occurred, he would presumably have continued working until age 70. Now that the accident has occurred, he is expected to retire earlier due to the anticipated deterioration in his physical health. The parties have accepted that 57 years and 6 months to be that age of early retirement. Ms Steenkamp was advised that the plaintiff receives no additional benefits such as medical aid contributions, pension or travel allowance, over and above his fixed salary, incentive bonuses and 13th cheque. It would therefore, be fair to assume that his current remuneration, subject to normal inflationary increases, would continue until his retirement, be it at age 70 or earlier. No evidence has been placed before this court regarding the plaintiff's post-retirement remuneration had the accident not happened, for example, whether he would continue to receive his salary for the remainder of his life, whether he has invested in retirement funding, or whether his shareholding in the company would provide adequate funds for his post-retirement upkeep. There is accordingly no indication that his post-retirement financial position would be negatively impacted by the accident or his injuries. This court also has to take into account that the plaintiff would benefit financially from his majority shareholding in the company, which would not be negatively impacted by the accident or his resultant injuries. The extent of such benefit has not been placed before this court

[18] In view of what I have said, it would appear to me that the plaintiff's future earning capacity or earnings would not be limited or impeded by his injuries. Reference to his inability to enter the labour market on an equal footing with others is, in my view, not applicable to the plaintiff due to his unique circumstances which I have outlined above. With regard to the contingency deduction in respect of future

earnings, I accept that there may well be unforeseen circumstances, such as illness, error in the estimation of life expectancy and “general hazards of life” which will bear upon the plaintiff’s earnings. It would be fair therefore to allow a contingency deduction that would cover such a situation. I am not in agreement that the 35% proposed in the actuarial calculation is necessary. Given the circumstances I have mentioned, I am more inclined to agree with the submissions made by Ms Booysen that a 20 % contingency deduction in respect of future earnings would be adequate.

[19] I base my view on the well-established position in our law that courts need to be mindful of the current situation of the plaintiff and exercise a measure of common sense and judicious discretion in avoiding an award that would amount to a windfall to which the plaintiff would not be entitled. The purpose of a claim such as this is to compensate the plaintiff for loss that he has suffered or will suffer and not to make an award that amounts to largesse. The plaintiff, however, must first discharge the onus on him to prove the loss. I am not satisfied that the plaintiff has shown that the accident or his injuries have caused a loss of earning capacity or will cause a loss of earnings in the future, to the extent that he claims.

[20] With regard to the past loss of earnings in the amount of R84 099.00, I am of the view that although such amount is a discretionary payment, dependent on the performance of the division and the company, it appears that, had the plaintiff been at work, he would have earned that amount. I accordingly do not deem it necessary to exclude that amount from the relevant actuarial calculations.

[21] In the circumstances, I make the following orders:

21.1 The merits having been settled, the defendant shall pay 100% of the plaintiff’s agreed or proven damages;

21.2 The defendant shall pay to the plaintiff the sum of Two Million Six Hundred and Eighty Eight Thousand Thirty Seven Rands and Forty Cents (R2 688 037.40) within one hundred and eighty (180) days from the date of this order, in respect of the plaintiff’s claim against the defendant for the following heads of damages:

21.2.1	Past and future loss of earnings/earning capacity	R1 388 037.40
21.2.2	General Damages	R1 300 000.40
21.2.3	Past hospital and medical expenses	To be determined at a later stage

21.3 In the event of the said amount not being paid timeously, the defendant shall be liable for interest on the said amount, at the prevailing interest rate, calculated from the 181st day after the date of this order, to date of payment;

21.4 The defendant shall furnish to the plaintiff an Undertaking in terms of section 17(4)(a) of Act 56 of 1996 for payment of 100% of the costs of accommodation of the plaintiff in a hospital or nursing home (to be agreed upon by the parties) or rendering of a service or supplying of goods to the plaintiff resulting from the motor vehicle accident that occurred on 20 March 2019, and to compensate the plaintiff in respect of the said costs, after the costs have been incurred by the plaintiff, and upon proof thereof;

21.5 The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale in respect of both merits and quantum, up to and including 8 March 2023;

21.6 In the event that the costs are not agreed:

21.6.1 the plaintiff shall serve a Notice of Taxation on the defendant's attorney of record;

21.6.2 the plaintiff shall allow the defendant one hundred and eighty (180) days from the date of the Taxing Master's allocatur to make payment of the taxed costs;

21.6.3 Should payment not be effected timeously, the plaintiff will be entitled to recover interest, at the prevailing rate, on the taxed costs calculated from the 181^{st} day after the date of the allocatur;

21.7 Subject to the discretion of the Taxing Master, such costs may include:

21.7.1 the costs incurred in obtaining payment of the amounts mentioned in 21.2 and 21.5 above;

21.7.2 the costs consequent upon the appointment of counsel, including counsel's fees for 7^{th} and 8^{th} March 2023 and the reasonable fee for preparation and attendance at the case management meeting held on 24 October 2022;

21.7.3 the reasonable and qualifying fees of the following experts:

21.7.3.1 Dr H Hoffman – Plastic Surgeon
21.7.3.2 Drs LF Oelofse and MB Deacon (Funda Medical) – Orthopaedic Surgeons
21.7.3.3 Drs Van Dyk and Partners – Radiologists
21.7.3.4 Ms L Grootboom - Neuropsychologist
21.7.3.5 Ms C Steenkamp – Industrial Psychologist
21.7.3.6 Ms F Steyn – Occupational Therapist
21.7.3.7 Dr P Steyn – Urologist
21.7.3.8 Mr J Terry – Orthotist and Prosthetist
21.7.3.9 Dr D Boungou- Poati – Neurosurgeon
21.7.3.10 Ms M Wasserman – Sexologist
21.7.3.11 Messrs GW Jacobson – Consulting Actuaries

21.8 The amounts referred to in 21.2.and 21.5 above are to be paid to the Trust Account of the plaintiff's attorneys, A Wolmarans Incorporated, bearing the following details:

Name of Account Holder: A Wolmarans Inc

Name of Bank and Branch:	ABSA Bank, Northcliff
Account Number:	406[…]
Branch Code:	632 005
Type of Account:	Cheque (Trust)
Reference:	G Van Rooyen/ MAT8668

21.9 The matter of the Past Medical Expenses is postponed to the pre-trial roll of 18 September 2023 to monitor either settlement thereof or readiness for hearing.

S NAIDOO, J

On behalf of Plaintiff:	Adv H De La Rey
Instructed by:	A Wolmarans Inc Ground Floor 10 Barnes Street Arboretum Bloemfontein (Ref: Mrs G Van Rooyen/BV/MAT8668)
On behalf of Defendant:	Ms M Booysen
Instructed by:	The Road Accident Fund 62 St Andrews Street Bloemfontein
Claim No.	502/1287917211/304/12. Link 5011257 (Ms J Gouws)