REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

(1) REPORTABLE:NO
(2) OF INTEREST TO OTHER JUDGES:YES
(3) REVISED: YES

[redacted] 02/02/2022

CASE NO: 645/2017

In the matter between:

ALBERTO EDUWARDO LANGA	Plaintiff
and	
ROAD ACCIDENT FUND	Defendant

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] The Plaintiff instituted this delictual damages action against the Defendant for personal injuries that he sustained during a motor vehicle accident on 17 October 2015. The collision happened between the Plaintiff as a pedestrian and motor vehicle with registration letters and number AAX 689 MC ("the insured vehicle") at approximately 23:00 on the N4 Highway towards Karino, Mpumalanga Province. The insured vehicle was driven by one Julio Titos Mutola ("the insured driver"). The action is not defended.

[2] The Plaintiff's injuries have been noted on the RAF4 Form as the fractures of the right tibia, fibular with torn ligaments of the knee. He was admitted to the Rob Ferreira Hospital and his treatment consisted in putting his right tibia, fibular and ankle in a back-slab. X-rays of his right leg, ankle and left shoulder were taken. The RAF4 also records that no operations could be performed due to lack of instruments. As a result, he was discharged on 30 October 2015 with a letter to Maputo Hospital for administration of further treatment.

[3] Believing that the manner in which the collision occurred renders the Defendant susceptible to liability for the injuries sustained by him, the Plaintiff instituted this action envisaged in the Road Accident Fund Act, 56 of 1996, as amended for compensation under various heads of damages, amongst which were general damages, future medical expenses, past and future loss of earnings. Documentary evidence comprises the papers with which the Plaintiff's claim was lodged and reports of experts of both parties.

[4] When the matter served before this Court on 2 August 2021, the parties had resolved that:

4.1 The Defendant accepted that the insured driver's negligent driving contributed 80% towards the occurrence of the collision. As such, the Defendant agreed to shoulder liability to pay the Plaintiff for any damages up to 80% that the Plaintiff may prove against it;

4.2 General damages and past medical expenses were also settled in line with the agreed 80% liability referred to above;

4.3 The Defendant agreed to furnish the Plaintiff with an Undertaking in terms of Section 17(4) of the Act for his future medical expenses on the basis of the 80% apportionment.

[5] The upshot of the parties' agreement is that two issues have been left for determination by this Court. Those matters concern the past and future loss of earnings of the Plaintiff and contingencies to be applied to both scenarios. In his endeavour to prove his case, the Plaintiff testified on his own behalf and was supported by experts who have examined him and compiled medico-legal reports subsequently.

EVIDENCE

[6] The Plaintiff testified that he sustained injuries to both of his legs and right arm. He stated that doctors at Rob Ferreira Hospital operated on his left leg and drew some fluid. His counsel understood this to mean that an internal fixative was inserted during the operation, which was incorrect. He confirmed that to date the process of drawing fluids from his left leg is still ongoing. The hospital has now removed the plaster of paris from his left leg.

[7] The highest education attained by the Plaintiff is Grade 9. Following that, he trained in ceiling carpentry and qualified as such. When he became involved in this collision he was self-employed in his area of specialization. He testified that he

became self-employed in 2012 earning a monthly net income of approximately 70 000.00 Meticals, which in South African currency is estimated at R12 000.00. He has not worked in any form since the collision in 2015.

[8] He could not state precisely when he would retire had the collision not occurred. Instead, he stated that he would have carried on until his body cannot take it anymore. He has not worked in any form since the collision and his business that employed him has ceased operations. The Plaintiff confirmed that he neither has any proof of his qualification as a ceiling carpenter nor of his income of R70 000.00 Meticals per month. He could not produce tax certificates nor bank accounts showing movements of amounts on monthly basis.

[9] Dr Trotsky is an orthopedic surgeon. He testified that he examined the Plaintiff in May 2017 and compiled a medico-legal report thereafter. He has recorded the Plaintiff's injuries as:

9.1 Segmental (3 segments) fracture to the right tibia and fibular;

9.2 Laceration to the left arm;

9.3 Abrasions to his left shoulder;

9.4 Possible roata cuff injury.

[10] The Plaintiff was admitted to Rob Ferreira Hospital for approximately two weeks. Dr Trotsky stated that the only treatment that the Plaintiff received at the Rob Ferreira Hospital was a debridement of the open fractures in a cast. He confirmed that according to the medical records, no internal fixative was inserted. The cast treatment of the tibia and fibular fractures continued for a period of four months.

[11] When he consulted with the Plaintiff in May 2017, the Plaintiff was still complaining of constant pain in his right leg and he told him that he felt that his right knee was unstable making it impossible for him to climb step ladders or stair cases. He also complained of pain in his left shoulder with decreased range of movement. This, the Plaintiff told him, made it impossible for him to work above shoulder level.

[12] Prior to the collision, the Plaintiff played soccer but cannot do so anymore as a result of the pain in his right leg. The Plaintiff cannot walk long distances to visit family as a result of which they visit him. On the day of the examination, Dr Trotsky stated that the Plaintiff came in walking with an antalgic painful gait on the right-hand side. He walked without the aid of a crutch. He had an atrophy of the right cuff as well as deformity of his right tibia and fibular.

[13] He could not stand on the right leg without the experience of excruciating pain. Dr Trotsky observed at that stage that the Plaintiff also had healed scars on his left shoulder and right lower leg. He had reduced range of movement on his left shoulder with pain on his rotated cuff muscle. In short, he had signs of left shoulder impingement or stiffness. There is an apparent 2 Centremetre shortening of his right lower limb.

[14] He also noticed atrophy of the Plaintiff's quadriceps and his cuff mussels on the right leg. His knee movements were limited recording 0 to 90 degrees instead of 0 to 130 degrees. He could not fully examine his right knee as the Plaintiff was very guarded due to pain. This led Dr Trotsky to suspect that the Plaintiff also had a problem with his knee joint. Although the fractures were well united, the Plaintiff was still tender to depalpation.

[15] The Plaintiff will require surgical intervention to improve or resolve the tibia fibular mal-alignment, muscle degeneration as well as internal derangement of his right knee. The left impinged shoulder will require physiotherapy to see if non-surgical management will not suffice. If he does not respond appropriately, he will need an

arthroscopy or surgical intervention on the shoulder to create more space between the bones to stop congestion of the muscles around it.

[16] The prognosis of the shoulder impingement, testified Dr Trotsky, is that most injured people realise improvement if they receive proper physiotherapy. 60% of injured people who receive such treatment experience remarkable improvement after six weeks. The remaining 40% usually require surgical intervention which is normally arthroscopy. The tibia fibular fracture is a permanent injury with shortening of the right leg. If it is left unattended, it will lead to abnormal forces around the knee joint and lower back. The lower back will in turn cause abnormality to the spine.

[17] Regarding employability, Dr Trotsky's evidence was that when he examined the Plaintiff, he was unable to climb stair cases or step ladders or scaffolding due to the instability and pain of his right knee. For a person in his type of occupation, he cannot afford not to climb step ladders. Dr Trotsky reminded this Court that the Plaintiff told him that he was a ceiling carpenter and therefore required to work above his shoulder level. For as long as the Plaintiff has a shoulder impingement, he cannot undertake work that requires him to work above shoulder level. The Plaintiff is now suited for light duty work but certainly cannot compete equally in the open labour market.

[18] Ms Charlene Cruickshank is an occupational therapist. She testified that the Plaintiff told her that following leaving school, he worked in the building and carpentry industry in Johannesburg for a period of one year under supervision before returning to his country of birth, Mozambique. On his return to Mozambique, he told her that he was trained in the installation of aluminium doors albeit that he could not furnish proof when requested to do so. He worked independently and as a self-employed individual.

[19] His area of work is classified as a medium labour to heavy as lifting of material is required from time to time. He employed two labourers at any time to assist him. Her further testimony was that the Plaintiff told her that he obtained small contracts in Maputo to install ceilings and aluminium windows and doors. He also concluded contracts with his customers to effect alterations to homes. His duties consisted in obtaining contracts, purchasing material, loading and delivering it at various sites. He would measure and erect scaffolding at those building sites.

[20] His work involved squatting, lifting material above shoulder level using both arms and climbing step ladders, stair cases and going up elevated areas at the work sites. He was unable to return to his pre-collision occupation in consequence of which he advised his two assistants to seek work elsewhere. The Plaintiff indicated to her that he has not worked since the collision. His reasons for not having done so are mainly that he cannot perform any of the duties that he performed previously.

[21] Ms Cruickshank testified that she found his inability to return to the same occupation after the collision justifiable because he would have needed flexibility of his muscles, strength and agility. Lack of those attributes automatically disqualified him. Post collision, the Plaintiff is only suited to occasional light or sedentary work. He can also lift a 10 Kilogram weight but again, he cannot sustain it for extended period. Currently he cannot work for a full day. She does not recommend that he does any type of lifting of loads at the moment for he remains unstable.

[22] Ms Cruickshank stated that even if the Plaintiff were to undergo the surgical intervention and/or physiotherapy recommended by Dr Trotsky, he would still not be able to return to his pre-collision occupation. In short, her opinion is that he is not suited for any employment at all as a result of the continued pains likely to be experienced. He cannot sit for protracted periods because of pain that might result.

In any event, he is not as sophisticated to obtain gainful employment in the light or sedentary work categories.

[23] Ms J White is an industrial psychologist. She testified that she consulted with the Plaintiff on 20 August 2016. She observed at the time that the Plaintiff walked with a limp favouring the right leg. She said that the Plaintiff told her that his highest level of education was Grade 9. Thereafter he received training to fit ceilings, aluminium windows, doors and wooden floors. Only one of his siblings managed to attain a matric level of education.

[24] She confirmed that the Plaintiff told her that he ran his own business, which employed two labourers. He paid them approximately R200.00 per day each. The Plaintiff told her that he earned a net profit of about 35 000.00 Meticals per month, which translated into about R7 000.00 per month at the time. He has not returned to any form of employment since the collision. Her findings insofar as pre-collision period is concerned is that he would have continued with the operation of his business venture.

[25] In the absence of any facts to the contrary, she stated that he could have progressed from being a semi-skilled to Koch's upper quartile by the age of 45 and thereafter normal increases until age 65 or more as he was self-employed. She places the Plaintiff at the level of a semi-skilled employee because the nature of the work was somewhat sophisticated, he owned the business venture and he supervised the people that he employed. Ms White did not have any collateral information to buttress the Plaintiff's claim of a business venture, employment of two labourers and the amounts that the Plaintiff paid them.

[26] She also stated that the Plaintiff reported to her that by 2015 he was earning an amount of R93 876.00 per annum, which she said was realistic. Post-collision, she testified, the Plaintiff is likely not to have any employment at all as a result of his injuries. Over and above the injuries, he only has a Grade 9 level of education and

sedentary or light work will be too demanding exposing him to possible reinjury. Counsel for the Plaintiff sought to suggest that the discrepancy in the income that he claimed to have earned and that which he reported to Ms White was the result of misinterpretation.

[27] Ms Lisa Schreiber is the actuary. The actuarial assumptions that she made for purposes of calculating the loss of the Plaintiff are as follows:

27.1 Inflation was equivalent to the Mozambiquen an CPI index from the collision date until January 2021 and 5% thereafter;

27.2 Earnings inflation was 6% per year in future;

27.3 She applied the Mozambique personal income tax rates tables to past income and assumed that in future these would be adjusted to allow for earnings inflation.

[28] She then discounted the annual income at which she arrived using the net discount rate, which is at 2.5%. Due to lack of access to Mozambique mortality tables, she used Life Table 5 of the Koch's Quantum Year Book 2021, which is based on South African data. She did not deduct any disability benefits nor did she make any contingency deductions. Based on that information, the figures for the pre-collision period remain the same. For the future loss, she used the same basis to arrive at the figures described in her report. **RECALLING OF THE PLAINTIFF**

[29] Counsel for the Plaintiff asked this Court if he could recall the Plaintiff to clarify the different evidence that the Plaintiff has levied before court. On the one hand he told the court that he earned an amount of 70 000.00 Meticals per annum yet Ms White testified that the Plaintiff had told her that he earned 35 000.00 Meticals per annum. the court allowed the Plaintiff to take the stand once again but it soon transpired that his Counsel wanted him for more than clarification of the

discrepancy aforesaid. As subtly hinted to him by his Counsel, the Plaintiff attributed the differences in amounts to misunderstanding between he and Ms White.

[30] His Counsel asked if he had any supporting documentary evidence to prove his income to which he said yes. Surprisingly, he was unable to levy such evidence before the court. He said that he had three major clients for which he did work and those paid him through the bank. It was only the odd smaller contract jobs that paid him in cash. Asked if he had any proof of money flowing in and out of his bank account emanating from transactions of his contract work, he said that he did but failed to produce bank statements.

[31] The court was then requested to admit into evidence the affidavits of two labourers who used to work for the Plaintiff, which it did but emphasized that it was not a guarantee that they would subsequently be of any value in determining the outcome of this case especially as they did not testify when they could have virtually.

[32] The actuary was instructed to estimate the expected present value of the Plaintiff's income to be used as a guide to determine a lump sum award for fair compensation for earning capacity suffered by the Plaintiff. The present value is calculated as at 1 March 2022. When calculating the loss of income, the actuary confirms that she was mindful of the amendment to the Road Accident Fund Act and concluded that the introduction of the limit does not have any influence on the figures.

[33] The actuary further notes that her instructions from the attorneys of the Plaintiff were that she ought to calculate the loss in Rands using scales applicable to South Africa notwithstanding that the Plaintiff lived and worked in Mozambique. As such, she has used the equivalent South African interest, inflation and income tax rates. Thus, she assumed that had the accident not occurred, the Plaintiff's income would have been as follows:

33.1 He would have started working on 1 January 2016 earning R7 700.00 per annum (lower quartile earnings, unskilled workers, July 2016 terms);

33.2 The income aforesaid would have increased in a straight line until reaching R97 000.00 per annum (upper quartile earnings, unskilled workers, July 2022 terms) at age 45;

33.3 Thereafter, increasing with inflation until retirement at age 65 (Basis A), alternatively at age 70 (Basis B).

[34] Insofar as income having regard to the accident, she was instructed to assume that as a result of the accident, the Plaintiff has not worked since the accident and would not be able to work in future. The basis of her calculation and assumptions were that historical evidence suggests that earnings inflation exceeded price inflation by between ½% and 2% per year over the long-term. For the purposes of the calculation, she allowed for earnings inflation of 1% above price inflation. Price inflation was assumed to be equal to the increase in the CPI-index from the accident date until December 2021 and 5% per year thereafter. She records that the implication is that she has assumed earnings inflation of 6% per year in future.

[35] With regard to income tax, she applied the personal income tax tables to past income. In respect of future income, she applied the most recent income tax tables, adjusted to allow for earnings inflation. She then proceeded to calculate the present value of income, had the accident not occurred, by discounting the net projected income allowing for interest and the Plaintiff's probability of survival.

[36] The Plaintiff was born on 1 May 1982. The actuary states that in the absence of comprehensive, reliable and up to date mortality tables for the Mozambique population, she has assumed life expectancy in line with Life Table 5 of Koch's Quantum Yearbook 2022.

[37] The present value of past income was simply taken as the income between the accident and calculation dates without allowing for interest. In order to allow for the investment income that could be earned on the lump sum award, she discounted the projected future income back to the date of calculation at a net discount rate of 2,5% per annum. The net discount rate of 2,5% per annum in conjunction with the earnings inflation described above imply an assumed investment return of 8,65% per annum.

[38] Insofar as disability benefits are concerned, she did not deduct any because no information was volunteered in this regard. Regarding general Contingency Deduction, Results are shown before allowing for general contingency deductions, which means that the court must use its discretion.

[39] Using the information above, on Basis A, the actuary arrived at a past loss of income of R179 496.00 being for the period between 1 January 2016 and 28 February 2022. On future loss of earnings and still on Basis A, she computed the loss to be R1 393 107.00 for the period, 1 March 2022 to the year on which the Plaintiff will turn age 65. The total loss amounts to R1 572 603.00.

ISSUES

[40] From the above evidence this Court is required to decide:

40.1 The award to be made to the Plaintiff in respect of past loss of earnings;

40.2 The award to be made to the Plaintiff in respect of future loss of earnings;

42.3 The contingencies to be applied to both the past and future loss of earnings.

LEGAL FRAMEWORK

[43] Rule 38(2) provides as follows:

"The witnesses at the trial of any action shall be examined viva voce, *but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit."*

[44] It has become fashionable for practitioners especially in undefended Road Accident Fund matters to insist that evidence of their witnesses be presented in an affidavit form and avoid to present viva voce evidence. This may of course, under appropriate circumstances, be permissible but it cannot be demanded as of right. It is evident from the provisions of the Rule that the evidence of witnesses 'shall be examined *viva voce….,'* Ordinarily therefore, evidence of witnesses in a trial must be levied by a witness taking the stand.

[45] The above said, the Rule also envisages that there might be those instances where, for good reasons, it may not be possible for witnesses to testify by physically taking the stand in a trial. In those situations, the Rule proceeds to provide that:" … but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit …." This means that the court ought to be satisfied that it is not possible for a party to secure the oral evidence of a witness. Reference to the word, sufficient', should be understood to mean that the reasons for a court to depart from the normal must be substantial.

[46] With the introduction of virtual hearings, cases where parties will not be able to adduce oral evidence have become circumscribed. Reasons for this are plentiful, witnesses do not have to travel to court and be accommodated in hotels. All that

needs to happen is the provision of a garget that can serve as a means of communication. Accordingly, witnesses adducing evidence to a court in this country while abroad OR IN SOME PERIPHERAL PART OF THIS COUNTRY have become daily occurrences. A party to proceedings ought to provide sound reasons why it cannot call a witness to adduce oral evidence.

[47] Parties in Road Accident Fund matters have often argued that it is pointless to call witnesses to take the stand where the action is not defended. Such assertion, it would seem, derives from the last portion of Rule 38(2) which states that: 'Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.".

[48] Cross-examination of a witness is one instance where *viva voce* evidence may need to be levied but another is where the court itself feels that there are matters that need clarification by a witness. Thus, prior to parties placing reliance on the part of Rule 38(2), that contemplates that is possible to present evidence on affidavit, they also need to remind themselves that they are expected to advance sufficient reasons for such proposition.

[49] Turning the onus of proving a claim. The general rule is that 'he who alleges must prove'. This is notwithstanding the fact that the matter is defended or undefended. That this is so is clear from the provisions of Rule 39(1), which stipulates that:

"If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he has discharged such burden. Provided that where the claim is for a debt or liquidated demand no evidence shall be necessary unless the court otherwise orders."

[50] To the extent that virtually without exception, the Road Accident Fund actions constitute illiquid claims, plaintiffs are required to allege and prove their claims lest the court might grant absolution from the instance. The fact that an allegation has been made and it is not opposed does not mean that it has been proved.

[51] This court agrees with the basis used by the actuary in the calculation of the loss. The differences obviously lies in the contingencies to be applied to both past and future loss of earnings on the one hand, and the Plaintiff's rapid elevation from lower quartile to higher quartile within a period of 10 years. It is trite that there are fundamentally two ways in which the court can approach this subject and these are:

51.1 the court may ascertain a practical and realistic amount of loss based on the verified facts and the existing circumstances of the case; or

51.2 the court may, with reference to mathematical computation, determine an amount made on the demonstrated facts of the case using such calculation as a foundation for its award. See in this regard the case of *Southern Insurance Association v Bailey N.O.* **1984 (1) SA 98 (A).**

[52] At times the court is faced with instances where there exists no sufficient information. In those cases the "gut feel" approach is normally ideal the proviso being that the plaintiff puts at the court's disposal adequate evidence to enable the court to appraise such financial loss. The Plaintiff is contending for a 5% contingency deduction on past loss and a 15% deduction on future loss. The Plaintiff believes that these contingencies sufficiently take into account all the vicissitudes of life, such as high unemployment rate in Mozambique.

[53] In the case of *Goodall v President Insurance Co Limited* **[1978] 1 ALL SA 101 (W)**, the court applied a 10% contingency deduction. The rationale behind that higher contingency was that the shorter the period over which contingency deduction is

to be applied the lower the deduction and the converse, the higher the contingency deduction. It seems that the instant case fits the model. The Goodall matter *supra* concerns an older plaintiff who was qualified in a certain trade and was near retirement age. A lower contingency deduction was applied. Had the opposite been true, a higher contingency would have been appropriate.

ANALYSIS

PAST LOSS OF INCOME

[54] The Plaintiff has evidently sustained serious bodily injuries that have left him markedly disabled. The loss that he has suffered is the difference between what he would have earned had the collision not occurred and the income, if any, that he is currently able to earn taking into consideration his injuries and their sequelae. Prior to the collision, the evidence is that he could climb step ladders, walk up ramps, could reach all elevated areas, could lift weight beyond 10 Kilograms, could work above shoulder level. Tersely, he was strong, agile and fit. Now he is weak, pathetic and unable to provide for his family.

[55] According to Dr Trotsky, the Plaintiff's injuries have left him permanently disabled with little hope that he could still return to his pre-collision occupation which was strength demanding in nature. This is confirmed by Ms Cruickshank who states that the Plaintiff cannot return to his pre-collision employment as he cannot engage himself in any work that requires strength. As I understand it, the fact of the Plaintiff being physically disabled is not in dispute and this court accepts it without any reservation.

[56] The above said, it is manifest that the level of education attained by the Plaintiff and the income that he earned from his alleged business venture cannot readily be accepted. Firstly, the Plaintiff would have this Court believe that he went up to Grade 9 in circumstances where he did not present any form of documentary

evidence in the form of a certificate or even a letter from the school that he attended. This being the era of virtual hearings, even an arrangement for someone from his school to testify could have been made. Accordingly, his evidence that he has a Grade 9 level of education has not been proved on a balance of probabilities and is rejected.

[57] Turning to the Plaintiff's post school technical qualification. The Plaintiff's claim is that following his attainment of Grade 9, he went on to train as a ceiling carpenter and fitting of aluminium windows. Ms White, the industrial psychologist, added that the Plaintiff also told her that he also trained to install wooden floors. The Plaintiff himself never said anything about installation of wooden floors. The obvious problem that any court would have with this kind of evidence is that none of all this can be objectively ascertained. Additionally, Ms White could not present any collateral information to serve as support for the allegations.

[58] The court was not given the name of the institution where the Plaintiff received his training. Not even evidence of his business venture or of the work that it undertook during its existence. The Plaintiff testified that he had done work for three major customers who paid him through the bank. Assuming that due to their business commitments, it was hard to secure their oral evidence, which is not the evidence before court, surely, they could have been requested to provide some form of documentary evidence and the debate would have centred around admissibility of such evidence.

[59] More startling is the industrial psychologist's testimony that she did not have any collateral information to buttress the information that she received from the Plaintiff yet she wants this court to accept the figures of his income without questions. All she had is a document that could have emanated anywhere partly written in Portuguese and the balance in English. The document does not confirm that he installed ceilings, aluminium windows and wooden floors. The document merely contains different figures, which are claimed to be what the Plaintiff would charge

his customers for each contract work that he undertook. The Plaintiff has as such, failed to establish on a balance of probabilities that he was a semi-skilled employee who was self-employed.

[60] Similarly, with regard to proof of income, the Plaintiff has failed on a balance of probabilities to establish that he earned the amounts that he presented before court. Firstly, it is disquieting that he told this Court that he earned a net income of 70 000.00 Meticals per annum. On the other hand, Ms White was categorical during her examination in chief that the Plaintiff told her that his net income was 35 000.00 Meticals per annum.

[61] Confronted with this apparent discrepancy, the Plaintiff's counsel attempted to spin it by suggesting to Ms White that the conflicting amount might have been the result of the Plaintiff and she misunderstanding each other. It is inconceivable that all the contents of her report are correct and that confusion only crept in when the amounts were discussed. This happened in circumstances where Ms White had an interpreter throughout the consultation. This is highly unlikely. The evidence of both the Plaintiff and Ms White on this aspect is improbable and it is rejected.

[62] Assuming that the court was willing to accept that the Plaintiff indeed earned the stated amounts, the Plaintiff failed to demonstrate that any amount went through his bank account or that he had tax records showing that he paid tax for what he earned. In an attempt to explain this, he stated that he was paid in cash. However, this comes head to head with his concession that most of his payments came from three large regular customers who paid him through the bank. Asked where the bank records are, conveniently he said that the bank had closed all of them.

[63] The Plaintiff could not even produce proof that he paid tax to the tax authorities for his income. This would have served as proof that indeed he earned the amounts that he claims. What is strange is that all this information could have been obtained with relative ease. If that is the case, the obvious question is, why did the Plaintiff

not do so? The answer is not difficult to fathom – the amounts are imaginary. The amounts upon which the actuary based her calculations must be incorrect and it was for this reason that I requested a recalculation.

[64] The industrial psychologist referred to two affidavits of two labourers, Messrs Machaieie and Muianga, claiming to have been in the employ of the Plaintiff before the collision. Another affidavit referred to is one by an alleged former employer, Mr E Nhamago who claims that the Plaintiff was working for him prior to the collision earning an amount of 90 000.00 Meticals per annum. The Plaintiff made no reference to Mr Nhamago during his testimony in court. That said, I note the actuary's remark that the income stated by Mr Nhamago was not utilized for purposes of the calculation of the Plaintiff's loss of income.

[65] The employment of Messrs Machaieie and Muianga is confirmed by the Plaintiff in his affidavit albeit that their salaries differ remarkably. The Plaintiff's evidence in court was that he paid the labourers approximately R200.00 per week whereas Messrs Machaieie and Muianga declare that he paid them 5 000.00 and 7 000.00 Meticals per month respectively. The affidavits were introduced to serve as proof of employment, the amount earned and how much profit the Plaintiff made.

[66] The affidavits do not and cannot constitute proof of the Plaintiff's income nor can this Court use such information to infer that the Plaintiff's income was 70 000.00 Meticals per month. Moreover, this happens in circumstances where this court was not advised why the two could not testify in court or virtually. This court also find it extremely strange that Messrs Machieie and Muianga knew that their employer, the Plaintiff, made a profit of 70 000.00 Meticals per annum. Such information is usually not disclosed to employees.

[67] Besides, it is not precisely clear how much the Plaintiff paid the labourers, if there were any such labourers at all. His evidence is radically different from that stated in the affidavits and his own before court. The Plaintiff has not demonstrated that

he was skilled or semi-skilled, self-employed, earning income in the amount alleged nor that he employed two labourers that he paid the amount stated at the time when the collision occurred. As such, he has failed to prove that he has lost income pre-collision.

<u>FUTURE LOSS OF EARNINGS</u>

[68] The above said, for future loss of earnings, it can be assumed, as did the actuary, that he could have become employed on 1 January 2016 until 28 February 2022, which will constitute his past loss of income. His future loss of income for purposes of calculation of the loss will begin on 1 March 2022 until his retirement age, assumed to be 65. In the result, the injuries of the Plaintiff and their sequelae are accepted. In essence, the court has no difficulty in admitting the evidence of Dr Trotsky, the othorpaedic surgeon, and parts of Ms Cruickshank, the occupational therapist. Such evidence would, in the main pertain to the sequelae of the injuries and not of his training or qualification.

[69] I have already mentioned that the Plaintiff is contending for contingency deductions of 5% and 15% on past and future loss of earnings respectively. It is noteworthy that the Plaintiff invokes those normal deductions in circumstances where he had no skills or striking income on which to base a calculation. The contingencies to be applied in this specific case should be higher than normal. The authority of Goodall *supra* is that the longer the period over which the contingency are to be applied, the higher the contingencies and the shorter the period, the lower the contingencies.

[70] 5% for past loss and 15% contingency deductions for future loss are too small if one has regard to factors such as:

70.1 the possibility of mistakes having been made in the determination of the life expectancy of the Plaintiff;

70.2 Accidents which may affect his earning capacity and life expectancy;

70.3 Circumstances which would increase or decrease his cost of living;

70.4 the likelihood of illness, inflation and adjustment for costs of living allowance;

70.5 the fact that the Plaintiff lives in a violent and lawless neighborhood which increases the risk of him being killed or assaulted; and

70.6 the likelihood of the Plaintiff being fired or retrenched.

[71] I might add that the harsh reality is that, young adults with grade 12 qualifications and even university qualifications struggle to find employment. In all probabilities therefore the indication is that the Plaintiff, armed with a Grade 9 qualification, which was not even proved, with a severely injured right leg, would not have been spared from these stark complexities in his life.

[72] This Court prefers to employ the method referred to in Paragraph 52.2 *supra*. I have noted that the actuary did not apply any contingencies whatsoever. In that event the court will consider all appropriate circumstances and apply what it regards as fair and just. The court will therefore with the figure suggested by the actuary in mind apply contingencies such as those mentioned under Paragraph 70 *supra*. Furthermore, this court is not satisfied with the rapid advancement of the Plaintiff from the lower quartile to the upper quartile. To be specific, from earning R7 700.00 per annum at age 35 to R97 000.00 when he turns age 45.

[73] The actuary has made provision for two basis of calculation. The one extends to age 65 while the other goes up to age 70. The motivation for the latter was the alleged self-employment of the Plaintiff. In other words, the argument was that in

most cases people who are self-employed usually work beyond the normal age of retirement. Now that I have found that the Plaintiff was not self-employed and that the cut-off must be age 65, there is no reason to take it that far.

CONTINGENCIES

[74] Having taken all the factors into consideration, I have come to the conclusion that 10% contingency deduction be applied to the amount of past loss while 25% should be applied to the future loss of earnings. After applying those contingencies the total award comes to R1 206 376.65….

ORDER

[75] In the circumstances, I make the following order:

1. The Defendant is directed to pay to the Plaintiff an amount of R1 206 376.65;

2. Interest on the amount of R1 206 376.65 at the prescribed rate of interest if the amount is not settled within 14 days of the date of this order;

3. The Defendant will bear the costs of the Plaintiff.

[redacted]

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 02 February 2022 at 10:00.

APPEARANCES:

Counsel for the Plaintiff:	**Adv L Botha**
Instructed by:	**Du Toit-Smuts Attorneys**
Counsel for the Defendant:	**No Appearance**
Instructed by:	
Date of Judgment:	**02 January 2022**