

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No: 1090/2017

In the matter between:

MFANELO SIBUSISO KHUZWAYO

APPLICANT

and

ROAD ACCIDENT FUND

RESPONDENT

ORDER

The following order is issued:

IT IS RECORDED THAT:

1. The plaintiff's claim for general damages is settled in the sum of R995 000 (nine hundred and ninety-five thousand rand).

IT IS ORDERED THAT:

2. Judgment is entered for the plaintiff in the sum of R6 831 830 (six million eight hundred and thirty-one thousand eight hundred and thirty rand) for loss of earnings.
3. The defendant is directed to furnish to the plaintiff an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 for 100% of the costs of all

future accommodation of the plaintiff in a hospital or nursing home and all medical treatment or the rendering of a service or the supplying of goods to him, arising out of the injuries he sustained in the motor vehicle collision that occurred on 2 January 2016 and to compensate him therefore after they have been incurred.

4. Payment of the amount in paragraph 1 above is to be effected within 180 calendar days from the date of this order.

5. The defendant is directed to pay interest on the amount referred to in paragraph 1 at the rate of 7.75% per annum calculated from 181st calendar days from granting of this order to date of payment.

6. The defendant is directed to make payment of the plaintiff's taxed or agreed party and party costs on the High Court scale. These costs shall include, but not be limited to:

a. The reasonable and necessary costs of senior counsel including senior counsel's costs for his preparation for trial, as well as the reasonable costs of senior counsel and the attorney for attending upon any necessary consultations with the plaintiff and the undermentioned expert witnesses.

b. The fees and expenses reasonably incurred by the undermentioned witness for, *inter alia* the preparation of their reports and any supplementary reports, joint minutes, deposing to affidavits and RAF 4 Forms as well as the experts' reasonable qualifying fees for their reasonable reservation fees, and their reasonable fees for attending upon any necessary consultations with the plaintiff's senior counsel and attorney to testify at the trial (with the quantum of their fees to be determined by the taxing master) namely:-

i. Dr M Du Trevou – Neurosurgeon;

ii. Dr RM Hardy – Neuropsychologist;

iii. Dr Grizic – Urologist;

- iv. Ms Z Gumede - Educational Psychologist;
 - v. Ms Felicity Jonck - Occupational Therapist
 - vi. Ms K Plaatjies - Industrial Psychologist
 - vii. Wim Loots Actuarial Consulting – Actuaries (reports only)
- c. The fees and expenses reasonably incurred by the undermentioned witness for, inter alia the preparation of joint minutes,
- i. Ms E Neethling - Industrial Psychologist;
- d. The reasonable attendance fees of the following experts for their attendance at court for the trial on 20 February 2023:
- i. Ms F Jonck- Occupational Therapist;
 - ii. Ms K Plaatjies - Industrial Psychologist
- e. The reasonable costs of the interpreter's attendance at court for the trial on the 20 February 2023;
- f. Any and all reserved costs become costs in the cause as set out above.
7. It is recorded the defendant's link number is 3[...].
8. The plaintiff is directed, in the event of the abovementioned costs not being agreed to:
- a. Serve the notice of taxation on the defendant's attorneys of record; and
 - b. allow the defendant one hundred and eighty (180) calendar days to make payment of the taxed costs.

9. The defendant is directed to make the payment referred to in paragraph 1 above directly to the trust account of the plaintiff's attorneys, whose details are as follows:-

ASKEW MARTIN AND ADRAIN INC. - TRUST ACCOUNT

BANK: NEDBANK

BRANCH: S[...] STREET

BRANCH CODE: 1[...]

ACCOUNT NO: 1[...]

REF: R[...]

JUDGMENT

Hiralall AJ

Introduction

[1] The only remaining issues to be decided in this action by the plaintiff, Mfanelo Sibusiso Khuzwayo, against the Road Accident Fund are the questions as to which Quantum Yearbook should be utilized, which life table is applicable, and the pre-morbid contingency to be applied in the calculation of the plaintiff's claim for loss of income.

[2] The issue of the plaintiff's general damages, and his past and future medical expenses, have been resolved.

Background

[3] The plaintiff, an adult male born on 13 May 1996, was involved in a motor vehicle collision that occurred on 2 January 2016 when he was a pedestrian and struck by an unidentified motor vehicle. When the collision occurred, the plaintiff was almost 20 years old. As at the date of trial he was 26 years old.

[4] As a result of the collision, the plaintiff suffered bodily injuries which are broadly described as a severe head injury; diffuse brain injury (traumatic subarachnoid hemorrhage with multiple hemorrhagic contusions); and subglottic stenosis.

[5] In a joint minute of the occupational therapists dated 8 February 2023, Ms F Jonck and Ms A Maharaj, they agreed in respect of the plaintiff's independence for daily living activities, that given the physical sequelae of the plaintiff's injuries, his functional independence has been permanently restricted, particularly for manual household chores, yard work and handling of heavier items when shopping. They agreed that the plaintiff has become socially isolated and withdrawn, has reduced engagement in previous recreational pursuits and has an impaired quality of life. They agreed that he has suffered permanent and significant loss of enjoyment and amenities of life.

[6] In respect of the plaintiff's pre-accident capacity to work, the occupational therapists agreed that but for the accident the plaintiff could have enrolled for further study and undertaken part-time work in keeping with previous experience. He would have been able to secure employment in keeping with his education and qualifications, with a potential for progression.

[7] In respect of his post-accident capacity to work, the occupational therapists agreed that the plaintiff is significantly vocationally compromised and that the complications that ensued reasonably impacted on his ability to study further and secure employment. Ms Maharaj elaborated that post-school, the plaintiff enrolled to study towards a degree qualification in mechanical engineering at Majuba College in 2017. He was able to complete three months towards his qualification, however he was forced to deregister from the course due to cognitive challenges as well as his inability to cope with prolonged sitting and changing classes. The occupational therapists agree that it is improbable that the plaintiff will be able to complete tertiary studies and his employment prospects are narrowed as he will require sedentary

work and an empathetic employer. Ms Jonck opined that a very much higher than normal contingency for unemployment is recommended. Ms Maharaj deferred to the industrial psychologists for final comment with regard to contingency application.

[8] In a joint minute of the industrial psychologists dated 14 February 2023, Ms E Neethling and Ms K Plaatjies, they agreed that the career development progress of the plaintiff is based on a variety of factors including his educational history, career history and general information on careers and employment. They agreed that the plaintiff achieved a grade 12 level of education and at the time of the accident he was unemployed but had planned on commencing his studies towards a National Certificate in Engineering Studies at Berea Technical College for which he was already accepted in the same year. The industrial psychologists gave deference to the opinion of the educational psychologist, Ms Gumede, in further assessing the plaintiff's pre-morbid academic potential and academic ceiling. According to Ms Gumede, the plaintiff's pre-morbid estimate of above average intellectual ability is consistent with functioning at a level where he could have proceeded to Further Education and Training College (FETC) and obtained a National Certificate in Engineering Studies as he had aspired to, and he could have coped with the demands of vocational training at an FET College obtaining a National Certificate (N1 to N5) in Engineering Studies.

[9] The industrial psychologists agreed, having regard to Ms Gumede's expert opinion, that the plaintiff would have pursued his academic studies within the technical/engineering field. He would have pursued a National Certificate in Engineering Studies at Berea Technical College and his parents would have funded his studies as they had done post-morbidly. He would have completed his N1 – N6 at the end of 2018, over a period of 18 to 24 months from January 2017. At the beginning of 2019 he would have commenced his 18-month internship/in-service training at a company (usually arranged by the college) which he would have completed in mid-2020 or at the end of 2020 taking into account any possible delays in the completion thereof. After the successful completion of his internship/in-service training he would have obtained a National Certificate in Engineering Studies (2020). It was anticipated that he was likely to have taken an additional 12 months (2021) to procure suitable employment.

[10] They agreed that in 2021 the plaintiff would have been able to procure entry level employment at the level of an artisan at the lower quartile of the Paterson B4 (basic salary) level earning R 234 000. After three years his earnings were likely to have progressed to the median of the grade earning R 267 000. Contingent on further in-house training opportunities and/or furthering himself academically (ie supervisory courses) including the scarcity of skilled artisans and Employment Equity considerations, it was envisaged that he was likely to have progressed further and his earnings were likely to have reached their maximum at the medium of the Paterson C2 (total package) level earning R 550 000 in the capacity of an artisan overseer/charge hand by the age of 45. Thereafter he was likely to have received annual inflationary-linked increases until normal retirement age of 65.

[11] The industrial psychologists agreed that post-morbidly the plaintiff was not able to immediately continue with his studies due to complications that arose, and that he commenced his studies a year later. He registered for a Diploma in Mechanical Engineering at Majuba TVET College in 2017. Although he passed three out of his four N1 modules and completed all his N2 examinations, he did not get his results for his N2 modules and subsequently dropped out of the course due to his severe pain and cognitive difficulties. They agreed, with deference to the expert opinions of Dr du Trevou (eurosurgeon), Mrs Gumede (educational psychologist) and the joint minute of the occupational therapists, that the plaintiff has reached his academic ceiling and it is therefore not anticipated that he will continue with his tertiary studies in the future due to his residual cognitive deficits.

[12] The plaintiff is currently unemployed and not in receipt of a government disability grant. The indications were that he obtained a Code 10 driver's licence in February 2020. Cognizance was, however, given to the fact that although he has a grade 12 level of education, his employment opportunities will always be dependent on his physical prowess to function at the unskilled/low semi-skilled level and his functional preclusions will lead to a significant degree of occupational narrowing at this level where work demands are predominantly heavy duty in nature. In addition, on the basis of his level of education and lack of relevant work experience and qualifications, particularly given that he has residual neurocognitive deficits which will affect his trainability, he does not meet industry-specific criteria to compete for

employment in pure sedentary/office-based occupations on the open labour market, especially when competing with better qualified job seekers. His employability has therefore been severely compromised by the above preclusions.

[13] Cognizance was also given to the fact that he has not been able to procure any form of employment on the open labour market since the accident occurred seven years ago despite the fact that he obtained a Code 10 driver's licence. Therefore on the basis of the combination of his residual physical, cognitive and behavioral deficits, including the fact that he still carries a risk to develop epilepsy (which will preclude him from working in certain hazardous work environments, working at heights, working in the sun and working with machinery), weakness of the left side of his body, significantly compromised occupational versatility, time out of the labour market (seven years), preclusion from all occupations with light to very heavy physical demands and the need for sedentary employment with a sympathetic employer, that the greater likelihood is that he will remain unemployable for the remainder of his working life until he becomes eligible for a government old age pension at age 60.

[14] The industrial psychologists agreed, in their joint minute, to use the earnings estimates set out in R Koch *The Quantum Yearbook 2023* ('Quantum Yearbook 2023') for actuarial calculation purposes.

[15] The parties differ on the final calculation of the plaintiff's loss of income claim. This is dealt with below.

Issues to be decided

[16] The following issues are to be decided:

- (a) the correct Quantum Yearbook to be utilized for the purpose of calculating the plaintiff's loss of income claim;
- (b) the correct life table to be utilized by the actuary; and

(c) the correct contingency to be applied to the calculation of pre-morbid loss of earnings.

Evaluation

[17] It was submitted by plaintiff's counsel, Mr *Mackintosh SC*, that the joint minutes of the industrial psychologists clearly recorded that they agreed to the use of the earnings estimate of the Quantum Yearbook 2023 for actuarial calculations, and that the defendant has therefore incorrectly calculated the plaintiff's loss of earnings by assuming earnings as per an earlier edition, namely, R Koch *The Quantum Yearbook 2022* ('Quantum Yearbook 2022') as indicated in their actuarial calculations dated 20 February 2023 and the addendum thereto dated 21 February 2023.

[18] Furthermore, the defendant's actuarial calculation utilised 'life table 4' instead of 'life table 2' which the plaintiff's calculation utilised. There was no justification for the use of 'life table 4', so it was submitted.

[19] Finally, it was submitted that the defendant applied a future contingency of 25% to the calculation of the plaintiff's pre-accident loss of income whereas it should have applied a 19% contingency. According to Mr *Mackintosh*, the Quantum Yearbook 2023 refers to a sliding scale of 0.5% per year to retirement age and gives an example of 25% for a child, 20% for a youth and 10% for middle-age. As the plaintiff had already left school and was about to turn 20 years of age when the collision occurred, the 19% applied in the plaintiff's calculation was appropriate as the plaintiff was in his 20th year and out of school since 2014.

[20] The plaintiff's actuarial calculation, as adjusted following earlier discussions between the parties, is as follows:

- (a) The consumer price index has been adjusted from 6% to 5%;
- (b) Earnings inflation has been adjusted from 7% to 6%; and
- (c) Interest rate for discounting has been adjusted from 9.675% to 8.65%.

[21] According to the plaintiff, having made the above adjustments, his loss of earnings amount to R6 912 873.

[22] Ms *Govender* submitted, on behalf of the defendant, that she had no instructions for the reason that 'life table 4' was used in the defendant's calculation of the plaintiff's loss of earnings. She also conceded that the correct figures to be utilised for the purpose of calculation are those contained in the Quantum Yearbook 2023. She pointed out that the 2023 figures were in fact used at paragraph 4.1 of the actuarial addendum handed up that morning.

[23] The only point of contention, according to Ms *Govender* was the contingency figure to be applied.

[24] She submitted that a higher than normal contingency should be applied having regard to unemployment due to labour unrest and general economic upheaval; the fact that the unemployment rate had increased to 32.6% during the COVID-19 pandemic; and the fact that the plaintiff may have had a less than normal life expectancy.

[25] It was common cause that the 0% contingency applied for post-accident calculations was correct.

Life tables

[26] Mr *Mackintosh* submitted correctly with reference to the judgment in *Singh and Another v Ebrahim*,¹ that there was no basis for the use of 'life table 4' as the defendant had done. The Supreme Court of Appeal stated in *Singh*, where one of the issues was the appropriate life table to be applied to the assessment of life expectancy, that it seems eminently reasonable to use the white male tables to exclude any racial component from the calculation:

'LIFE TABLES

[199] As with most things in this matter, the appropriate life tables to be applied to the assessment of Nico's life expectancy were also in issue. The high court applied the SA white male tables. The appellant contends for the application of the Koch life

¹ *Singh and Another v Ebrahim* (413/09) [2010] ZASCA 145 (26 November 2010) para 199.

tables which adds between 2 to 4 years to the various scenarios calculated by Strauss. Koch's attempt to remove race from the SA life tables is obviously attractive, but the evidence of the assumptions made to compile his life tables does not, in this case, succeed to illustrate their reliability. Although the 1984/1986 SA life tables are out of date, they are still the best available. In the circumstances it seems eminently reasonable to have used the white male tables to exclude any racial component from the calculation. Consequently the dispute about whether the appellant agreed to the application of the SA life tables only to the actuarial calculation or also to the assessment of life expectancy is irrelevant.'

[27] See also *AD and Another v MEC for Health And Social Development, Western Cape Provincial Government*,² where the court stated as follows with reference to the above passage in *Singh*:

'[190] This passage embodies a decision of legal policy by which I am bound in the absence of new data. The conclusion, based on this policy, would be that although IDT is a coloured child I should, to exclude any racial component, use the 1985 life table for white males (ie K2, not K3 – K6).'

[28] In the absence of any justification by the defendant for the use of 'life table 4', and having regard to the above authorities, I find no reason to disagree with Mr *Mackintosh*.

Contingencies

[29] The plaintiff's actuarial calculation based on 'life table 2' (Quantum Yearbook 2023) and a 5%/19% contingency is as follows:

	Past	Future	Total
Earnings had accident not occurred	405 777	8 104 322	8 510 099
Less contingencies (5%/19%)	20 289	1 539 821	1 560 110

² *AD and Another v MEC for Health And Social Development, Western Cape Provincial Government* (27428/10) [2016] ZAWCHC 181 (7 September 2016) para 190.

	385 488	6564 501	6 949 989
Earnings having regard to accident	0	37 116	37 116
Loss of earnings	385488	6 527 385	6 912 873
Loss of Earnings (Capped)			Not applicable

[30] I am not in agreement with the 19% contingency pegged by the plaintiff's calculation.

[31] At the time of the collision, the plaintiff was out of school for two years and was about to commence his college studies. He was four months short of 20.

[32] 'Youth' is defined in the Oxford South African Concise Dictionary³ as the period between childhood and adult age, more consistent with adolescence and teenage years. However, the concept of youth means different things to different segments of the population in South Africa. The age of majority in South Africa is 18 years of age. Before a person turns 18 they are still considered a child.⁴ Article 1 of the United Nations Convention on the Rights of the Child⁵ defines 'children' as persons up to the age of 18, and for statistical purposes, the United Nations has agreed on a definition of 'youth', as being those persons between the ages of 15 and 24 years.⁶

[33] In *Jones v The Road Accident Fund*,⁷ where the plaintiff was 20 years' old, employed as a sports coach at the time of the accident and expected to have worked in that field until retirement age, the court found that a pre-morbid contingency of 20% was appropriate. The court considered that the contingency deduction in respect of the pre-morbid situation only has to cater for the usual risks in life, such as accidental death.

³ Oxford South African Concise Dictionary 2 ed (2010) at 1383.

⁴ The Children's Act 38 of 2005.

⁵ Convention on the Rights of the Child, General Assembly resolution 44/25 of 20 November 1989.

⁶ This definition was endorsed by the General Assembly in its resolution 36/28 of 1981.

⁷ *Jones v Road Accident Fund* (3967/2019P) [2022] ZAKZPHC 37 (18 August 2022).

[34] I align myself with the above reasoning. Notably, the judgment handed down in August 2022 did not take into account the COVID-19 pandemic and labour unrest issues as raised by Ms *Govender* in the present case.

[35] In my assessment in the present case, the plaintiff's normal contingency should be pegged at 20%. Having regard to the joint minute of the industrial psychologists, which record that the plaintiff was likely to have taken an additional 12 months after obtaining his qualifications to procure suitable employment, a further 0.5% should be added. However, they have also indicated that in due course the scarcity of skilled artisans and employment equity considerations were positive contingencies. I do not see why this positive contingency should not have applied immediately the plaintiff obtained his National Certificate in Engineering Studies.

[36] In view of the fact that there was no dispute other than those detailed above, I have used the plaintiff's pre-morbid calculation of earnings had the accident not occurred:

	Past	Future	Total
Earnings had accident not occurred	405 777	8 104 322	8 510 099
Less contingencies (5%/ 20%)	20 289	1 620 864	1 641 153
	385 488	6 483 458	6 868 946
Earnings having regard to accident	0	37 116	37 116
Loss of earnings	385488	6 446 342	6 831 830
Loss of Earnings (Capped)			Not applicable

[37] The draft order handed in by the plaintiff was agreed between the parties save for the amount of the loss of earnings at paragraph 2 thereof.

[38] The following order is issued:

IT IS RECORDED THAT:

1. The plaintiff's claim for general damages is settled in the sum of R995 000 (nine hundred and ninety-five thousand rand).

IT IS ORDERED THAT:

2. Judgment is entered for the plaintiff in the sum of R6 831 830 (six million eight hundred and thirty-one thousand eight hundred and thirty rand) for loss of earnings.

3. The defendant is directed to furnish to the plaintiff an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 for 100% of the costs of all future accommodation of the plaintiff in a hospital or nursing home and all medical treatment or the rendering of a service or the supplying of goods to him, arising out of the injuries he sustained in the motor vehicle collision that occurred on 2 January 2016 and to compensate him therefore after they have been incurred.

4. Payment of the amount in paragraph 1 above is to be effected within 180 calendar days from the date of this order.

5. The defendant is directed to pay interest on the amount referred to in paragraph 1 at the rate of 7.75% per annum calculated from 181st calendar days from granting of this order to date of payment.

6. The defendant is directed to make payment of the plaintiff's taxed or agreed party and party costs on the High Court scale. These costs shall include, but not be limited to:

- a. The reasonable and necessary costs of senior counsel including senior counsel's costs for his preparation for trial, as well as the reasonable costs of senior counsel and the attorney for attending upon any necessary consultations with the plaintiff and the undermentioned expert witnesses.
- b. The fees and expenses reasonably incurred by the undermentioned witness for, *inter alia* the preparation of their reports and any supplementary reports, joint minutes, deposing to affidavits and RAF 4 Forms as well as the experts' reasonable qualifying fees for their

reasonable reservation fees, and their reasonable fees for attending upon any necessary consultations with the plaintiff's senior counsel and attorney to testify at the trial (with the quantum of their fees to be determined by the taxing master) namely:-

- i. Dr M Du Trevou – Neurosurgeon;
 - ii. Dr RM Hardy – Neuropsychologist;
 - iii. Dr Grizic – Urologist;
 - iv. Ms Z Gumede - Educational Psychologist;
 - v. Ms Felicity Jonck - Occupational Therapist
 - vi. Ms K Plaatjies - Industrial Psychologist
 - vii. Wim Loots Actuarial Consulting – Actuaries (reports only)
- c. The fees and expenses reasonably incurred by the undermentioned witness for, inter alia the preparation of joint minutes,
- i. Ms E Neethling - Industrial Psychologist;
- d. The reasonable attendance fees of the following experts for their attendance at court for the trial on 20 February 2023:
- i. Ms F Jonck- Occupational Therapist;
 - ii. Ms K Plaatjies - Industrial Psychologist
- e. The reasonable costs of the interpreter's attendance at court for the trial on the 20 February 2023;
- f. Any and all reserved costs become costs in the cause as set out above.

7. It is recorded the defendant's link number is 3[...].
8. The plaintiff is directed, in the event of the abovementioned costs not being agreed to:
 - a. Serve the notice of taxation on the defendant's attorneys of record; and
 - b. allow the defendant one hundred and eighty (180) calendar days to make payment of the taxed costs.
9. The defendant is directed to make the payment referred to in paragraph 1 above directly to the trust account of the plaintiff's attorneys, whose details are as follows:-

ASKEW MARTIN AND ADRAIN INC. - TRUST ACCOUNT
BANK: NEDBANK
BRANCH: S[...] STREET
BRANCH CODE: 1[...]
ACCOUNT NO: 1[...]
REF: R[...]

Hiralall AJ

Case Information

Date of Hearing : 20 February 2023
Date of Judgment : 9 June 2023

Appearances

Counsel for the Applicant : Mr McIntosh SC

Instructed by
Applicant's Attorneys : ASKEW MARTIN & ADRAIN INC.

4th Floor, Room No. 403
FNB Building
151 Musgrave Road
Berea Road
DURBAN

Tel: 031 306 2401
Ref: MJM/K445/cn/ao
Email: litigation@askew.co.za

Counsel for the Respondents : Ms Govender

Instructed by

Respondent's Attorneys : LIVINGSTON LEANDY

1ST Floor, building 3
Glass House Office Park
309 Umhlanga Rocks Drive
DURBAN

Tel: 031 536 7511
Ref: N. Williams/sa/34R095318 – LN: 386
7174
Email: nwilliams@livingston.co.za
RaginieM@raf.co.za
ThulaniNt@raf.co.za