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

20/06/2022

CASE NO: 1851/2021

In the matter between:

GANON DZUNISANI NHUBUNGA Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] This is a delictual claim emanating from a motor vehicle collision between the Plaintiff and motor vehicle with Registration letters and numbers DTX 3 MP. The collision happened on 23 September 2012 at Dwarsloop in the district of Bushbuckridge in Mpumalanga Province, at about 16h30. When the collision occurred, the Plaintiff was a pedestrian. In consequence of the collision described aforesaid, the Plaintiff sustained multiple injuries.

[2] Believing that the Defendant was as a result of the negligent driving of the driver of motor vehicle DTX 3 MP liable to compensate him for the resultant injuries, he lodged a motor vehicle accident claim against it. The action was initially defended but the Defendant subsequently withdrew the mandate that it had given to its attorneys causing the matter to become essentially undefended. When the matter served before me on 18 October 2021, I was advised that merits and quantum had been settled on an earlier date on the basis that the Defendant would be liable for 80% of damages that the Plaintiff may subsequently prove against it.

[3] To this end, the Court was provided with an order of the Gauteng Division dated 8 October 2018, which was evidently prior to the transfer of the matter to this Court. As such, the purpose of these proceedings is to assess and dispose of the quantum part of the claim. Both parties have appointed experts who, following their examination of the Plaintiff or consultation with him, have compiled reports describing their findings.

[4] I note that of all these experts only the Orthopaedic Surgeons have compiled joint minutes. The action is undefended consequently it did not come as a surprise that majority of the Plaintiff's experts gave evidence in Court while those of the Defendant did not. I cannot take the reports of the Defendant into consideration because they were not presented to Court nor was there a request on behalf of the Defendant that they be

admitted into evidence. Additionally, I have no pre-trial minutes to guide me on what the status of those reports is.

INJURIES

[5] The Mapulaneng Hospital clinical notes record the injuries as fractures of the left tibia and fibular distal 1/3, abrasions on his left foot and the anterior aspect of the tibia and a head injury, which consisted mainly in lacerations to the scalp. Treatment comprised x-ray examination of the left tibia and fibular, suturing of all his scalp lacerations and analgesics. Later, when the Plaintiff received further treatment at OR Tambo Memorial Hospital in Boksburg, doctors operated on his left leg to insert a nail. The fractures are stated to have united without any complications and the nail is to be removed.

[6] In their joint minute, Drs Preddy and Tladi record the injuries sustained by the Plaintiff as fracture of the left tibia and fibula, scalp laceration, left foot abrasions and left upper limb abrasions. The treatment administered on the Plaintiff while admitted in both hospital is common cause between the doctors. The treatment that he received at Mapulaneng Hospital consisted in the suturing of the scalp laceration, analgesia, dressings, back slap cast to the left power leg and antibiotics. He underwent an intramedullary locking nail procedure as an 'open reduction and internal fixative' ("ORIF") while at OR Tambo Memorial Hospital.

[7] Drs Preddy and Tladi examined the Plaintiff on 30 September 2015 and 3 October 2018 respectively. Both the Mapulaneng and OR Tambo Memorial Hospitals did not capture the right shoulder injury detected in 2015 by Dr Van Rensberg, a Radiologist, and subsequently reported by Dr Preddy in his medico-legal report. Similarly, when Dr Tladi examined the Plaintiff in 2018, she neither observed or noted the Plaintiff's shoulder injury yet the x-ray report captures it as follows:

"A fracture is noted of the superior aspect of the body of the scapula. Thefracture extends to the glenoid cavity. The radiographic features are suggestive of a non-united fracture with aresidual lucency still demonstrated. The glenoliumeral joint space is otherwise intact. The visualized clavicle and ribs are intact."

PLAINTIFF'S COMPLAINTS TO THE RESPECTIVE DOCTORS

[8] On 3 October 2018, the Plaintiff told Dr Tladi that his pain was intermitted in nature. He advised her further that it was exacerbated by prolonged walking, lifting of heavy weights and inclement weather. He was unable to walk for long distances. On 30 September 2015 when he saw Dr Preddy, he complained that he limped on the left leg. He could not run and experienced pain when he walked for long periods. His leg swells if he stands for long and often wakes up at night because of pain coming from the left led. He reiterated to Dr Preddy that inclement weather intensified his pain.

[9] Both doctors noted that the Plaintiff was experiencing recurring headaches for which they deferred his complaint in that respect to a Neurosurgeon or Neurologist. It is common cause that the Plaintiff sustained a head laceration at the occiput. The magnitude of this injury is not recorded anywhere except by the Neurosurgeon of the Defendant, Dr Mosadi whose report, for reasons described above, I cannot consider because it is not before me. It should suffice to state that it is stated in the medical records that following the collision, the Plaintiff lost consciousness and only woke up in hospital. The GCS registered his level of awareness on admission at the Mapulaneng Hospital at 15/15.

[10] On the question of injuries sustained by the Plaintiff, all the other experts take their queue from Drs Peddy and (Mosadi, the Neurosurgeon. For reasons that I have already stated above, I reiterate that I cannot take into account the report of Dr Mosadi as his report is essentially hearsay. That leaves me with the report of Dr Preddy as the only one that describes the injuries of the Plaintiff.

EVIDENCE

[11] As could be expected, the evidence levied before Court was not challenged because the matter was not defended. That said, I must emphasise that the weight and pertinence of their testimony and sequelae lean heavily on the accuracy of the injuries described by Dr Preddy in his report. If the injuries are incorrect, so will those captured in the reports of other experts who depended on it for their inferences.

[12] Under the heading: Assessment Summary, Messrs. Mphuthi and Maye state as follows:

"Neuropsychological test results indicate impaired neurocognitive and psychosocial capacity and function, particularly in the following domains: cognitive flexibility, information-processing speed, executive function, psychomotor speed, motor speed,reaction time and memory.

Mr Nhubunga's EEG results fall within the normal range, and brain connectivity measures suggest problems with erratic cortical processing. This indicates vulnerability to problems with attention/concentration.

As reviewed above, his performances on psychometric testing were likely influenced by premorbid cognitive-intellectual capacity, as well as the disruptive impact of chronic painand mood-effects on his attention/concentration, motivation and frustration-tolerance.

Conclusion regarding traumatic brain injury

Taking all the foregoing into account, we conclude that Mr Nhubunga sustained a mild concussion at the time of the accident. This is evidenced by the brief period of retrogradeamnesia, the prolonged period of post-traumatic amnesia, the period of irritability, confusion, forgetfulness and restlessness, according to Mr Nhubunga's account of his hospitalization, and the scalp lacerations noted in the hospital records.

We nevertheless defer to the diagnoses of neurosurgeons regarding the severity of braininjury."

[13] Ms D Mathebula, the Occupational Therapist, was appointed by the Defendant to

examine the Plaintiff and to furnish her report thereafter. She saw the Plaintiff on 13 November 2015. Her testimony stood unchallenged and I have no reason not to accept it. However, it must be recalled that to the extent that she refers to a sublaxed right shoulder, her evidence is incorrect. I will elaborate later on this aspect of this judgment.

[14] Ms Mathebula assessed the Plaintiff with the objective of firstly, determining the extent to which the motor vehicle accident has affected his functional abilities to participate in daily activities. Secondly, furnishing a professional opinion on the financial implications of the Plaintiff's injuries. Thirdly, making recommendations for the Plaintiff's future care. In her endeavour to accomplish the above, Ms Mathebula conducted various tests among which were the pain, cognitive and psychosocial assessments of the Plaintiff.

[15] Ms Mathebula records that the brief pain inventory was utilized to measure the degree of pain. The scale assesses both (quantitative) subjective experiences and (quantitative) amount of pain that the client has experienced within a short period of time such as within one or two weeks. The scale uses 0-10 numeric rating scale for item rating. It measures the severity and how the pain interferes with the quality of life. The Plaintiff experienced pain on right shoulder and left leg, when palpating the injured sites. Similarly, when requested to perform certain movements, he evinced objective behavioural signs of pain by grimacing. The severity of pain generated using the above method, out of a scale of 0-10, the Plaintiff measured 6/10. This amount of pain, she states, would interfere with his ability to engage in general activities such as walking and running.

[16] On assessment of the Plaintiff's hand function, Ms Mathebula records that this was found to be intact in both hands. In any event, she continues, there was also no evidence of notable injuries to the hands. Equally, with regard to motionless sitting balance, he was able to sit without any support. Insofar as dynamic sitting balance was concerned, he was able to maintain his dynamic sitting position. When an external force was applied to affect his base of support he was able to regain his balance and also extend his hand to protect himself.

[17] The Plaintiff was able to stand immobile without external support. Ms Mathebula found the Plaintiff's dynamic standing position to be fair as he could perform activities in standing position without losing balance. He could stand on tip toes but could not hop on one leg. His sitting posture was fair. His shoulders were not aligned with the right shoulder being slightly lower than the left. His back was not slouched when sitting. He maintained an upright posture. He was able to position both his feet on the floor and knees maintained a 90° angle.

[18] Ms Mathebula's observation of the Plaintiff's sitting endurance is that he did not show signs of fatigue and discomfort during the evaluation. The Plaintiff succeeded to keep a sitting position for the duration of the assessment. His standing endurance too was observed to have been good. That said, he complained of physical fatigue and pain when he had to walk for long distances.

[19] On cognitive and psychosocial assessments, which she states includes orientation to time, place name, memory, intellectual insight, problem solving skills, decision making, attention, concentration, judgement and thought processes, Ms Mathebula says that all his cognitive abilities were assessed and confirmed to be intact. The Plaintiff was able to walk independently but does so with a limp. Ms Mathebula writes that the Plaintiff told her that he could not walk for long distances anymore. Likewise, he experiences difficulty with running. The Plaintiff could stand on one leg while raising the other but experienced difficulty with weight bearing on the left leg.

[20] The Plaintiff could fully squat. Regarding self-care activities, which refers to the ability to bath independently, toilet use, bathing and grooming, the Plaintiff is said to have come well-groomed and tidy. He informed Ms Mathebula that he experienced difficulty with combing his hair, bathing and dressing. Insofar as use of public transport and money management, he reported that he was fully independent. He assists to make shopping at home. On home management, which refers to activities such as cleaning the house, cooking and making one's own bed, the Plaintiff advised Ms Mathebula that prior to the collision, he assisted with most of the chores but after the injury he only does those

activities that do not cause him pain.

[21] Prior to the collision, the Plaintiff is said to have been unemployed and busy with upgrading his Grade 12. Following the collision and after undergoing several medical consultations and examinations, the Plaintiff was unable to continue with his job studies. He is currently said to be presenting with physical problems, pain and walking with a limp favouring the left leg. He played football before the collision but cannot do so anymore as he cannot run. Ms Mathebula is of the opinion that the physical problems with which he now presents are negatively affecting his ability to perform daily living activities that he performed before the collision. She recommends the following medical management:

21.1 Specialist Physician;

21.2 Continued rehabilitation consisting in Physiotherapy for pain management techniques, improvement of joint range of motion, strengthening of muscles, and mobilization;

21.3 Domestic assistance with some daily activities;

21.4 Orthopaedic consultation for sublaxed shoulder.

[22] Ms Mathebula concludes with loss of amenities of life and she states:

"The claimant was involved in a motor vehicle accident, which left him with injuries on his left leg and right arm. He received appropriate conservative and surgical treatments during his hospitalization. He currently presents with residual symptoms that are restricting his abilities to fulfil his pre-accident roles (particular his scholastic activities, self-care and Leisure activities). His current functional limitations also limit his ability to enjoy meaningful life with family and friends as he did before the accident. His abilities to perform daily activities independently have been negatively affected as result of his injuries. The claimant had dreams and aspirations about his career path."

[23] Dr M Malaka is the Plaintiff's Industrial Psychologist. He looked at the pre and post collision employment prospects of the Plaintiff. He states that the collision occurred when the Plaintiff was approximately 21 years old. He assumed that, but for the accident, the Plaintiff would have completed Grade 12 and proceeded to attain a tertiary education. To decide on the impact, the collision has had on the Plaintiff's abilities and future prospects, he found it necessary to investigate the background of the family of the Plaintiff, their age and education.

[24] The Plaintiff's father, Mr Deference Nhubunga, passed standard ten (Grade 12). He has a civil engineering degree from University of KwaZulu Natal. He works at Thaba Chweu Municipality as a Projects Manager. His mother who has since passed on was Nunu Mokoena. She passed Grade 12 following which she proceeded to acquire a Nursing Diploma. She worked at Barberton Hospital as a nurse. The Plaintiff is the second born of three children the first being Innocent. Innocent has matric and is currently unemployed and fully dependent on his father. Katlego, the third child, is a learner at Nkothesi Primary School.

[25] The highest grade achieved by the Plaintiff is Grade 11, which he attained at Masana High School. He attempted Grade Twelve in 2009 but failed. In 2010, he took a 'gab-year. In 2011, he enrolled at the Germiston FET College studying Marketing but dropped out as a result of insufficient financial support. His attempt to rewrite Grade 12 in 2012 foiled as he became involved in the accident. The Plaintiff informed Dr Malaka that he holds a Code 10 driver's license. Dr Malaka construes the background information of the Plaintiff's family to suggest that the Plaintiff had prospects of completing his high school education and to proceed beyond.

[26] Dr Malaka assumed that, but for the collision, the Plaintiff would have obtained Grade 12. Armed with a matriculation certificate, continued Dr Malaka, the Plaintiff would have acquired a two or three year certificate/diploma. The diploma would have empowered him to obtain a semi-skilled work at **R19 500.00 - R56 000.00 – R143 000** per annum. Dr Malaka adds that after ten years or so, given more experience and even

in-house training as well as further studies, he would have earned at Paterson B1/B2 level. At fifteen years or so, he could have earned at Paterson B5/C1 level. His ceiling would have been at Paterson C2/C3 level at age 45 years. At this stage, he could have qualified for general annual increment until his retirement at the age of 65 years.

[27] Taking his queue from the Orthopaedic Surgeon, Neuropsychologist and Occupational Therapist, the Industrial Psychologist, Dr M Malaka, states that it is plain from the contents of the reports of the aforesaid experts that since the collision, the Plaintiff battles to complete his schooling and to continue with his work goals. Due to the Plaintiff's Orthopaedic and Neuropsychological deficits, chances of successful employment or the ability to generate income is limited. Dr Malaka further avers that the Plaintiff has therefore been rendered a vulnerable worker. His work capacity has been drastically compromised and seems ordained for a sympathetic type employment, which is hard to come by.

[28] The report of the Industrial Psychologist has set the stage for the actuary. The calculations of the actuary derive, in the main, from the report of the Industrial Psychologist. Thus, in appropriateness or correctness of such a report will reverberate through to the actuarial calculations. The assumptions made by the actuary in arriving in the answer will as such, either be proper or incorrect depending on the Industrial Psychologist's report and the information upon which it in turn relied.

ISSUES

[29] The first matter that requires the attention of this Court is which of the injuries ought to be taken into consideration when determining the loss of earning capacity of the Plaintiff. This becomes necessary because the injuries recorded by the Mapulaneng and OR Tambo Memorial Hospitals are different from those noted by the Plaintiff's experts. Secondly, the Court ought to determine the value of the award that it should make given the injuries sustained by the Plaintiff and their sequelae.

LEGAL FRAMEWORK AND ANALYSIS

DETERMINATION OF INJURIES SUSTAINED

[30] When the Plaintiff was admitted to the Mapulaneng Hospital on 23 September 2012 the injuries noted in the hospital records were a scalp laceration, fractures of the left tibia and fibula distal 1/3 and abrasions on his left foot and the anterior aspect of the tibia. When compiling their joint minute, Drs Preddy and Tladi added to this list of injuries, abrasions of the left arm. Putting his report together on 30 September 2015, Dr Preddy made a further addition of a right shoulder injury.

[31] The x-ray examination of October 2018 on which Dr Tladi based her findings did not detect the shoulder injury. Even more disquieting is that the Mapulaneng Hospital, which detained the Plaintiff for approximately one or two weeks prior to transferring him to OR Tambo Memorial Hospital did not note the shoulder injury. An enquiry regarding the genesis of the right shoulder injury is inevitable. In other words, how did the Mapulaneng Hospital on 23 September 2012 and Dr Tladi on 3 October 2018 miss this serious right shoulder injury detected by Dr Preddy in 2015?

[32] Given the nature and gravity of the right shoulder injury described above, it is unlikely that the Plaintiff would not have reported it to the treating doctors at the hospital. Almost three years after the collision, Dr Preddy noted the right shoulder injury. Three years following Dr Preddy's report, 2018, the Plaintiff omits to inform Dr Tladi of the shoulder injury. Dr Tladi is unequivocal that he examined the Plaintiff's upper limbs and found no deformities with both.

[33] There are several possibilities but they are all speculative. First, there was never a right shoulder injury and that is why it was not reported on admission at the hospital. Second, there might have been an intervening act that resulted in an injury to the Plaintiff's right shoulder and that is what the Radiologist detected. Third, the shoulder injury pertains to another person whose films mixed with those of the Plaintiff on submission to Dr Preddy. Fourth, the Plaintiff had completely recuperated when he was examined by Dr

Tladi in 2018. On any one of these the Defendant cannot be held liable for the compensation of the Plaintiff.

[34] Turning to the fractures of the left tibia and fibula. It is understandable that the complaints and sequelae reported by the Plaintiff to Dr Preddy were more severe. The reason is not difficult to fathom – it had been only three years since the left leg injury and possibly it had not settled. When Dr Preddy saw him in 2015, he was experiencing pains from the injured site, he could not stand for long without pain, could not walk or run for long distances without being subjected to pain and his left leg would swell when he stood for protracted periods. This picture had changed in 2018 when the Plaintiff visited Dr Tladi because his complaints were captured as follows:

"PRESENT MAIN COMPLAINT

I recorded the following history:

- *Left leg pain:*
    - ✓ *This pain is intermittent in nature.*
    - ✓ *Exacerbated by prolonged walking, lifting of heavy weights and inclementweather.*
    - ✓ *He is unable to walk for a long distance.*
- *Recurrent headaches:*
    - ✓ *Opinion deferred to a neurosurgeon/ neurologist.*
- *No other symptoms reported."*

[35] These complaints are obviously less serious than those recorded in 2015 by Dr Preddy. I attribute the severity of the complaints in 2015 to the period over which healing

had to occur. Although some of the complaints were persisting in 2018, they were not as serious as those recorded by Dr Preddy in 2015. Both doctors agree though that the fractures have united without any significant difficulties and that all that must happen is for the Plaintiff to undergo a further surgery for the removal of the intramedullary nail. Additionally, and worth mentioning, is that both doctors examined the Plaintiff prior to the removal of the intramedullary nail, which on its own causes discomfort because it is a foreign object inserted in his left leg.

[36] As such, this Court is somewhat disadvantaged because it cannot speculate on the Plaintiff's recuperation after the removal of the nail. From the joint minute though it would appear that the operation is not anticipated to bring about untold amount of prolonged pain. That said, it must be noted that the Plaintiff will nonetheless be immobile for approximately six weeks while recovering. Most of the Plaintiff's medico-legal reports are stale making reliance on them exceedingly difficult as demonstrated by the 2018 report of Dr Tladi. The Plaintiff ought to have taken the responsibility of updating them.

[37] The conclusion of the Court on the right shoulder and left leg fractures is that the former injury cannot be considered because the Plaintiff has not proved that he sustained it during the collision on 23 September 2012. Insofar as the left leg injury is concerned, I note that although both Orthopaedic Surgeons report on residual pain, their reports were made prior to the suggested operation to remove the nail. The doctors do not record of any possible complications that may be brought about by the awaited operation. This is an aspect that the Plaintiff should have investigated further with relevant experts. I therefore conclude that from the reports of both Orthopaedic Surgeons, the left leg injury will not hinder the Plaintiff to compete in an open labour market.

[38] The last major injury of the Plaintiff is the scalp lacerations. The only indication of the severity of this injury is recorded by Messrs. Mphuthi and Maye, Neuro Clinical Psychologists. Having consulted and extracted information from the Plaintiff they reasoned that the Plaintiff has sustained the following injuries:

"Taking all the foregoing into account, we conclude that Mr Nhubunga sustained a mild concussion at the time of the accident. This is evidenced by the brief period of retrogradeamnesia, the prolonged period of post-traumatic amnesia, the period of irritability, confusion, forgetfulness and restlessness, according to Mr Nhubunga's account of his hospitalization, and the scalp lacerations noted in the hospital records.

We nevertheless defer to the diagnoses of neurosurgeons regarding the severity of braininjury."

[39] It must be noted that the recommendation that the Plaintiff be referred to a Neuro-Surgeon or Neurologist was not exploited by the Plaintiff. Once again, the Court's ability to fully assess this injury is impaired as it finds itself having to rely on experts such as Neuro Clinical Psychologist to comment on brain injuries instead of a proper diagnosis by a Neurosurgeon or Neurologist and then the former to report on sequelae flowing from those injuries. An added difficulty is that that the Court cannot even be certain of the circumstances that caused the Plaintiff to fail Grade 12 in 2009 as no records of his scholastic performance prior to that have been provided.

[40] The only manner in which the Court can assist is to accept the subjective report of the Plaintiff to the various experts that he suffers pain that emanates from his occiput. This pain is directly connected to his cognitive challenges as it and will continue to limit his ability to apply himself academically or in his work situation. The amount of this pain cannot be the cause of all his cognitive problems because part of it was occasioned by the right shoulder and left leg injuries.

PAST MEDICAL EXPENSES

[41] I have noted that the Plaintiff also claims an amount of **R50 000.00** for past medical expenses but has provided no proof that these amounts have indeed been incurred. I have as a result ignored the amount claimed as there is no basis for claiming it. I have noted that the injuries of the Plaintiff have been classified as not serious. As such, I have ignored the amount claimed under general damages. Insofar as past and future loss of incomes, I have been furnished with the report of Mr Gert Du Toit of Independent

Actuaries and Consultants (IAC) on which I intend to rely to produce the amount that I will award below.

LOSS OF EARNING CAPACITY

[42] Insofar as loss of earnings is concerned, two matters come into play in this case. Firstly, the fact that initially the pains that the Plaintiff suffered and had to be taken into account included the right shoulder and the left leg. It will be recalled that the right shoulder and the left leg have now been taken out of the equation. The pains that should be regarded as contributing towards his cognitive deficits is now only one and that is the headaches.

[43] Secondly, the scholastic record of the Plaintiff was not supplied and one cannot with confidence, as the Industrial Psychologist does, predict with some measure of certainty that the Plaintiff would have ultimately passed Grade 12 and acquired a tertiary education qualification.

[44] Customarily, the above difficulties would be addressed by the application of higher than normal contingencies. However, that will not address the problems in this case because the amount claimed for loss of earning capacity is way off the mark because of the inclusion of the shoulder and the left leg injuries. Another complicating factor in this case is that assessment of pain is exceedingly hard. The reason for that is its subjective nature. Seriousness of pains will differ from one person to the next as some individuals have a high threshold whilst the opposite is true in others.

[45] Given the fact that the original cause of the pains was based on three injuries two of which have been discarded for reasons stated above, the amount of the award should be discounted by two third prior to discussing contingencies. I note that the actuary has suggested two scenarios. In the first scenario, the amount of the loss is **R3 285 195.00** while in the second, it is **R4 381 293.00**.

[46] One third of **R3 285 195.00** is **R1 095 065.00**. This amount has taken into account

5% contingency deductions on the amount of **R157 702.66** and **15%** contingency deductions on the amount of **R937 362.33**. It is trite that there are fundamentally two ways in which the Court can approach this subject and these are:

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

46.2 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.* [1]

[47] 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 it to appraise such financial loss. The lowest possible deductions have been made because I have assumed that each injury has contributed one third to the pain experienced by the Plaintiff without any employment of a known scientific method.

[48] This Court prefers to employ the method referred to in Paragraph 46.2. The amount of **R1 095 065.00** to which I have referred above, has taken into consideration all appropriate circumstances and applied what it regarded as fair and just. The contingencies applied include, among others, the following:

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

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

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

[1] 1984 (1) SA 98 (A)

48.4 The likelihood of illness, inflation and adjustment for costs of living allowance;

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

48.6 The likelihood of the Plaintiff being fired or retrenched.

[49] The list above of possible contingencies is not exhaustive but it is merely intended to serve as guidance. However, it is also true that one cannot always assume that the worst will happen to a Plaintiff. In this regard see *Southern Insurance Association Ltd v Bailey supra* where the court stated the following:

"Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, 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 the "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. The rate of discount cannot, of course, be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case. In making such a discount for "contingencies" or the "vicissitudes of life", it is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable."

[50] Having considered the personal circumstances of the Plaintiff such as the fact that life would not necessarily have been rosy for him pre-collision, that he still has a residual earning capacity and that he may still be employed as a result of his relatively young age, the Court set the contingency deductions on past and future loss of earnings at **5%** and **15%** respectively. The result is an amount of **R1 095 065.00** to which I have made mention above.

ORDER

[51] In the result, the following order is made:

1. The Defendant is liable for payment of **R1 095 065.00** to the Plaintiff;

2. Interest *atempore morae* on the aforesaid sum at the prescribed rate of interest per annum, from the date 14 days after the date hereof to date of payment; and

3. The Defendant is liable for payment of the costs of the Plaintiff.

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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 20 June 2022 at 10:00.

APPEARANCES:

Counsel for the Plaintiff:	**Miss BN Manzini**
Instructed by:	**BC Masinga Inc.**
Counsel for the Defendant:	**No Appearance**
Instructed by:	
Date of Judgment:	**20 June 2022**