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

Reportable: YES

Of Interest to other Judges: NO

Circulate to Magistrates: NO

Case no **2855/2015**

In the matter between:

CHARLES JAMES BEUKES

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

CORAM: JP DAFFUE J

HEARD ON: 25 and 26 OCTOBER 2022 and 19 JUNE 2023

DELIVERED ON: 27 OCTOBER 2023

ORDER

1. The defendant shall pay the amounts of R500 000.00 (five hundred thousand rand) in respect of general damages and R35 419.23 (thirty-five thousand, four hundred and nineteen rand and twenty three cents) in respect of past medical and hospital expenses to the plaintiff, which amounts shall be made without set-off or deduction, within 180 (one hundred and eighty) calendar days from the date of the

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	-	110 234 00
Account number	-	110 [...]
Reference	-	HL Buchner/J03127

2. The defendant shall forthwith provide the plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996 for the costs of future accommodation and treatment of the plaintiff in a hospital or nursing home, or treatment of, or rendering of a service to him, or supplying of goods to him, arising out of the injuries sustained by him in the motor vehicle collision of 17 April 2013, after such costs have been incurred and upon production of proof thereof.

3. The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale, until date of this order, including the costs of senior counsel as well as the reasonable qualifying and reservation fees and expenses (if any) of the following experts:

- 3.1 Dr J.J Schutte – General Practitioner;
- 3.2 Dr R Dyason – Eye Surgeon;
- 3.3 Dr D Hoffmann – Plastic, reconstructive and cosmetic surgeon;
- 3.4 Ms M Coetzee – Clinical Psychologist;
- 3.5 Ms H Meyer – Occupational Therapist;
- 3.6 Ms I Aurret-Besselaar – Psychologist and HR Consultant;
- 3.7 Munro Actuaries and
- 3.8 Dr G.M Rosendorff – General Practitioner and approved medical examiner of the Maritime and Coastguard Agency of the United Kingdom.

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

5. In the event of no agreement on the costs of suit, the plaintiff's attorney shall give 14 (fourteen) days' notice to the defendant of taxation of their bill of costs.

6. Interest shall accrue at 11.25% per annum, being the statutory rate, compounded, in respect of:

6.1 The capital of the claim, calculated from 14 (fourteen) days from date of this order.

6.2 The taxed or agreed costs, calculated from 14 (fourteen) days from date of taxation, alternatively date of settlement of such costs.

7. The plaintiff's claim for past and future loss of income is referred to Munro Forensic Actuaries to be recalculated, within 20 (twenty) days of the date of this order, in accordance with the actuarial report dated 15 March 2021 by amending the calculations as follows and by applying the following contingency deductions:

7.1 Uninjured scenario

7.1.1 By inserting the following:

May 2049 – 75% of \$ 7000 per month decreasing in straight line to 50% of \$ 7000 per month at retirement age 65 years.

7.2 Injured scenario

7.2.1 By amending July 2023 to the following:

July 2023 – R10 158,00 per month (2018 terms)

7.2.2 By inserting the following

July 2034 – Patterson level B5 at R360 000 per year (2023 terms)

7.3 Contingencies

7.3.1 Uninjured – past loss 15%

7.3.2 Uninjured – future loss 35%

7.3.3 Injured – future loss 15%

8. Leave is granted to the plaintiff to set down the matter on notice to the defendant on the unopposed motion court roll once the actuarial recalculation of the plaintiff's claim for past and future loss of income has been made for an appropriate order of court.

JUDGMENT

INTRODUCTION

[1] This is one of those scenarios that judges have become accustomed to. The plaintiff's firm of attorneys, a well-oiled machine, has done its homework and obtained all relevant witnesses, including experts. It became embroiled in litigation with the Road Accident Fund's legal team that elected to come to court without countervailing evidence. The outcome was a foregone conclusion as is often the case in the matters that are brought to court on a weekly basis in this division and across the country.

THE PARTIES

[2] The plaintiff is Mr Charles James Beukes who was born on 26 May 1994, he being 18 years old at the time of the collision wherein he completely and irreversibly lost the vision of his left eye. He was 28 years old at the time when he testified in respect of the *quantum* of his claim. Adv PJJ Zietsman SC appeared for him, instructed by Honey Attorneys, Bloemfontein.

[3] The defendant is the Road Accident Fund who was at all relevant times represented by Ms P Banda.

A HISTORY OF THE LITIGATION

[4] The following is a summary of the events that led to the conclusion of the case:

- a. on 17 April 2013 and about a month before his 19th birthday, the plaintiff was seriously injured in a motor vehicle collision;
- b. on 18 June 2015 he instituted action against the Road Accident Fund;
- c. six months later the defendant filed its plea;
- d. the matter was declared trial-ready, but on 26 July 2016 the defendant raised the white flag, indicating no further interest in a losing battle about the merits of the claim, agreeing to pay 100% of the plaintiff's proven or agreed damages, an outcome that was not surprising at all as the plaintiff was a passenger in one of two motor vehicles that collided with each other and would be called upon at a hearing on the merits to prove 1% negligence only against one of the two insured drivers;
- e. the parties could not agree on the plaintiff's damages and on 1 December 2021 they eventually signed a pre-trial minute in terms of Rule 37A, recording that the following issues were still in dispute:
 - i. the extent of plaintiff's injuries and the sequelae thereof;
 - ii. his claim for past medical and hospital expenses, past and future loss of income and general damages;
- f. the plaintiff recorded, already at that stage, that he intended calling seven experts who were not only identified, but short summaries of their evidence were recorded, although by then, the reports of these experts had already been filed;
- g. the defendant recorded then that it did not intend appointing expert witnesses, but reserved the right to do so;¹

¹ Pleadings bundle p 67, clause 13.2 of the pre-trial minute.

h. the trial on quantum was declared trial-ready and conducted on 25 and 26 October 2022;

i. by the end of the second day (the matter was set down for two days only), Mr Zietsmann indicated that the plaintiff intended to call a further witness as the defendant did not want to concede that the plaintiff had failed his medical examination and could not obtain the required ENG1 certificate, whereupon the matter was postponed to 18 and 19 April 2023;

j. during March 2023 I became concerned about the further proceedings insofar as the plaintiff had in fact filed the further expert report by Dr G.M Rosendorff, but nothing was forthcoming from the defendant as Ms Banda anticipated earlier, as a result a conference was held in my chambers whereupon mid-trial minutes were prepared;

k. Ms P Banda indicated at the conference that she was still awaiting instructions from the defendant pertaining to the appointment of expert witnesses, whereupon the defendant was put on terms pertaining thereto, *ie* it had to file its rule 36(9)(a) notices on/or before 30 March 2023 and expert report on/or before 31 May 2023;

l. as a result, an arrangement was made that I would allow the matter to be heard during the recess from 19 to 21 June 2023;

m. I again communicated with the parties per email and after they agreed that the plaintiff's expert witness, Dr G.M Rosndorff could testify by means of the MS-Teams facility, I was informed on Thursday, 15 June 2023, the last court day before the next hearing date, that the defendant was prepared to accept the report;

n. on 19 June 2023 Mrs Beukes and Wessels testified about the past medical and hospital costs incurred by them on behalf of the plaintiff as well as the cessions of their claims in his favour;

- o. by agreement the parties filed written heads of argument and forfeited the right to oral argument.

AGREEMENTS BETWEEN THE PARTIES

[5] Prior to the leading of evidence on 25 October 2022 the court was informed that the parties had agreed as follows:

- a. general damages in the amount of R500 000 to be awarded to the plaintiff;
- b. the defendant shall provide the plaintiff with the usual undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996;
- c. the claim for past medical and hospital expenses to be separated and postponed *sine die*;
- d. the court shall after hearing of the evidence make a finding as to the plaintiff's probable career path and the contingencies to be applied and then refer the matter back to the actuary to re-calculate the plaintiff's claim;
- e. the reports of Dr R Dyason, the eye surgeon and Dr D Hoffmann or the plastic, reconstruction and cosmetic surgeon, appearing in the expert notices bundle were admitted.

[6] On the morning of the second day of the hearing the defendant conceded the correctness of the two expert reports of the clinical psychologist, Ms M Coetzee, dated 19 August 2016 and 10 December 2018.

[7] As mentioned, just before the 19th June 2023 the defendant conceded the correctness of the report of Dr G.M Rosendorff, an approved medical examiner of the Maritime and Coastguard Agency of the United Kingdom, regarding his assessment of the plaintiff and the issuing of a certificate of permanent unfitness for a career as a seafarer, known as an ENG3.

[8] Although not by agreement, there is also no reason why an order should not be made in respect of the claim for past medical and hospital expenses which was initially separated and postponed *sine die*. During the further hearing of this matter on 19 June 2023 the plaintiff's mother, Mrs Beukes and a family friend, Mr Wessels testified about the payment of medical and hospital expenses of the plaintiff in the total amount of R35 419.23. These two witnesses made payment on behalf of the plaintiff, respectively in the amounts of R6 152.28 and R29 266.95. Their claims were ceded to the plaintiff as is apparent from their evidence and the exhibits before the court. Ms Banda did not contest the evidence which is therefore undisputed. Consequently, the defendant shall be ordered to pay the further amount of R35 419.23 to the plaintiff.

[9] Although the plaintiff's claim for past and future loss of income is still to be determined, there is no reason why orders should not be made already at this stage pertaining to the payment for general damages and past medical and hospital expenses, as well as the undertaking in terms of s 17(4)(a) of the Road Accident Fund Act.

[10] Bearing in mind the stage of the proceedings and the only outstanding issue, being the recalculation of the actuary's calculations, there is also no reason why an appropriate costs order should not be made as requested by the plaintiff.

A SUMMARY AND EVALUATION OF THE EVIDENCE LED ON BEHALF OF THE PLAINTIFF

[11] It is appropriate to deal with the uncontested medical expert opinion at this stage prior to summarising and evaluating the *viva voce* evidence led on behalf of the plaintiff. The eye surgeon, Dr R Dyason examined the plaintiff on 2 September 2014, as well as on 11 June 2021. Although the right eye examination was normal and the plaintiff maintained an uncorrected vision of 6/6 in the right eye, the expert initially made the following diagnosis:

- '1. Traumatic optic neuropathy of the left eye causing total loss of vision.
2. Enophthalmos of the left eye.'

After the second assessment he *inter alia* made the following observation:

‘Fundoscopy was unchanged with optic atrophy of the left eye’

He also confirmed that the plaintiff would not regain vision of the left eye.

[12] The plastic, reconstructive and cosmetic surgeon, Dr D Hoffmann examined the plaintiff on 3 September 2014. He confirmed that, *ex facie* the medical records, the plaintiff had sustained multiple lacerations to his left eye and face and that a CT-scan revealed ‘traumatic Zygoma compound fracture and medial and lateral orbit blow out.’ The records indicated that the plaintiff had been taken to an operating room immediately after he had sustained his injuries for debridement and suture of the left eyelid and lacerations on the left side of his face. At the time of the expert’s examination of the plaintiff the scars on his face were still visible, but healed. He was of the opinion that any revision attempt would not be of any benefit.

[13] The clinical psychologist, Ms M Coetzee, consulted the plaintiff in August 2016 and December 2018. She dealt extensively with the plaintiff’s pre-morbid psychological background and trauma experience, the trauma of the collision and injuries sustained, as well as long-term psychological adjustment. She was of the view that the plaintiff presented with typical symptoms of acute stress disorder which later developed into Post Traumatic Stress Disorder (PTSD). He has never received any treatment and consequently, she suggested several sessions of psychotherapy. She emphasised that, given the plaintiff’s history, he would remain susceptible to mood and anxiety symptomatology and should be closely monitored at times of increased stress. If the reports are read in context, it is apparent that the plaintiff ‘has suffered significant psychiatric dysfunction throughout several formative years of his life.’ She pointed out that she was concerned that the plaintiff’s prognosis was complicated by a probable genetic pre-dispossession to depression. Finally, she mentioned that the plaintiff had lost his competitive edge and was more likely to shy away from any pressure or stress.

[14] Eventually and due to the defendant's insistence that the plaintiff failed to prove that he was disqualified from receiving a medical certificate known as an ENG1 certificate, that would allow him to become a seafarer, a report was obtained from Dr G.M Rosendorff. However, as mentioned, the expert's report was conceded to be correct. This expert assessed the plaintiff on 18 November 2022. He agreed with the medico-legal report of Dr R Dyason which had been provided to him and confirmed that the plaintiff had monocular vision and a field of vision of less than 120° in the horizontal field. As a result, the expert found that the plaintiff did not qualify to be issued with an ENG1 medical certificate, but instead issued a certificate of permanent unfitness, known as an ENG3.

[15] At the stage when the plaintiff testified, he was 28 years old, residing at Clarens, a small holiday destination in the Eastern Free State. At the time of the hearing he was running Bukes, a small men's clothing shop as the sole proprietor. He was also involved in rock-climbing, referred to as bouldering, as a hobby. He matriculated in 2013, ie at the end of the year in which he sustained his injury.

[16] The plaintiff's rule 35(3) notice was handed in as exhibit A and his income and expenditure statement for the year ending February 2022 as exhibit B. Ms Banda made it clear that she did not accept the correctness of the information contained therein, but as will appear herein later her cross-examination did not take the matter any further. I shall briefly refer to the contents of the two documents during my summary and evaluation of the plaintiff's evidence.

[17] Prior to opening his own business, the plaintiff assisted his mother in her business, Mona Lisa, that is selling women's garments. The plaintiff sources his stock from *inter alia* Johannesburg, Cape Town and even internationally.

[18] The seeds for his adventurous character have been planted by his father during his early high school days. He and his brother even flew to Cairo in Egypt in 2012 when he was supposed to do his Grade 12 school year. They cycled from there, the intention being to cycle all the way to South Africa. Unfortunately, upon arrival in Tanzania, they heard the news of their father's suicide. As a result, they

flew back to South Africa, but returned to Tanzania shortly after the funeral in order to finish the cycling experience, eventually arriving in South Africa.

[19] The plaintiff is seriously involved in rock-climbing or bouldering as a hobby. It is apparent from the expenses incurred in exhibit B and his evidence that he often travels to other destinations in order to fulfil this part-time sporting activity. He indicated that he wanted to pursue the vision of the founder of Billabong who co-incidentally also lost the vision in one eye. In doing so, he is using his hobby to network and to promote his business.

[20] It is apparent from the income and expenditure statement that although the plaintiff made a gross profit of R446 273.00, his nett income was R121 903.00 only. As testified and after considering the expenses, it is apparent that much of the expenses such as in respect of travelling, accommodation and entertainment are directly, alternatively indirectly related to the plaintiff's endeavours to do rock-climbing. It must also be taken into consideration that this business was started in 2019 and just before the Covid19 pandemic struck the world. Bearing in mind the plaintiff's business acumen and the fact that the tourist industry which had a definite down-swing during the Covid19 pandemic, would have picked up its head after February 2022, there is sufficient reason to believe that the plaintiff will increase the business' profitability. During evidence the plaintiff was in the process of finalising a book on bouldering with the idea to utilise the tourist industry in the Eastern Free State to the advantage of his hobby which in all probabilities will increase his business' profitability.

[21] The plaintiff's brother is a qualified quantity surveyor employed in the Cayman Islands, while his sister is employed in his mother's business. Prior to opening his own business, he worked for his mother, earning R15 000.00 per month.

[22] The plaintiff was involved in the collision and sustained his injuries during the second term of his matric year in 2013. He did well in the first term examinations in 2013 and according to him the break from school in 2012 did him the world of good. During his matric year he started dreaming of becoming a captain on a luxury yacht. He did some research and eventually did a number of courses during the September

school holidays in 2013 as is evident from exhibit A. This included courses in medical first-aid, fire prevention and firefighting and personal safety and social responsibility, provided by the Academy of Maritime Medicine. In 2014 he did numerous other courses presented by the Offshore Sailing Academy as is evident from exhibit A.

[23] The plaintiff passed matric in 2013 and met the 'minimum requirements for admission to a diploma or higher certificate study as gazetted for admission to higher education'. Notwithstanding, passing grade 12, the plaintiff had only one thing in mind and that was to become a seafarer. The courses completed by him ensured that he was qualified to at least become a deckhand on a yacht. His first assignment at sea was to assist with the delivery of a racing boat in Australia. They left the Durban harbour, but on their way to Australia a gale force wind prevented them from reaching their destination. The mast of their boat *inter alia* broke off. Notwithstanding this traumatic experience the plaintiff did not lose his love for sailing. Shortly afterwards he went to Fort Lauderdale in North America where he was employed as a refitter (labourer) in the ship yard, earning \$120 per day. He worked there for five months. Hereafter the owner of the boat requested him to become part of his crew on the boat. However, he could not obtain the required ENG1 medical certificate. He was held to be medically unfit by two doctors because of the blindness in his left eye. The owner of the boat confirmed that he could carry on working in the ship yard, but not on the boat. He did not want to do that and flew back to South Africa.

[24] On his flight back to South Africa he met the owner of the Josie Maria, a 69 feet sail yacht. As the yacht was privately owned and bearing in mind its size, an ENG1 medical certificate was not required. He went on a trip to Sydney, Australia, from there on a different leg to Trinidad, and ultimately from Trinidad to South America. On this last leg the captain of the yacht started to harass him sexually. The plaintiff testified that, after this trip he did not return to sea as he realised that his dream to become a captain and to travel the world would not become a reality. The plaintiff said this, notwithstanding the fact that he would be able to remain a seafarer on smaller boats and particularly privately-owned pleasure yachts, as is apparent from the report of Dr G.M Rosendorff.

[25] My overall impression of the plaintiff is that he is an adventurous sole with an entrepreneurial mindset. Notwithstanding the signs of PTSD mentioned in the report of Ms M Coetzee referred to above, I am satisfied that the plaintiff is a shrewd businessman with the necessary business acumen who is doing his best to make a success of his life. He mentioned that he wanted to follow a similar path than the founder of the well-known sports brand, Billabong, a surfer who also lost vision in his one eye, but used his sport to grow his brand name worldwide. As mentioned, at the time of his testimony the plaintiff was busy writing a guide on bouldering for tourist and particularly tourists flocking to Clarens. Clearly, he wants to use his passion for an adventurous sport, such as bouldering, to network and grow his business.

[26] I accept that the plaintiff has had a torrid time growing up as explained to Ms M Coetzee and that he may well be suffering from underlying PTSD. My impression of him on the witness stand, and particularly bearing in mind his testimony of his endeavours post-morbid, tells a different story. In saying this, I do not want to be understood as not accepting what the expert stated in her report. However, she examined him for the last time four years before he testified. The plaintiff did not undergo any therapy as advised and he did not mention that he was on medication. Yet, he started a new business and kept it running during the Covid-19 pandemic.

[27] The plaintiff called Mr Johan Albert Harmse to testify about his experiences as a seafarer. Mr Harmse started his career in the yachting industry in 2019 only. At the time of his testimony he was working on his second vessel, to wit the Big Fish, a 45-meter vessel that is based in Australia. It is diesel-powered and not a sail yacht. He started off as a deckhand, but was promoted to a bosun. He confirmed due to the Covid19 pandemic, that they were quarantined for four and a half months in Chilli and thereafter had to obtain special permits to return to Australia. The witness explained the progress that may be made by seafarers. After a few years as bosun, one can become a first officer, or chief officer, and thereafter a captain, although years of experience and several courses have to be completed in the process. He confirmed that it was difficult to move up the ranks, but the captains he had met were all in their late 40's and would work until their late 50's. The starting salary of a bosun is usually between \$4000 to \$4500.

[28] The occupational therapist, Ms H Meyer, testified about her assessments of the plaintiff, the last being on 4 September 2019. At that stage she was not told that the plaintiff had opened his own business, but merely that he was residing in Clarens and managing the shop, Mona Lisa in this tourist town. His tasks included buying stock and collecting it from Johannesburg or Durban every month or every second month. He did not experience any difficulties in performing these tasks, including travelling distances of 400 to 500 kilometres at a time. She noticed while conducting the Thurstone test that tasks requiring fast moving of the eyes and copying information in this regard were slightly affected, regarding speed and accuracy. Consequently, she mentioned that 'safety precautions and implementations with regard to his left eye loss of vision would always be of importance, especially in the physical adventure type of work.' From a physical perspective, the plaintiff would be at risk for injury when being part of a crew working on a yacht. The witness was adamant that the plaintiff never told her that he had started his own business, an aspect to be frowned upon. Obviously, the plaintiff could not be examined in this regard as he testified before the expert. Fact of the matter is that the plaintiff is still involved in a relatively dangerous activity such as rock-climbing, whilst he is managing his own shop and is used to travel vast distances by car.

[29] The psychologist and HR Consultant, Ms I Auret-Besselaar, also testified on behalf of the plaintiff. She confirmed, based on the evidence of Mr Harmse and her own investigations by serving the internet, what would be the probable career path of the plaintiff as a seafarer and the income increases that he might have received in the process.

[30] I have my doubts about the career path of the plaintiff with reference to scenario two in the pre-morbid as well as the post-morbid career path contained in paragraphs 7.1 and 7.2 of her report to which she also testified. I was not impressed with this witness' explanation as to why it would not be possible for the plaintiff to take on the same career path post-morbid as pre-morbid pertaining to scenario two and therefore to reach the Paterson C3/C4 level within 10 to 12 years. Her version that the plaintiff is not an academic type of person, but rather being practical and hands-on, does not explain why she was prepared to use scenario two pre-morbid, but not post-morbid.

[31] The witness conceded after listening to the evidence of Mr Harmse that, pre-morbid, the plaintiff would have reached a ceiling in salary of \$7000 per month between the ages of 40 and 45 as a first officer and that he would probably retire at the age of 55, where after he might have still been employed in the marine environment, but at a decrease in salary of between 25% and 50% of the top notch.

[32] The witness confirmed that nothing prevented the plaintiff to carry on as a refitter in the ship yard where he earned \$120 per day, six days per week. If multiplied by 24, it provides a figure in excess of \$2 800 per month. Obviously, the plaintiff decided to return to South Africa and carry on with his career in the tourist town of Clarens where he had the support of his mother and grandfather. I accept the reason for his decision being that he by then recognised that he would never be able to become a captain of a luxury yacht.

[33] In considering the *viva voce* evidence of the experts Ms H Meyer and Ms I Auret-Besselaar as well the report of Ms M Coetzee, I am mindful of the fact that their opinions must be cable of being reconciled with all other evidence in the case and be underpinned by proper reasoning based on correct facts.²

[34] Although she was in court when the plaintiff and Mr Harmse testified, and became aware that the plaintiff was the sole proprietor of a shop that he opened during 2019, I am satisfied that Mis I Auret-Besselaar found it difficult to accept that the plaintiff was not 'severely compromised in terms of his future career choice, his learning capacity and commensurate earning potential' as set out in paragraph 8 of her report. She even went so far to state that 'should his entrepreneurial endeavours of his mother's business prove unsuccessful, he will need financial resources and a period of time... to switch to complete an alternative qualification to improve his employability.' She also mentioned that in doing so he would likely have to relocate from the limited opportunities available in the Clarens region outside the retail sector. Her version that he was assisting his mother as a salesman in her clothing business, a job that according to her was not his choice, but merely to earn an income, has

² In re: *Bee v Road Accident Fund* (093/2017) [2018] ZASCA 52; 2018 (4) SA 366 (SCA) (29 March 2018).

turned out to be totally incorrect, bearing in mind the circumstances in which the plaintiff found himself when he testified.

CONTINGENCIES

[35] It is well settled that contingencies, whether negative or positive, are an important control mechanism to adjust the loss suffered to the circumstances of the individual case in order to achieve equity and fairness to the parties. The following *dictum* in *Southern Insurances Associations Ltd v Bailey NO*³ remains relevant:

‘(The) generalisation that there must be a ‘scaling down’ for contingencies seems mistaken. All ‘contingencies’ are not adverse: All ‘vicissitudes’ are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune?’

[36] Although the so-called usual contingency deduction ranges between 5% in respect of past loss of income to as high as 50% in respect of future loss, depending upon the facts of the case as *inter alia* mentioned in *Van Der Plaats v South African Mutual Fire and General Insurance Co Ltd*⁴ and *AA Mutual Insurance Association Ltd v Maqula*⁵, the more usual contingency deductions range between 5% for past loss and 15% for future loss. In *Road Accident Fund v Guedes*⁶ the court confirmed that there were no fixed rules regarding general contingencies, but confirmed the guidelines to be used, *ie* 25% for a child, 20% for a youth and a 10% in middle age with half a percent added per year until retirement.

[37] In *Road Accident Fund v Kerridge*⁷, the plaintiff was a student at the time of the collision wishing to become a diesel mechanic, but was rendered unable to finish his studies due to the injuries sustained which prevented him from pursuing the type of work he was interested in. In that case the contingency deduction for future loss of earnings was increased from 15% to 35%, having considered that the plaintiff had a

³ 1984 (1) SA 98 (A) at 117 c – d.

⁴ 1980 (3) SA 105 (A) at 114 – 115 a – d.

⁵ 1987 (1) SA 805 (A) at 12.

⁶ (611/04) [2006] ZASCA 19; 2006 (5) SA 583 (SCA) (20 March 2006).

⁷ *Road Accident Fund v C K* (1024/2017) [2018] ZASCA 151; [2019] 1 All SA 92 (SCA); 2019 (2) SA 233 (SCA) (1 November 2018). 2019 (2) SA 233 (SCA).

greater chance of being subjected to vicissitudes of life and given his limited employment history. Therefore, there was a greater uncertainty in assessing his career path.

[38] I accept that a provision for contingencies falls squarely within the subjective discretion of the court as to what is reasonable and fair.⁸ In order to come to a final conclusion I shall consider the parties' submissions. Ms Banda relied on 30% and 35% contingencies in respect of pre-morbid and post-morbid future earnings respectively. Unfortunately, her calculation of plaintiff's future loss is unacceptable.

[39] Mr Zietsman submitted that the following contingency deductions should be allowed, relying in particular on the version of Ms I Aurret-Besselaar.

- a. 5% to past loss of income in the uninjured scenario and 20% to future loss of income in that scenario;
- b. 0% in respect of past loss of income post-morbid as we all know what happened to the plaintiff during the past five years and 35% to future loss of income.

[40] Insofar as contingencies in respect of the uninjured scenario are to be considered, I do not agree with Mr Zietsman. The 5% in respect of past loss pre-morbid does not take into consideration the severe impact of the Covid19 pandemic. Mr Harmse has indicated the effect to an extent, but there can be no doubt that the international lock down had a severe effect on economic activity worldwide and relative to this case, the marine industry. Therefore, the 5% should be increased to 15%, I have also noticed that the actuary did not take into consideration that there might have been a period from January 2020 when the Covid19 pandemic struck since when pre-morbid earnings would be much less than assumed.

[41] Furthermore, in the calculation of loss of earnings, post-morbid, no earnings are assumed during the period January 2021 to July 2023. It is not clear what the

⁸ *Shield Insurance Co Ltd v Hall* 1976 (4) SA 431 (A) at 444.

actuary had in mind. The plaintiff worked for his mother until he opened his own shop in 2019. I do not agree with the assumption and/or instructions relied upon by the actuary, applying 20% contingencies in respect of future earnings pre-morbid and Mr Zietsman's submission in this regard. In my view, several adverse contingencies have not been considered:

- a. the plaintiff grew up in the Free State, far from the sea and did not show that any of his family or other relatives had any sea faring experience; it is one thing to be adventurous and believe that one day became a captain faring across the oceans, but I am not prepared to find that this was also a realistic goal in the present circumstances;
- b. Mr Harmse's evidence does not assist at all as he was a mere three years in the industry when he testified in this matter, although he indicated how long it would take to become a captain or even a first officer, but confirmed that it was a difficult road;
- c. Ms I Aurret-Besselaar made her latest calculation assumptions as evident from her evidence on the basis that the plaintiff would at least have become a first officer and eventually be able to retire at the age of 55, but continue to stay on in the marine industry but at a much lower salary;
- d. sea faring is not the usual occupation of South Africans, and especially people growing-up in a high veld town such as Sasolburg;
- e. most people are prepared to enjoy adventures and at the same time earning an income for a few years, but it cannot be doubted that the majority of people want to settle at a stage, get married, raise children and be close to their families, instead of being months away from them;
- f. I am not convinced that the plaintiff would on the probabilities become a first officer, not even mentioning a captain, in the time frames as indicated or at all. It might be easy to become a deck-hand or even a bosun, but there are only so many yachts and so many positions for first officers or captains

across the world; in my view insufficient evidence has been placed before me to find on the probabilities that the plaintiff's career path would be so smooth, pre-morbid, as indicated by either Mr Harmse or Ms I Aurret-Besselaar.

[42] Therefore, it would be more realistic and fair to both sides if a high contingency of 35% is applied on pre-morbid future earnings and the actuary is requested to do his calculations based thereon.

[43] The actuary had initially been instructed to apply a 40% contingency on future earnings, post-morbid, whilst Mr Zietsman submitted that a contingency of 35% should be applied. I am satisfied, that bearing in mind all positive factors, some of which I list hereunder, a 15% contingency should be applied in respect of post-morbid future earnings. Some of those factors are:

- a. the plaintiff has always relied on his mother in support of his business endeavours, bearing in mind that he to an extent used her business as well as her business premises as a springboard to start and grow his own business;
- b. the income and expenditure account of the plaintiff indicates a rather low nett income, but it must be seen in light of the recent start-up of the business in difficult times during the Covid19 pandemic, the initial ban on interprovincial travel preventing tourists from other provinces and/or international tourists to visit the tourist town of Clarens;
- c. the plaintiff is apparently a hardworking businessman with the necessary business acumen with an adventurous spirit who is prepared to go the extra mile to attract new clientele, by *inter alia* utilising his hobby of rock-climbing to advertise his business and to network;
- d. the probabilities of increasing his nett income are favourable.

CONCLUSION

[44] I have had regard to Mr Zietsman's submissions and the draft order prepared by him. Save for my difference of opinion pertaining to the contingencies to be

applied, I agree with the figures contained in paragraphs 1.1.1, 1.2, 1.2.1 and 1.2.2 of the draft. Having dealt with the evidence and my evaluation thereof and bearing in mind the wide discretion I have pertaining to the application of contingency, Munro Actuaries are requested to recalculate the plaintiff's past and future loss of income in accordance with the order issued herein.

ORDER

1. The defendant shall pay the amounts of R500 000.00 (five hundred thousand rand) in respect of general damages and R35 419.23 (thirty-five thousand, four hundred and nineteen rand and twenty three cents) in respect of past medical and hospital expenses to the plaintiff, which amounts shall be made without set-off or deduction, within 180 (one hundred and eighty) calendar days from the date of the 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	-	110 234 00
Account number	-	110 [...]
Reference	-	HL Buchner/J03127

2. The defendant shall forthwith provide the plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996 for the costs of future accommodation and treatment of the plaintiff in a hospital or nursing home, or treatment of, or rendering of a service to him, or supplying of goods to him, arising out of the injuries sustained by him in the motor vehicle collision of 17 April 2013, after such costs have been incurred and upon production of proof thereof.

3. The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale, until date of this order, including the costs of senior counsel as well as the reasonable qualifying and reservation fees and expenses (if any) of the following experts:

- 3.1. Dr J.J Schutte – General Practitioner;
- 3.2. Dr R Dyason – Eye Surgeon;
- 3.3. Dr D Hoffmann – Plastic, reconstructive and cosmetic surgeon;
- 3.4. Ms M Coetzee – Clinical Psychologist;
- 3.5. Ms H Meyer – Occupational Therapist;
- 3.6. Ms I Auret-Besselaar – Psychologist and HR Consultant;
- 3.7. Munro Actuaries and
- 3.8. Dr G.M Rosendorff – General Practitioner and approved medical examiner of the Maritime and Coastguard Agency of the United Kingdom.

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

5. In the event of no agreement on the costs of suit, the plaintiff's attorney shall give 14 (fourteen) days' notice to the defendant of taxation of their bill of costs.

6. Interest shall accrue at 11.25% per annum, being the statutory rate, compounded, in respect of:

6.1 The capital of the claim, calculated from 14 (fourteen) days from date of this order.

6.2 The taxed or agreed costs, calculated from 14 (fourteen) days from date of taxation, alternatively date of settlement of such costs.

7. The plaintiff's claim for past and future loss of income is referred to Munro Forensic Actuaries to be recalculated, within 20 (twenty) days of the date of this order, in accordance with the actuarial report dated 15 March 2021 by amending the calculations as follows and by applying the following contingency deductions:

7.1 Uninjured scenario

7.1.1 By inserting the following:

May 2049 – 75% of \$ 7000 per month decreasing in straight line to 50% of \$ 7000 per month at retirement age 65 years.

7.2 Injured scenario

7.2.1 By amending July 2023 to the following:

July 2023 – R10 158,00 per month (2018 terms)

7.2.2 By inserting the following

July 2034 – Patterson level B5 at R360 000 per year (2023 terms)

7.3 Contingencies

7.3.1 Uninjured – past loss 15%

7.3.2 Uninjured – future loss 35%

7.3.3 Injured – future loss 15%

8. Leave is granted to the plaintiff to set down the matter on notice to the defendant on the unopposed motion court roll once the actuarial recalculation of the plaintiff's claim for past and future loss of income has been made for an appropriate order of court.

JP DAFFUE J

Counsel for the plaintiff: Adv PJJ Zietsmann SC
Honey Attorneys
BLOEMFONTEIN

Attorney for the defendant: Ms P Banda
Road Accident Fund

BLOEMFONTEIN