IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No. 5994/2015

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED: YES/NO

In the matter between:

CRAIG EDDIE KIRKHOFF **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

CORAM: GUSHA, AJ

HEARD ON: 23 MAY 2023

DELIVERED ON: This judgment was delivered electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for delivery is deemed to be at 14h00 on 04 JULY 2023.

JUDGMENT

INTRODUCTION

[1] On the 21st June 2013 the plaintiff, then 22 years old, was involved in a road traffic accident. The collision occurred in Bloemfontein Free State Province, between a motor vehicle driven by the insured driver (Mr Matoetoe Molelekoa) and a motorcycle ridden by the plaintiff. As a result of the accident he sustained a right shoulder injury, chest injury and abrasions on his right knee. He was taken to theatre on the day of the accident for a closed reduction of his right shoulder and the application of an arm sling for his right arm. He remained overnight in hospital for observation and was discharged the following day.

[2] At the time of the accident he was employed and subsequent to his discharge from hospital, he recuperated at home until the 02nd July 2013. He purportedly received no remuneration for the period whilst recuperating at home.

[3] As a result of the injuries sustained, he instituted action against the defendant for damages he suffered. His claim was for the amount of R2 552 820.00, made up as follows;

3.1.	Future Medical expenses	**R**	**494 600.00**
3.2.	Past and Future Loss	**R**	**1 458 220.00**
3.3.	General Damages	**R**	**600 000.00**
	TOTAL		**R 2 552 820.00**

[4] At the hearing, the parties submitted that they reached a settlement in respect of general damages in the amount of R350 000.00. In respect of future medical expenses the parties agreed that the defendant will furnish the plaintiff with a 100% undertaking in

terms of section 17 (4) (a) of the Road Accident Fund Act, Act 56 of 1996 (the Act), for the costs of the future accommodation of the plaintiff in a hospital or nursing home, or treatment of, or rendering of a service, or supplying of goods to him arising out of the injuries sustained by him in the collision on 21 June 2013.

[5] Consequently, I am only called upon to adjudicate the remaining dispute; the damages suffered by the plaintiff in respect of his past and future loss of earnings as well as the contingencies to be applied thereto.

BACKGROUND

[6] I now turn to briefly deal with the background of this matter. The plaintiff progressed to grade 12 in school and was at the time of the accident employed as a sales consultant at Brano Industries earning a monthly salary of R4 500.00. His work entailed mainly light and sedentary duties, the latter mainly being administrative work and assisting customers in the store.

[7] Due to the injuries sustained, he was off work from the 22nd June 2013 until his return on the 02nd July 2013. After returning to work, he continued to perform his erstwhile duties.

[8] In 2015 he secured employment at Doors Galore as a sales consultant. Once more performing light and sedentary work mainly tending to administrative work and assisting customers in store. He continued performing light and sedentary work at different employers until he joined Nova Refrigeration as a sales consultant. In July 2020 he however lost his employment when Nova Refrigeration closed down due to the effects of the COVID-19 virus and has been unemployed since.

Expert Reports

[9] By agreement between the parties the following expert reports were presented by way of affidavits in terms of section 38 (2) of the Uniform Rules of Court[1];

9.1. Dr JJ Schutte - General Practitioner
9.2. Dr LF Oelofse – Orthopaedic Surgeon
9.3. Drs van Dyk & Partners – radiologists
9.4. Mrs M Grobler of Rita van Biljon Occupational Therapists
9.5. Mrs L van Zyl of Rita van Biljon Occupational Therapists
9.6. Dr EJ Jacobs – Industrial Psychologist
9.7. Munro Forensic Actuaries.
9.8. Munro forensic actuaries

[10] I shall now deal with the most germane aspects of some of the aforesaid reports;

Dr JJ Schutte - General Practitioner

[11] Dr Schutte conducted the serious injury assessment report[2] on the plaintiff. In his report he noted that the plaintiff was, during his hospitalisation, treated for chest injury / rib fractures, right knee abrasions and a dislocated right shoulder. At the time of the assessment the plaintiff presented with, amongst others, a painful right shoulder, pain when sleeping on his right side and difficulty in carrying or picking up heavy objects. Dr Schutte concluded that according to the narrative test[3] the plaintiff has serious long-term impairment which could cause loss of bodily function.

Dr LF Oelofse – Orthopaedic Surgeon

[1] **38. Procuring evidence for trial**

(2) The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.

[2] RAF 4.

[3] The whole person impairment evaluation indicates a 19% upper extremity impairment.

[12] Dr Oelofse examined the plaintiff on the 27th March 2018. During the examination the plaintiff reported sustaining a right shoulder injury, chest injury and right knee injury during the accident. He however reported no current symptoms and or complaints of the chest or right knee. With regards to the right shoulder injury, the plaintiff reported current symptoms of “nagging, consistent” pain which is exacerbated by inclement weather, prolonged periods of use and or working above shoulder weight. He further reported difficulty driving as the activity reportedly aggravates the pain in his right shoulder.

[13] Upon examination Dr Oelofse noted amongst others, severe atrophy of the anterior and lateral shoulder muscles; palpable and painful muscle spasms in the trapezius and peri-scapular shoulder muscles, moderate pain with palpation of the biceps groove and rotator cuff, movement of the shoulder mildly restricted in comparison to the left. He opined that there is radiological evidence of early degenerative changes of the Gleno-humeral joint. He further opined that even with successful treatment, the plaintiff’s right shoulder will have a profound impact on all aspects of his life and that he has a probability to have chronic pain and weakness of his shoulder muscles. Dr Oelofse concluded that the plaintiff will not be able to do physical labour again and must be accommodated in a strict light duty working environment.

<u>Mrs M Grobler / Mrs L van Zyl of Rita van Biljon Occupational Therapists</u>

[14] Mrs Grobler examined the plaintiff on the 22nd January 2018. Truncated, her findings are that the plaintiff retains, despite the injury to his right shoulder of his non-dominant arm, physical capacity for sedentary occupational tasks. She further opined that he presented with the physical strength and tolerance to meet the demands of work falling within the category of light category, but he is excluded to optimally engage in tasks performed at elevated levels involving bilateral upper limb use and to handle loads

of a medium nature asymptomatically due to the restricted right shoulder range of movement and aggravating pain at the joint when straining the right shoulder joint

[15] Notwithstanding the aforesaid, she found that, despite the injury sustained to his non-dominant arm, according to his occupational description, he will still be able to perform his main occupational tasks of sedentary work and assisting clients in store with light demands.

Dr EJ Jacobs – Industrial Psychologist

[16] The salient and truncated findings of Dr Jacobs with regards to the *sequelae* are as follows;

Past loss of income

- Past loss of income is not applicable as the plaintiff continued to earn a living post the accident.

Loss of earning capacity

Uninjured career

- Due to the serious injuries the plaintiff sustained, early retirement at age 60 from sedentary work is expected.

- His uninjured career can be summarised as follows, but for the accident and injuries sustained he probably would have worked until the age of 65 years, employed and earned R54000.00 per annum and at the time of the interview in 2019 had the capacity R 139 200.00 per annum.

- He progressed to grade 12 in school and has no further qualifications. At the time of the accident he had a career span of 42 years and due to a lack of post-matric qualifications he is regarded as an unskilled worker and would probably have continued in a semi-skilled capacity such as sales.

[17] Dr Jacobs opined that the accident resulted in a change of the plaintiff's capacity to earn.

Injured career

- Early retirement at the age of 60 years.

- Fewer opportunities and reduced productivity due to periodic pain.

[18] Dr Jacobs opined that a post-morbid contingency deduction which is slightly higher than normal should be applied.

Munro Forensic Actuaries

[19] Mr Boshoff, an actuary, was requested to estimate the capital value of the potential loss of earnings suffered by the plaintiff as a result of the accident and resultant injuries sustained. In his report he states that based on data furnished, the plaintiff is expected to retire 5 years early and might suffer losses not directly quantifiable which should be addressed via contingencies. At the time of the calculation for loss of income, the plaintiff's earnings were as follows;

Basic salary	R 11.600 per month (before tax)
ER pension contribution	4.36% of basic salary (tax-free)

EE pension contribution	2.64%deduction from basic salary (allowing for tax breaks)

[20] In calculating the loss of earning suffered due to the accident, the applicable assumption employed was that the plaintiff lost his employment in July 2020 due to the effects of Covid 19 and other non-accident related reasons. The conclusion reached in the report is that the plaintiff was thus suffered past loss of income from July 2020 as he cannot be regarded as an equal competitor.

[21] Mr Boshoff applying a 10% and 15% contingency deduction on past and future loss respectively in respect of the uninjured earnings and a 30% contingency deduction on future earnings in respect of the injured earnings, concluded that the plaintiff's capital value of loss of earnings was R 1 458 220 calculated as follows;

	Uninjured earnings	Injured earnings	Loss of earnings
Past	R 264 220		
Less Contingencies	10%		
	R 237 780		**R 237 780**
Future	R 5 487 000	R 4 919 300	
Less Contingencies	**15%**	**30%**	
	R 4 663 950	**R 3 443 510**	**R 1 220 440**
	TOTAL LOSS OF EARNINGS		**R 1 458 220**

SUBMISSIONS BY THE PARTIES

[22] It was submitted on behalf of the plaintiff that what is cardinal in determining past loss of income is the loss of the capacity to earn an income rather than the monetary value lost. To this end it was submitted that the plaintiff albeit he was employed and earned a living, his capacity to earn same was diminished and or lost in July 2020 and that he accordingly suffered pecuniary loss and was entitled to be reimbursed.

[23] On behalf of the defendant it was submitted that the plaintiff did not suffer any past loss of earnings as he was employed even after the accident and only became unemployed as a result of an occurrence unrelated to the accident. They submitted that the in respect of future loss of earnings the pre and post injury scenarios were the same at an amount of R 5 487 000.00. They implored the court to apply thereto contingencies of 15% and 25%respectivly.

THE LEGAL FRAMEWORK

[24] It needs no restating that a person is entitled to be compensated to the extent his or her patrimony has been diminished in consequence of another's negligence **RAF v Guedes**[4].

[25] It further needs no restating that such damages include loss of future earning capacity. However the calculation of the quantum of a future amount, such as loss of earning capacity, is not a matter of mathematical calculation. By its nature such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss that is often a very rough estimate. The court necessarily exercised a wide discretion when it assesses the quantum of damages due to the loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that, in order to assist in such a determination, an actuarial computation is a useful basis for establishing the quantum of damages. Even then the trial court has a wide discretion to award what it believes is just[5].

[26] In **Southern Insurance Association Ltd v Bailey N.O**[6] Nicholas JA remarked as follows;

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[4] RAF v Guedes 2006 (5) 583 SCA para 8.
[5] Ibid at fn 4. See also AA Mutual Assurance Association Ltd v Maqula, 1978 (1) SA 805 (A) at 809B.
[6] 1984 (1) SA 98 (AD) at 116G-117A.

> "Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right". One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case."

[27] It is trite that the determination of allowances for contingencies involves, by its very nature, a process of subjective impression or estimation rather than an objective calculation. The question of the contingencies deductions to be applied, as is the issue of the calculation of the quantum of a future amount, such as loss of capacity, are often difficult matters. Speculation inevitably abound.

[28] There are no hard and fast rules of mathematical logic in the determination of contingency discount. One has to make a value judgment in determining a rate of contingent discount. The court has a wide discretion based upon a consideration abysm of all the relevant facts and circumstances. Contingencies of whatever nature generally serve as a control mechanism to adjust the loss to the circumstances of the individual case in order to achieve justice and fairness to the parties[7].

APPLICATION

[29] It is established law that the plaintiff must prove the extent of his loss and damages on a balance of probabilities. With regard to loss of income he must adduce

[7] Hall v Road Accident Fund [2013] (2008/11330) [2013] ZAGPJHC 129 (28 May 2013) at para 52.

evidence of his income in order to enable the court to assess his loss of past and future earnings. In **MVUNDLE V RAF**[8] the court held as follows;

> "It is trite that the damages for loss of income can be granted where a person **has in fact suffered** (my own emphasis) or will suffer a true patrimonial loss in that his or her employment situation has manifestly changed…

Past Loss of Earnings

[30] In the present case the plaintiff continued working and earning an income post the accident. In fact, he only lost his employment years after the accident, in July 2020 to be precise due to an unrelated occurrence; the effects that Covid 19 had on the general economic climate in the country and indeed globally. If regard is had to the data contained in the expert reports, he was only off work from the 22nd June 2013 until his return on the 02nd July 2013, approximately 11 days. At the time of the accident he earned an amount of R 4 500.00 per month. No data has been furnished with regards to whether the plaintiff was remunerated, in full, in part and or not at all,[9] for the period he was hospitalised and whilst recuperating at home. The actuarial report simply alludes to the period of unemployment as from July 2020. In view of the aforesaid facts and in the absence of any evidence by the plaintiff and/or any explanation in the expert reports, the basis of the actuarial calculation regarding the plaintiff`s alleged past loss of earnings, constitutes, in my view, mere speculation.

[31] I am consequently of the view that the plaintiff did not discharge his *onus* in respect of his claim for damages for past loss of earnings.

Future Loss of Earnings

[32] In their submissions the parties were *ad idem* that the pre and post injury scenarios were the same. Their only point of variance being the percentage of

[8](63500/2009) [2012] ZAGPPHC 57(17 April 2012) at

[9] And if not remunerated to what extent he lost his earnings,

contingencies to be applied. In view of the expert reports admitted and the uncontroverted evidence that the plaintiff injured his non-dominant hand, I am not persuaded that the vicissitudes of life would have been so unfavourable on him as to warrant the reduction of his potential loss of earnings by a drastic reduction of 30% contingency rate. Albeit an unfair competitor, he is still young and I hold the view that at the relative youthful age of 35 years he can still secure employment in a light and sedentary environment where he will not be required to either use or put strain on his injured non-dominant hand. Accordingly I consider it fair and appropriate to allow for a decremental contingencies of 25% to be applied to the post injured scenario.

[33] In the result I make the following order;

33.1. The plaintiff's claim for damages in respect of past loss of earnings is dismissed.

33.2. The defendant shall pay to the plaintiff;

33.2.1. R350 000.00 (Three hundred and fifty thousand rand) in respect of general damages arising from the motor vehicle accident that occurred on the 21st June 2013.

33.2.2. R 508 700 (five hundred and eight thousand rand) in respect of future loss of income.

33.3. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4) (a) of Act 56 of 1996 for payment of 100% of the for the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supply of goods to him, arising from the injuries sustained by him in the motor vehicle collision on the 21st June 2013.

33.4. The defendant shall pay the plaintiff‘s taxed or agreed party and party costs until the date of this order including costs of counsel. Such costs shall include the following the reasonable and qualifying fees of the following experts:

33.4.1. Dr JJ Schutte - General Practitioner

33.4.2. Dr LF Oelofse – Orthopaedic surgeon

33.4.3. Drs van Dyk & Partners – Radiologists

33.4.4. Mrs M Grobler of Rita van Biljon Occupational Therapists

33.4.5. Mrs L van Zyl of Rita van Biljon Occupational Therapists

33.4.5. Dr EJ Jacobs – Industrial Psychologist

33.4.6. Munro Forensic Actuaries.

33.5. Payment of the capital amounts shall be made without set-off or deduction, within 180 (hundred and eighty) calendar days from the date of granting of this order, directly into the trust account of the plaintiff’s attorneys of record by means of electronic transfer, the details of which are the following:

Honey Attorneys - Trust Account
Bank – Nedbank, Maitland Street, Bfn
Branch Code - 11023400
Account No. – 1[…]
Reference – HL Buchner/I22884

33.6. Payment of the taxed or agreed costs shall be made within 180 (hundred and eighty) days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney.

33.7. Interest *a tempore-morae* shall be calculated in accordance with the Prescribed Rate of Interest Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund Act 56 of 1996, one hundred and eighty (180) days from the date of this order.

NG GUSHA, AJ

On behalf of the plaintiff	Adv. Pohl SC
Instructed by:	Honey Attorneys
	BLOEMFONTEIN
On behalf of the respondent:	Ms. P Banda
Instructed by:	State Attorney
	BLOEMFONTEIN