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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: **431/2021**

In the matter between:

T[....] K[....] M[....]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT BY:

VAN RHYN J

HEARD ON:

19, 20 AND 22 JULY 2022

HEADS OF ARGUMENT SUBMITTED ON: PLAINTIFF:

27 JULY 2022

DEFENDANT:

12 AUGUST 2022

DELIVERED:

9 SEPTEMBER 2022

INTRODUCTION:

[1] The plaintiff instituted action against the defendant in terms of the provisions of the Road Accident Fund Act¹ (“the Act”) for the payment of the amount of R10 931 488.00 in damages arising from an incident which occurred on 1 December 2018. A motor cycle with registration letters-and-numbers [...], driven by Morgan Peter Wracc (the “first insured vehicle”) collided with a motor vehicle with registration letters-and-numbers [...] driven by Thabiso S Motaung (the “second insured motor vehicle”) and wherein the plaintiff was a passenger at the time of the collision. The collision occurred along the R 712 Main road between Phuthaditjhaba and Harrismith, Free State Province. The plaintiff’s action is based on the negligence of the first insured driver.

[2] On the 20th of July 2022 the defendant conceded the merits and its liability to compensate the plaintiff for 100% of the proven or agreed damages, arising from the collision. The general damages and future medical expenses have also been settled and the court has been provided with an draft order in terms whereof the defendant is liable for payment to the plaintiff in the amount of R500 000.00 (FIVE HUNDRED THOUSAND RAND) in respect of general damages and to furnish to the plaintiff an undertaking in terms of the provisions of s 17(4)(a) of the Act in respect of future accommodation of the plaintiff in a hospital or nursing home or the rendering of future medical treatment arising from the injuries sustained in the motor vehicle accident.

[3] The remaining issue in dispute and which the court is called upon to adjudicate is in respect of the loss of earnings, more specifically the contingencies that need to be applied in respect of the future loss of earnings. By agreement between the parties and in terms of Rule 38(2) of the Uniform Rules of Court, plaintiff’s expert reports were received by way of affidavit. The plaintiff did not adduce any evidence regarding his claim for loss of future earnings and neither did the respondent present any evidence in this regard. By agreement, the legal representatives filed heads of argument pertaining to the percentage to be applied in respect of the contingencies regarding future loss of income of the plaintiff.

¹ No 56 of 1996.

THE INJURIES SUSTAINED BY THE PLAINTIFF

[4] The plaintiff is an adult male who was born on 29 April 2002. He was 16 years of age at the time of the motor vehicle accident and was a scholar at the time. He was transported to the Mofumahadi Manapo Hospital subsequent to the incident where his wounds were cleaned and dressed and x-rays were taken. It is common cause that the plaintiff sustained the following injuries during the collision:

- 4.1 lacerations and abrasions to his face;
- 4.2 soft tissue injury to left shoulder;
- 4.3 lacerations and abrasions to left chest;
- 4.4 fracture right elbow.

[5] Plaintiff was discharged on the 24th of December 2018. He was referred for physiotherapy and provided with medication and a review date. The plaintiff was re-admitted at the same hospital on 11th of January 2019 for the internal fixation of his right elbow. He was discharged on the 22nd of January 2019.

[6] The plaintiff filed the following expert reports:

- 6.1 Dr A Makau – general practitioner;
- 6.2 Dr M A Scher – orthopaedic surgeon;
- 6.3 T da Costa - clinical psychologist;
- 6.4 S Fletcher – occupational therapist;
- 6.5 A Mattheus – educational psychologist
- 6.6 I Leibowitz – industrial Psychologist;
- 6.7 W Loots – actuary.

[7] Dr Scher, an orthopaedic surgeon at Medi-Clinic, Cape town, opined that the plaintiff's compromised right elbow will probably manifest with progressive functional impairment and will be a significant handicap for the rest of the plaintiff's life. His upper extremity impairment (UEI) would be at 38% and his Whole Person Impairment (WPI) at 23%. On examination Dr Scher found moderate loss of right elbow movement but the plaintiff is able to reach his mouth with his right hand. The damaged right elbow will probably manifest with secondary degenerative changes

over the medium to longer term (7 – 17 years). Ongoing and increasing disability will probably lead to surgery being considered. In the workplace ongoing impairment of his dominant arm and elbow function will likely have variable bearing on his job opportunities and earnings.

[8] The clinical psychologist found that the plaintiff suffered from moderate depression, severe anxiety and post- traumatic stress disorder which affects his overall functioning. From the medico legal report compiled by the educational psychologist, A Mattheus, it is evident that the plaintiff's father's educational level is unknown. His biological mother completed Grade 12. He has two siblings who completed respectively Grade 11 and Grade 8. The plaintiff has 5 other siblings who are all still attending school.

[9] With regards to his educational history, the plaintiff started his formal schooling in 2007 at Mojatsohle Primary School. He repeated Grade 2. In 2015 he was enrolled at Mangaung Intermediate School where he repeated Grade 7. At the time of the accident, he was in Grade 9. During 2019 he was enrolled at Nkhobiso Secondary School for Grade 10. He repeated Grade 10 in 2020. At the time of the assessment by the educational psychologist in 2021, plaintiff was in Grade 11. The educational psychologist opined that available academic results suggest that the plaintiff is in danger of failing Grade 11 due to poor performance in Accounting and Mathematics. It is furthermore stated that school reports suggest that the plaintiff had pre-existing learning difficulties and that plaintiff is likely to fail grade 11. He will most probably drop out of school with a Grade 10 level of education and that he would then attempt to seek employment. It is furthermore stated by the educational psychologist that the plaintiff may complete Grade 12, with low marks, and the likelihood of repeating the Grade 12 cannot be excluded.

[10] The occupational therapist opined that it is unlikely that the plaintiff will ever be able to engage in work that are demanding of physical strength and fitness. The plaintiff is limited to sedentary work options as a result of his injuries. During the assessment it was found that plaintiff suffers from decreased endurance and fatigue and that he would only be able to perform forward bending and walking on an occasional basis during a working day. The occupational therapist did not provide

any reason why the applicant presents with endurance difficulties and what exactly is affecting his walking and forward bending abilities. However, it was noted that the plaintiff would be able to perform the following on a frequent basis during a working day:

- 10.1 sitting;
- 10.2 standing;
- 10.3 crouching;
- 10.4 squatting;
- 10.5 kneeling;
- 10.6 stairs.

[11] The industrial psychologist, L Leibowitz, with a reference to the educational psychologist's report is of the opinion that the plaintiff would probably have relied largely on his physical abilities to secure employment in future. As a school leaver after Grade 12, in a highly competitive market, a period of unemployment would likely have ensued. Plaintiff's earnings upon entering the labour market and after a further period of three years of unemployment, may have somewhat aligned to the national minimum wage level and may have been around R 4 229.55 per month. Cognisant of all the expert's reports, the industrial psychologist is of the opinion that, should the plaintiff exit the schooling system with a Grade 10 level of education, the impact of his orthopaedic injuries and related sequelae have rendered him an uncompetitive and vulnerable individual. If it is accepted that he would be limited to sedentary employment, he is likely to struggle to secure, and more importantly, sustain employment.

[12] The actuarial report compiled by Mr. Wim Loots and filed by the plaintiff, to calculate the present value of the potential loss of earnings suffered by the plaintiff, is based on the assumption that the plaintiff is regarded as unemployable. The calculation is based on the further assumptions that the plaintiff would have completed Grade 12 in December 2022 where after a period of three years of unemployment would follow. The plaintiff would then obtain employment from 2026 and would be remunerated in accordance with the National Minimum Wage until the age of 47.5. From 1 November 2049 the plaintiff's earnings are calculated at R 179 875.00 per annum until the age of 65.

[13] In paragraph 8 of the actuarial report the following is recorded:

“The actuarial calculations for loss of earnings take into account mortality, taxation, inflation etc. but traditionally further adjustments may be required for unforeseen factors. These factors could include an allowance for illness, unemployment or injury (possibly resulting in a reduced quantum) or the possibility that the claimant could have experienced the earnings progression beyond that assumed (possibly resulting in an increased quantum). Allowance for these contingencies should take into account the specifics of the case, are of a subjective nature and therefore not actuarially determined. The following contingency deductions were applied per instruction:

- Pre-accident: 20%
- Post-accident: Not applicable”

[14] The present value of the loss of earnings at 1 December 2021 is as follows:

Earnings had the accident not occurred	R 2 616 524.00
Less 20% contingency deduction	R 523 304.00
Total loss of earnings	R 2 093 219.00.

[15] It should be pointed out that the defendant approached the court without any witnesses or medico legal reports. The reports filed by the plaintiff was accepted as uncontested evidence.

CONTINGENCIES.

[16] In **Southern Insurance Association v Bailey NO**,² Nicholson JA held as follows concerning computation of future loss of earnings as a component of delictual damages:

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can

² 1984 (1) SA 98 (AD) at 113G.

do is to make an estimate, which is often a very rough estimate, of the present value of the loss.”

[17] Contingencies are the “hazards of life that normally beset the lives and circumstances of ordinary people”³ and should therefore, “by its very nature, be a process of subjective impression or estimation rather than objective calculation”⁴. In *Gillbanks v Sigournay*⁵ Henochsberg J held that in any estimate of a person’s loss of earning capacity allowance must be made for all contingencies. These contingencies for which allowance should be made, would usually include the following:

- “(i) a possibility that plaintiff’s working life may have been less than sixty-five years;
- (ii) the possibility of his death before he reaches the age of sixty-five years;
- (iii) the likelihood of his suffering an illness of long duration;
- (iv) unemployment;
- (v) inflation and deflation
- (vi) alterations in the cost- of- living allowances;
- (vii) an accident whilst participating in sport such as hockey or cricket, or at any other time which would affect his or earning capacity; and
- (viii) any other contingency that might affect is the earning capacity.”⁶

[18] In **Sandler v Wholesale Coal Suppliers Ltd**⁷ Watermeyer JA held as follows:

"The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the Judge's view of what is fair in all the circumstances of the case".⁸ In the *Quantum Yearbook*⁹ the learned author points out that there are no fixed rules as regards general contingencies. However, he suggests the following guidelines:

³ Corbett & Buchanan, *The Quantum of Damages*, Vol II 360 at 367.

⁴ *Shield Ins. Co. Ltd v Booyesen* 1979 (3) SA 953 (A) at 965G-H.

⁵ 1959 (2) SA 11 (NPD)

⁶ *Gillbanks v Sigournay* at p17D-F.

⁷ 1941 AD 194.

⁸ *Sandler v Wholesale Coal Suppliers Ltd* at 199.

⁹ Robert Koch, 2017 Edition, p 126.

‘Sliding scale: 0,5% per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age...’

Normal contingencies: The RAF usually agrees to deductions of 5% for past loss and 15% for future loss, the so-called normal contingencies.”

[19] Contingencies of whatever nature, generally serve as a control mechanism to adjust the loss to the circumstances of the individual case in order to achieve justice and fairness to the parties.¹⁰ There are no hard and fast rules of mathematical logic in the determination of a contingency discount.

[20] In her heads of argument, Mrs Hatting- Boonzaaier, counsel on behalf of the plaintiff, contends that the educational psychologist is of the view that the plaintiff will most probably fail his 2021 school year and will have to repeat the year. As predicted, it turns out that the plaintiff failed his Grade 11 year and is now repeating Grade 11. The occupational therapist agreed with Dr. Scher’s findings regarding the impairment of the plaintiff’s elbow and the bearing same will have on his employment possibilities. It is therefore contended that the plaintiff would be an extremely vulnerable individual in the open labour market and that it would be unlikely for the plaintiff to obtain sedentary employment, more so, to find any employment in the open labour market. It is therefore submitted that the contingencies applied as per the actuarial report of Mr. Wim Loots, who based the calculations on the industrial psychologist’s report, are both fair and reasonable and that same be applied to equate the total loss of earnings.

[21] On behalf of the defendant Mrs Gouws contends that the report of Mr. Wim Loots includes only one scenario as to the postulated career progression of the plaintiff. It is therefore submitted that the inclusion of only one scenario, essentially usurps the court’s duties as the court is prescribed the scenario which it should use. The court should actively evaluate the evidence and consider various scenarios which may find application. Rarely would there be only one scenario which may find application on a set of facts, specifically because the postulations are speculative by the very nature thereof. Mrs Gouws furthermore contends that it should be noted that

¹⁰ Hall v Road Accident Fund [2013] JOL 30456 (GSJ) at paragraph 52; Road Accident Fund v Guedes 2006 (5) SA (SCA) at paragraph 8.

Mr. Wim Loots was instructed to base his calculations on certain earnings and to use specific contingencies which effectively detracts from him being an independent witness.

[22] On behalf of the defendant it is furthermore argued that the assumptions on which the actuarial report is based are not in line with the common cause facts, assumptions or conclusions reached by the experts. The defendant did not sustain a brain or head injury. According to the clinical psychologist's report it is likely that the plaintiff had pre-existing cognitive difficulties and had failed Grades 2, 7, 10 and has recently also failed Grade 11. He presents with working memory difficulties which impacts negatively on his learning abilities. Even though the educational psychologist concluded that pre-morbid, the plaintiff would "probably" have been able to complete Grade 12 with low marks, the likelihood of him repeating Grade 12 cannot be excluded. As to the post-morbid scenario the Educational Psychologist concluded that he is likely to fail Grade 11 given the severity of the emotional difficulties which impacts on his cognitive performance and that he will most likely drop out of school with a Grade 10 level of education.

[23] It is therefore contended that no logical and factual nexus between the injury (to his elbow) and plaintiff's post-morbidly being unable to obtain Grade 12 is provided and explained. Post-morbid the plaintiff continued academically on the same path as he did pre-morbid and this cannot be as a result of the injuries sustained in the accident. Mrs Gouws thus contends that no specific and subjective contingencies were however taken into consideration. The plaintiff's academic history, his family history in respect of limited academic aptitude and his personal circumstances points to the plaintiff pre-morbid most probably not being able to attain Grade 12. This would have resulted in him being less competitive in the labour market without taking cognisance of the sequelae of the accident.

[24] I agree with the submissions made by Mrs Gouws that the mentioned factors all militate against a pre-morbid contingency deduction of only 20%. I furthermore agree with her that there is no evidence to the effect that the plaintiff can be regarded as totally unemployable as a result of the injuries sustained in the accident. The occupational therapist clearly indicated that the plaintiff will be able to perform

normal functions such as sitting, standing, crouching, squatting, kneeling and climbing stairs but walking only on an occasional basis. There is no evidence before court that the plaintiff is unable to use a telephone, or drive a motorcycle and therefore obtain employment as a delivery person, a taxi assistant or selling fruit and vegetables, to name but a few possible employment options.

[25] The plaintiff, according to the defendant, prior to the accident, in any event had bleak prospects of occupational advancement ahead of him. Such possible buffets of poor prospects of employment must also be taken into account. However, the defendant adduced no evidence whatsoever relating to the impairment of the right elbow or the upper extremity impairment as assessed by Dr Scher. To my mind the defendant has not disputed the evidence of Dr Scher that the plaintiff's damaged right elbow will probably manifest with progressive functional impairment and secondary degenerative changes over the medium to longer term. The ongoing and increasing disability will also probably require further surgery in future.

[26] The plaintiff's legal representatives instructed the actuary, Mr Wim Loots, to calculate his future loss of earnings based on contingencies of 20%. The actuary arrived at a loss of earnings in the amount of R 2 093 219.00. Counsel on behalf of the defendant contends that a pre-morbid contingency deduction of 40% will be fair under the circumstances. As to the post-morbid un-employability of the plaintiff, it is contended that this has not been proven on a balance of probabilities and he cannot be deemed to be "disabled". The plaintiff has a residual work capacity. It is contended that all sedentary work which the plaintiff may do or may be interested in doing is not necessarily of an administrative nature. It is submitted that a post-morbid contingency deduction of 50% be applied.

[27] Mrs Gouws therefore contends that the total future loss of earnings will amount to R130 826.20 whereas the calculation presented by Mrs Hatting-Boonzaaier amounts to R2 093 219.00. Having regard to the facts of this matter and the arguments on behalf of the parties, I am convinced that a higher percentage contingency should be applied in respect of general contingencies and not only 20% as suggested by the plaintiff. It is undisputed in my view that the plaintiff is an unfair competitor in the open labour market due to the injuries sustained during the

accident and the further degeneration of his elbow in future. I am however not convinced that the contingencies as suggested by Mrs Gouws in respect of the pre-morbid and post- morbid scenarios have been substantiated by any evidence. The plaintiff suffers from a permanent impairment of earning capacity.

[28] In *Southern Insurance Association v Baily* NO¹¹ the two approaches that may be used to ascertain future loss of earnings were discussed¹² by Nicholas JA. Having regard to all the facts before the court and having regard to what was held in *Baily's* case, a trial judge is not necessarily tied down by inexorable actuarial calculations but has "a large discretion to award what contingencies he considers right". I find in the circumstances that a 30% contingency deduction would be reasonable. Therefore, the amount for the loss of future earnings is calculated as follows:

Earnings had the accident not occurred	R 2 616 524.00;
Less 30% contingencies	R 784 957.20;
Total loss of future earnings	R 1 831 566.80.

[29] The settlement reached between the parties in respect of the claims pertaining to General Damages, and future medical expenses is reflected in the draft order submitted by the plaintiff's counsel, which I intend to include in the order of court.

[30] **ORDER:**

1. The defendant is liable for 100% of the plaintiffs proven or agreed damages.
2. The defendant is ordered to compensate the plaintiff in the amount of R500 000.00 (FIVE HUNDRED THOUSAND RAND) in respect of general damages resulting from the motor vehicle collision that occurred on 1 December 2018.

¹¹ 1984 (1) SA 98 (A).

¹² On p 113.

3. The defendant is ordered to furnish to the plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for 100% of the costs of the future accommodation of the plaintiff in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to the plaintiff arising out of the injuries sustained by the plaintiff in a motor vehicle collision mentioned above, in terms of which undertaking the defendant will be obliged to compensate plaintiff in respect of the said costs after the costs have been incurred and on proof thereof.

4. The abovementioned undertaking shall be delivered by the defendant to Mokoduo Erasmus Davidson Attorneys.

5. The defendant shall pay the plaintiff an amount of R1 831 566.00 (ONE MILLION EIGHT HUNDRED AND THIRTY-ONE THOUSAND FIVE HUNDRED AND SIXTY- SIX RANDS) for loss of future earnings.

6. The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale, including the reasonable qualifying fees of the following experts:

- 6.1 Dr Makau (General Practitioner);
- 6.2 Dr Scher (Orthopaedic Surgeon);
- 6.3 Burger Radiologists (Radiologist);
- 6.4 Alet Mattheus (Educational Psychologist);
- 6.5 Talita Da Costa (Clinical Psychologist);
- 6.6 S Fletcher (Occupational Therapist);
- 6.7 L Leibowitz (Industrial Psychologist);
- 6.8 Wim Loots (Actuary).

7. The payment provisions in respect of the paragraph 2 and 5 above are as follows:

- 7.1 Payment of the capital amounts shall be made without the set-off or deduction, within 180 (HUNDRED AND EIGHTY) calendar days from 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:

Holder:	Mokoduo Erasmus Davidson Attorneys Trust Account
Bank:	FNB
Branch:	Rosebank
Account Number:	[....]
Branch code:	253 305
Ref:	M3215

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

7.3 Interest *a tempore morae* to shall be calculated in accordance with the Prescribed Rate of Interest Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund Act 56 of 1996, as follows:

7.3.1 on the capital amount of the claim, calculated 14 (FOURTEEN) days from the date of this order;

7.3.2 on the taxed or agreed costs, calculated 14 (FOURTEEN) days from date of taxation, alternatively date of settlement of such costs.

VAN RHYN J

On behalf of the Plaintiff:	ADV. D C HATTINGH-BOONZAAIER
Instructed by:	MED Attorneys

On behalf of the Defendant:	MRS. J GOUWS
Instructed by:	State Attorneys, Bloemfontein