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: 6052/2017

In the matter between:

L.C. AFRIKA Plaintiff

and

ROAD ACCIDENT FUND Defendant

CORAM: AFRICA, AJ

HEARD ON: 3 AUGUST 2022

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to have been at 11h00 on the 24th of August 2022.

JUDGMENT

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[1] The plaintiff instituted an action for damages against the defendant as a result of certain bodily injuries sustained in a motor vehicle accident on the 14th of May 2014, at Dr. Belcher drive, Heidedal, Bloemfontein.

[2] It is pleaded that the collision occurred when the insured vehicle collided with the plaintiff who was a pedestrian at the time.

[3] It is contended that this court is called upon to adjudicate the issue of quantum only, as the issue of merits has become disposed of in 2015. Further that the defendant admitted to being 100% liable for plaintiff's agreed or proved damages.

[4] The remaining issues in dispute are the plaintiff's claim for loss of income and the contingency applicable to the future earnings, post-morbidly. The other heads of damages claimed for was past medical expenses; but there are none as plaintiff was treated at provincial facilities. As far as future medical and hospital expenses are concerned, this can be compensated by way of an undertaking in terms of the provisions of section 17(4)(a) of the Road Accident Fund Act 56 of 1996.

[5] The general damages have been rejected by the defendant, and consequently have to be referred to the HPCSA[1], for adjudication. Thus the only issue therefore is the <u>future loss of earning and contingencies applicable to the post morbid scenario.</u>

[6] The defendant expressly placed on record that the parties agreed that the expert reports are what they purported to be and that same may therefore be handed up by means of affidavit. No admissions are however made by the defendant on the contents of these

[1] The Health Professions Council of South Africa

affidavits and that the defendant will present arguments on the reports for purposes of the contingencies to be applied.[2]

[7] The parties relied on the calculation as provided for by plaintiff's Actuary report[3], with past loss of earnings calculated as R162 365. As far as Future loss of earnings are concerned, the figure calculated for pre-morbid future earnings, namely R1 279 440 are to be accepted post morbidly as well. Parties agreed that 10% contingency deduction would be justifiable in circumstances of this matter, bringing the pre-morbid future loss of earnings to R1 151 496. The issue to be decided on is the appropriate contingency deduction applicable to the post-morbid future loss of earnings.

[8] It is common cause that plaintiff sustained a severe fracture of the upper arm, suffering *sequelae* to the left arm and lower back; a left humerus fracture was surgically reduced and is it argued that his earning capacity has been significantly compromised as a result of the injuries.

[9] In relation to plaintiff's personal circumstances, his highest qualification is grade 10, pre-morbidly he was a qualified painter, categorised as falling into the category of medium to heavy. It is submitted that the plaintiff was unemployed for a number of months but subsequently managed to secure work as driver. He is being sympathetically accommodated by the employer and the plaintiff is not at risk of losing his job as a driver, as long as he is capable of performing his duties.

[10] It is submitted that the experts opined that the plaintiff is not suited to work as a driver, therefore the probabilities are that he will not be

[2] Paragraph 3 of defendant's heads of argument.
[3] Expert Notice Volume 2 page 174.

able to continue in this position as his condition deteriorates with age. He will eventually have to re-apply for work. The occupational therapist indicated that he is only suited for sedentary type of work. Having regard to his low level of education, his work experience falling into the category medium to heavy, he is very unlikely to compete with competitors that are better educated and more experienced in the clerical field in order to obtain employment in this category of work. Therefore, the plaintiff stands a real chance of being functional unemployable.

[11] Further, should the plaintiff lose his current sympathetic employment, when taking into consideration his low level qualification, lack of work experience together with his current medical condition, his job choices have been truncated and he surely will not have a greater chance of 10-20% to obtain and sustain ideal work in future.[4] Effectively, having a 10-20 % chance of obtaining work, the plaintiff has 90-80% possibility of being unemployed. This is reason why contingencies are applied to make provisions for these risks.

[12] Further, having regard to the other expert reports, if the recommended treatment improves the plaintiff's lower back symptoms to the extent that he can stand frequently and handle heavier weights, he should be able to engage in medium work demands and chances of him securing employment in future may increase by 10% effectively 20-30%.[5]

[13] Therefore the following calculation is submitted by the plaintiff to be fair and reasonable in the circumstances:

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[4] Report by Ben Moodie paragraph 6.10 page 21.

[5] Report by Ben Moodie Paragraph 6.10 page 21.

	Pre-morbid	Post-morbid	Difference: Loss
Past earnings	R507 038	R336 127	
Less Contingency deductions 5%/5%	R25 352	R16 806	
Total loss of Past earnings agreed to:	**R481 686**	**R319 321**	**R162 365**
Future earnings	R1 279 440	R1 279 440	
Less Contingency deductions 10%/**70%**	R127 994	R895 608	
Total loss of future earnings	**R1 151 496**	**R383 832**	**R767 664**
Total loss of earnings			**R930 029**

[14] The defendant highlighted certain extracts of the expert reports,[6]starting with Drs Oelofse and Deacon, who recorded that the plaintiff has a previous left foot fracture unrelated to the accident and that he was diagnosed with a united shoulder facture. They further opined that the plaintiff will do better after treatment. No back injury or complaints related thereto, was mentioned to the orthopaedic surgeons.

[15] According to the report of Yandi De Klerk, the plaintiff is currently employed as a driver at Hancor and he delivers milk with the help of an assistant, who accompanies him. His load handling capacity falls within the low to medium category. His work demand as a driver was based on the description as given by plaintiff. There are some limitations in standing, kneeling, elevated work and forward bending, indicating that he can do this up to 33% of the day. Based on his mobility, posture and load handling abilities, his physical capacity falls within the light category with moderate demands on standing. Plaintiff is not suited to his current occupation (as driver) due to his demands on weight handling. Should he be able to stand frequently

[6] Page 2 of defendant's heads of argument.

following treatment to the back, he should be able to do medium category work. However, for as long as the back-pain remains symptomatic, the plaintiff is limited to sedentary and light category work.

[16] The defendant argued that the back injury played an important part in the opinion of defendant's Occupational Therapist. Further that according to the report of the Industrial Psychologist, Mr Ben Moodie, the plaintiff was assessed on 15 October 2019[7]. It is reported that the plaintiff has been employed as a driver at Hancor Dairy from 1 November 2015. The employer was contacted and he advised that there is no set retirement age and that the plaintiff is not in danger of losing his job for as long as he can do the said job. There was no mention made of sympathetic employment by employer. Mr Moodie opines that should the plaintiff forfeit his current employment for whatever accident-related reason, he would not have a greater than 10-20% chance of obtaining ideal work. Should treatment alleviate his lower back symptoms and his capacity increase to medium work demands, his chances of employment improve by at least 10%. Further, that the difference between the pre and post-accident postulated earnings should be calculated until age 65. Lastly, Mr Moodie indicates that his report is only valid for 2 (two) years and should the matter not settled within that time, an addendum needs to be filed.

[17] The Occupational Therapist made deference to an Orthopaedic Surgeon with regards to back pain, but no further addendum report by an Orthopaedic Surgeon has been filed. The Occupational Therapist further determines that based on the carrying of heavy objects, the plaintiff is not suited for his current job. It is argued that

[7] Pages 3-4 of defendant's heads of argument

it must be kept in mind that the plaintiff is employed as a driver and is accompanied by an assistant and further that there is no confirmation from his employer on what specifically his duties entail and whether he is indeed, as a driver, expected to carry heavy objects. Further, that Mr Moodie has based his opinions and postulations on the report of the Occupational Therapist, which considered an undiagnosed injury and *sequelae* and without having confirmed the work demands with the employer directly.

[18] Considering the above, the defendant submits that the Court must have regard to the issues as pointed out, relating to an undiagnosed injury and *sequelae*, as well as unconfirmed work duties and the stale report of the Industrial Psychologist. In the circumstances, the defendant submits that there is no proof that the plaintiff who has been employed in the same position for the last 7 (seven) years, will not be able to continue in the said position as the employer expressly stated that there is no threat of plaintiff losing his job. In amplification thereof, Dr Oelofse indicated that the plaintiff's symptoms will improve with treatment.

[19] Further, that the plaintiff's calculation of the total loss of earnings as R930 029 is in stark contradiction to their own Actuarial report tabling the total loss of earnings as R754 294.

[20] Therefore the following calculation is submitted by the defendant to be fair and reasonable in the circumstances:

	Pre-morbid	Post-morbid	Difference: Loss
Past earnings	R507 038	R336 127	
Less Contingency deductions 5%/5%	R25 352	R16 806	
Total loss of Past earnings agreed to:	**R481 686**	**R319 321**	**R162 365**
Future earnings	R1 279 440	R1279 440	
Less Contingency deductions 10%/30%	R127 994	R383 832	
Total loss of future earnings	**R1 151 496**	**R895 608**	**R255 888**
Total loss of earnings			**R418 253**

[21] The basic rule in civil proceedings is that he who asserts must prove and the standard of proof in a civil case is on a balance of probabilities. That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not. This means that if there is more than one possible interpretation of facts relating to any particular issue in dispute, the interpretation least favourable to the party bearing the onus of proof must be applied.

[22] Further, in finding facts or making inferences, the court will select a conclusion which is the more natural or plausible conclusion from several conceivable ones, even though that conclusion may not only be the reasonable conclusion.

[23] In considering the implication of a suitable contingency factor to be applied to the plaintiffs future earnings post-morbidly, this court was

referred to the case of *Southern Insurance Association v Bailey*[8] where Nicholson JA held:

> "Where the method of actuarial computation is adopted, 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 "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."

[24] Damages for loss of income will be granted where the plaintiff has suffered or will suffer a patrimonial loss in that his employment situation has manifestly changed. The plaintiff's performance can also influence his patrimony if there is a possibility that the plaintiff could lose his current job and be limited in the number and/or quality of available choices, should he decide to find other employment.

[25] In *Goodall v President Insurance Co Ltd*[9] it was stated:

> "In assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practices by ancient prophets and soothsayers, and by authors of a certain type of almanac, is not numbered among the qualifications for judicial office."

[26] Upon a careful perusal of the Orthopaedic Surgeon's Report, compiled by Drs Oelofse and Deacon, apart from the date of injury being incorrectly recorded as 12 October 2012, it also incorrectly states that the plaintiff was employed as a driver at the time of the accident,[10] whereas it is not in dispute that plaintiff was self-

[8] 1984 (1) SA 98 (A) at 99-E-F.
[9] 1978 (1) SA 389 (W) at 392 H-393 A.
[10] Page 59 paragraph 1.2.1.

employed as a painter at the time of the accident.[11] One further glean from his report at paragraph 2.2.11 that plaintiff was taken to theatre on the 21st of October 2012, for an open reduction and internal fixation (ORIF) of the left humerus, again, this is factually incorrect as the accident only occurred on the 14th of May 2014. Noteworthy, is the fact that the defendant correctly points out that no complaints of back pain was raised to the Orthopaedic Surgeon, neither was plaintiff diagnosed with any back injury.

[27] Further, that the report of Mr Moodie is grounded on the report of the Orthopaedic Surgeon and that of the Occupational Therapist[12], who notes that but for the accident, the plaintiff would have been able to continue work until the normal retirement age of 65, health permitting. Her report states that though the plaintiff is aided by an assistant who goes with him when they off-load together, prolonged sitting increased the pain in the plaintiff's back, and as a result of his reduced physical workability, he is not suited for his current occupation due to the weight handling demands. The plaintiff is therefore currently best suited to work that falls within the sedentary category. However, the defendant correctly points out that it was never confirmed with the employer what exactly plaintiff's duties entail, and whether as a driver, it was expected of him to carry heavy objects.

[28] With reference to the case of *Road Accident Appeal Tribuma & Others v Gouws and Another*[13] courts are not bound by the view of any expert. They make the ultimate decision on issues on which experts provide opinion. Expert opinions serve as a tool to assist the court to come to a conclusion.

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[11] Paragraph 8.1.1 of defendant's written heads of argument.
[12] Page 149 of Experts Notices volume 2.
[13] 2018 (1) ALL SA 701 (SCA) at paragraph 33.

[29] The evidence does not suggest that the plaintiff will not stay in his current employment, health permitting and there is no evidence to suggest that he has been sympathetically employed for the past 6 to 7 years as a driver. This court takes cognisance of plaintiff's age, that being 46; that despite the injuries sustained, he has continuously been employed as a driver, with no complaints from the employer, and the fact that the plaintiff is in no threat of him losing his job. A high contingency as suggested by the plaintiff is vastly different to the 25% contingency deduction as tabled in their actuarial report. The suggestion that there is 90-80% chance of the plaintiff being unemployable, is untenable.

[30] This court is mindful of the case of *Pitt v Economic Insurance Co Ltd*[14] where it was stated:

> "The court must take care to see that its award is fair to both sides-it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant's expense."

[31] Consequently, after listening to the arguments, submissions made and considering the actuarial report, it is my view and finding that an appropriate contingency deduction to be applied would be 45%.

	Pre-morbid	**Post-morbid**	**Difference: Loss**
Past earnings	R507 038	R336 127	
Less Contingency deductions 5%/5%	R25 352	R16 806	
Total loss of Past earnings agreed to:	**R481 686**	**R319 321**	**R162 365**
Future earnings	R1 279 440	R1 279 440	
Less Contingency deductions 10%/**45%**	R127 994	R575 748	
Total loss of future earnings	**R1 151 496**	**R703692**	**R447 804**

[14] 1957 (3) SA 284 (N) at 287-E.

Total loss of earnings			**R610 169**

[32] I accordingly make an order in the following terms:

1.1 The defendant is liable for payment of 100% (Hundred Percent) of the plaintiff's proven or agreed damages;

1.2 The defendant shall pay plaintiff the sum of R610 169.00 (Six hundred and ten thousand one hundred and sixty-nine rand) in respect of the Total Loss of Earnings;

1.3 The general damages to be referred to the HPCSA, for adjudication.

1.4 The defendant is to furnish an undertaking to the plaintiff in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, insofar as future medical and hospital expenses are concerned.

1.5 The defendant is to pay the plaintiff's taxed or agreed costs on a party and party scale to date of this order, including but not limited to the reasonable qualifying fees of plaintiff's experts.

AFRICA, AJ

APPEARANCES:

COUNSEL FOR THE PLAINTIFF: Adv. Cross
Instructed by:
VZLR Inc

COUNSEL FOR DEFENDANT:	Adv. Bornman Instructed by: State Attorney