IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 3094/2020

In the matter between:

SYDNEY MASIMOLA Plaintiff

and

ROAD ACCIDENT FUND Defendant

CORAM: LOUBSER, J

HEARD ON: 27 OCTOBER 2023

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 16 NOVEMBER 2023

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[1] On 20 September 2018 the plaintiff was walking at or near Hanger Street in the city of Bloemfontein when he was hit by a motor vehicle. He sustained serious injuries to his left leg in the accident. Pursuant to these events, the plaintiff issued summons against the defendant for future medical expenses, past and future loss of income and for general damages to a total of more that R7 million. His claim for past and future loss of income amounted to more than R5 million.

[2] The defendant denied liability for the plaintiff's claims, and the matter came before this court for adjudication. During the course of the litigation, the parties reached

agreement in respect of the claims for future medical expenses and for general damages. They also reached agreement that the defendant is liable to pay 70% of the plaintiff's proven or agreed damages. These agreements were given effect in an order of this court dated 4 October 2023.

[3] All that now remains to be decided is the amount for which the defendant is liable in respect of the plaintiff's past and future loss of earnings. The bone of contention as far as this item is concerned, exists in the application of contingencies only. This court is therefore called upon to only determine the contingencies to be applied in the calculation of the plaintiff's past and future loss of earnings.

[4] Neither of the parties presented any *viva voce* evidence in the court. By written agreement between the parties, the expert reports of an orthopaedic surgeon, an occupational therapist, an industrial psychologist and an actuary were merely handed in. The last paragraph of the written agreement reads as follows: "It is recorded that the affidavits deposed to by the aforesaid expert witnesses and the collateral evidence which forms the basis of the findings contained in the aforesaid expert reports is accepted into evidence by agreement between the parties in terms of rule 38(2) read with section 3(1) of the Law of Evidence Amendment Act 45 of 1988."

[5] It appears from the expert reports mentioned that, at the time of the accident, the plaintiff was a self employed carpenter. According to the experts, he is unable to continue with this work due to his injuries. At most, he can only be accommodated in a light work and sedentary environment. However, the chances of him finding such work is not good because, *inter alia*, he is already 49 years old and he is only in possession of a grade 9 qualification.

[6] In the report of the industrial psychologist, it is stated that at the time of the accident, the plaintiff made a profit of R23 000.00 per fortnight, but that no proof of this amount could be provided. In his calculations the actuary used an amount of R25 000.00 per month as the plaintiff's income for the period after the accident, but there was also no proof provided for this amount. Assuming for the moment that the pre-accident amount per fortnight and the post accident amount per month

reflects the true position, it means that the plaintiff made a profit of R46 000.00 per month before the accident occurred. It further appears from the expert reports that the plaintiff tried to continue his carpentry work after the accident, but that he was unable to do much himself. He had to make use of the assistance of others, and in the process he did not make much profit. These attempts to continue with his carpentry work are referred to in one of the expert reports as "piece jobs". It needs mentioning that, according to the reports, the plaintiff received a disability grant as from March 2019, although there is also no proof of this income as well. Be it as it may, it appears that the plaintiff is functionally unemployable as far as the future is concerned.

[7] Now when it comes to the calculation of loss of earning capacity for the future, it speaks for itself that it can never be a matter of exact mathematical calculation. Such an enquiry is speculative at most. Notwithstanding, an actuarial computation is always a useful basis for determining the future loss of earnings. However, the court still has a wide discretion to award what it believes to be just.[1] In exercising this discretion, contingencies play an important role, because it refer in general to the normal consequences and circumstances of life, which beset every human being and which directly affect the amount that a plaintiff would have earned. The deduction of contingencies remains the prerogative of the court, but in normal circumstances, contingencies are generally applied as deductions of 5% for past loss of earnings and 15% for future loss of earnings.[2]

[8] In the present matter, the court has the benefit of an actuarial calculation presented by the plaintiff. The actuary calculated the past loss of earnings to be R370 791.00 and the future loss of earnings to be R2 465 491.00. This amounts to a total loss of earnings in the sum of R2 836 282.00. In calculating these figures, the actuary used the alleged R46 000.00 profit per month before the accident and an income of R25 000.00 per month after the accident, and applied no contingencies. It was submitted in this court by the plaintiff's counsel that the normal contingencies of 5% for the past loss and 15% for the future loss should be applied by the court.

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[1] **See for instance RAF v Guedes 2006 (5) SA 583 (SCA) par 8**
[2] **Koch: The Quantum Year Book 2023**

[9] On the other hand, the attorney for the defendant relied on the fact that the alleged monthly profit of the plaintiff before the accident was not substantiated by any proof or documentary evidence. For this reason, the contingency percentage should be much higher than the normal, she submitted. A contingency deduction of 50% was suggested by her.

[10] As far as this submission is concerned, it is clear that a contingency deduction of up to 50% may be applied where there is no proof of income.[3] Since the plaintiff provided no proof of his income after the accident and before the accident, I am of the view that there is no basis for differentiating between past and future loss of income in the pre-morbid scenario (had the accident not occurred), and that it would be proper and correct to provide for the same contingency in respect of both.

[11] Having regard to all the expert reports, the base values used by the actuary and to the lack of proof for the income, I am of the view that a 25% contingency deduction should be applied to the plaintiff's pre-morbid (had the accident not occurred) loss of earnings calculation in respect of both the past and the future. At the same time, the post-morbid (having regard to the accident) contingency deductions should be retained at 5% for the past loss of earnings and 15% for the future loss of earnings. So calculated, the plaintiff's total loss of earnings amount to a sum of R1 642 204.65.

[12] In terms of the agreement between the parties and the subsequent order of court, the defendant is liable to pay 70% of that amount to the plaintiff. As for costs, I can find no reason why the general rule that costs follow the result, should not apply.

[13] The following order is made:

1. The defendant is ordered to pay to the plaintiff the sum of R1 149 543.00 for past and future loss of earnings.

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[3] See AA Mutual Insurance Association v Maqula 1978(1) SA 805 (A); RAF v Kerridge [2018] ZASCA 151; Mbokazi v Minister of Police and Another [2020] JOL 47640 (GP)

2. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs on a High Court scale from 5 October 2023 to date of this order.

3. In the event that costs are not agreed:

   3.1 The plaintiff shall serve a notice of taxation on the defendant's attorney of record;

   3.2 The plaintiff shall allow the defendant fourteen (14) days to make payment of the taxed costs.

[redacted]

P. J. LOUBSER, J

For the Plaintiff:	Adv. R. van der Merwe
Instructed by:	Phatshoane Henney Inc.
	Bloemfontein
For the Defendant:	Mrs. J Gouws
Instructed by:	State Attorneys
	Bloemfontein

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