

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **18711/2017**

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



24 JUNE 2024

DATE

SIGNATURE

In the matter between:

LEGEMO: DEWET SOLOMON

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

BOKAKO AJ

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 24 June 2024.

INTRODUCTION

1. This matter pertains to an action for damages arising from a motor vehicle collision on 30 March 2015 at Kwa-Thema Springs, involving the pedestrian, Solomon Dewet Legemo (the “plaintiff”). This is a delictual claim against the defendant for personal injury sustained by the plaintiff.
2. The plaintiff launched a claim against the Road Accident Fund in terms of section 17 of the Road Accident Fund Act 56 of 1996 (the RAF Act) as a result of the injuries fully set out in the summons. The matter proceeds in respect of both merits and quantum. The matter was enrolled for trial and came before the court on 24 February 2024. This judgment was reserved after the court had listened to extensive oral and written submissions by counsels for both parties.
3. The court heard the preliminary issue relating to the special plea raised by the defendant that the plaintiff has not complied with the provisions of section 24 (2) (a) of the RAF Act. The court found no merit in the special plea and dismissed it.
4. At the commencement of the trial, the defendant did not object to the handing in of the plaintiff's expert reports, and in terms of Rule 38(2) of the Uniform Rules, the plaintiff's expert reports were admitted into evidence. I must state that the defendant had two experts, but they were not called to testify.
5. The injuries sustained by the plaintiff were common causes and included the following: severe traumatic brain injury, hearing loss and loss of smell, and right femur fracture. Those described above severe traumatic brain

injury was accompanied by small right frontal subdural hematoma, right frontal hemorrhagic contusion, acute traumatic subarachnoid hemorrhage, and temporal bone fractures.

6. Currently, the plaintiff suffers from the following sequelae: pain in the injured areas, headache, he cannot carry heavy items, no sense of smell, no hearing on the left ear, he cannot run, he cannot sit for long and he cannot do heavy duties.
7. The recommended future medical treatment includes removing the locked femoral nail, hearing aids, psychotherapy, and occupational therapy.
8. The defendant failed to decide on the seriousness of the injuries despite the medical experts' RAF 4 form assessments, and consequently, the general damages were postponed sine die.

ISSUES IN DISPUTE

9. Both merits and quantum are in dispute. The plaintiff's amended particulars of the claim pray that the defendant should be held 100% liable for the plaintiff's proven and agreed damages. Based on the injuries sustained and the applicable case law, an undertaking for future medical expenses in terms of section 17(4) (a) should be awarded, and a total loss of earnings and/or earning capacity in the amount of R11 300 000.00 should be awarded.

10. The plaintiff demonstrated in his founding affidavit that the reasons for using an affidavit and viva voce for evidence are that: firstly, the defendant has not demonstrated intention to cross examine experts in respect of loss of earnings. Lastly, the application of contingencies on the actuarial report is within the court's discretion, and it is cost-effective to use the expert affidavit rather than giving oral evidence.

ON MERITS

11. Counsel for the plaintiff submitted that the issue for determination by the court is the issue of liability and the plaintiff's loss of earnings or earning capacity. The issue of general damages has been postponed *sine die*

12. The undisputed facts of the collision were that on 30 March 2015, the plaintiff parked his vehicle along Majola Street, Kwa-Thema, Springs. Majola Street is a single-carriageway with lanes in each direction. It was daylight, and the road visibility was clear. Bram Mauya Rumo (the "insured driver") drove a blue Toyota Corolla Sedan bearing registration letters and numbers NFX 228 GP (the "insured motor vehicle"), traveling east to west along Majola Street, Kwa-Thema, Springs.

13. The plaintiff was a pedestrian standing alongside the roadway, and as he was crossing the street from north to south using the designated and marked pathway, the insured driver ignored the stop sign and collided with the plaintiff in the middle of the road. The plaintiff sustained severe injuries as a result of the collision.

14. Counsel for the plaintiff submitted that the driver's action had established negligence because he failed to stop when the road signs instructed him to do so. He should have kept a proper lookout and applied the brakes timeously or at all. He failed to avoid the accident and the collision when, by exercising reasonable care and skill, he both could and should have done so. He needed to maintain sufficient control over the insured motor vehicle. He failed to give any warning of his approach. He encroached onto the plaintiff's path of travel and disregarded the interests of other road users, particularly those of the plaintiff. The defendant is, therefore, liable for 100% of the plaintiff's proven and or agreed damages.

15. The defendant contends, without calling witnesses, which the plaintiff's involvement in the pedestrian-vehicle accident is not in dispute; what is disputed is how the accident occurred and whether the plaintiff was also negligent and contributed to the accident.

16. According to the defendant's Counsel, the plaintiff did not keep the insured vehicle under constant observation as he assumed the car would stop at the stop sign. The defendant's Counsel contended that the plaintiff was also negligent and contributed to the accident. The Counsel urged the court to consider apportioning the damages on a 40 % basis against the plaintiff.

17. It is trite that the plaintiff bears the overall onus to prove, on a balance of probabilities, which the insured driver was driving negligently at the time of the collision. In **Stacey v Kent** 1995 (3) SA 344 (ECD) at 352i, Kroon J, writing for the majority of the full bench, put it in this way:

"The inquiry after the case remains whether the plaintiff has, on a balance of probabilities, discharged the onus of establishing that the

collision was caused by negligence attributable to the defendant. In that inquiry, the explanation tendered by the defendant will be tested by considerations such as probability and credibility."

18. It is also trite that no onus rests on the defendant to establish, on a balance of probabilities, the correctness of his explanation as to the circumstances which led to the event's occurrence. **Stacey v Kent**, *supra* at 352 and **Guardian National Insurance Co Ltd v Saal** 1993 (2) SA 161 (CPD).

19. The plaintiff took the stand and adduced direct evidence, and the defendant called no witnesses to testify on its behalf. Put differently, no version was proffered on behalf of the defendant.

20. I shall now examine the facts, evaluate the evidence, and apply the principles above of law to the facts.

21. On 30 March 2015, the plaintiff parked his vehicle along Majola Street, Kwa-Thema, Springs, and a single-carriageway with lanes in each direction. It was daylight, and the road visibility was clear. The "insured driver" drove a blue Toyota Corolla Sedan bearing registration letters and numbers NFX 228 GP and was traveling east to west along Majola Street. The plaintiff stood alongside the roadway, attempting to cross north to south. The plaintiff proceeded to cross the road using the pedestrian crossing pathway. As he entered the roadway, suddenly and without warning, the insured driver ignored the stop sign, ignored the plaintiff's right of way to cross the road, and proceeded to collide with the plaintiff as he was crossing the road. He further testified that he did not keep the insured vehicle under constant observation as he assumed that the car

would stop at the stop sign, and at that crucial moment, it was impossible for him to turn back as he was still in the middle of the road.

22. The evidence in court was slightly in conflict with what was stated in his statement signed on 14 December 2016. He testified in court that he saw the insured vehicle approaching the stop street some 50 meters away before the accident, yet in the written statement, he states that there was no car when he crossed and did not know what happened.

23. The plaintiff crossed the street at the pedestrian pathway and believed that the insured vehicle he saw 50 meters away would heed the stop sign and stop the car. Instead, the vehicle failed to stop and collided with him. The defendant argues that the plaintiff could not look for cars that might fail to stop at a stop sign.

24. According to Regulations 316 of the National Road Traffic Act of 93 of 1996, as stated by the plaintiff's Counsel, a pedestrian shall not walk on such roadway except to cross from one side to the other or for some other sufficient reason. A pedestrian on a public road which has no sidewalk or footpath abutting on the roadway shall walk as near as is practicable to the edge of the roadway on his or her right-hand side to face oncoming traffic on such roadway, except where a prescribed road traffic sign prohibits the presence of pedestrians on the roadway, no pedestrian on a public road shall conduct himself or herself in such a manner as to or as is likely to constitute a source of danger to himself or herself or to other traffic which is or may be on such road also a reasonable prudent pedestrian should not cross the road when doing so exposes him to the reasonable risk of collision with passing vehicles.

25. Counsel, on behalf of the plaintiff, urged the court to find in favour of the plaintiff and argued that according to the version of the plaintiff, which version was supported by his statement that the driver did not stop at the stop sign and the plaintiff reasonably believed that it was safe for him to cross the road. Therefore, she submitted that the insured driver was negligent. Clearly, this accident was unavoidable; the plaintiff could only proceed to cross the road, so the argument goes.

26. But Counsel on behalf of the defendant argued without a formal version from the insured driver that the insured driver was not the sole cause of the accident, in that the plaintiff acted contrary to a reasonable pedestrian and implored the court to find that the plaintiff contributed 40 % to the accident. It was contended that awarding 100% compensation to the plaintiff would be unreasonable, and a 40% - 60% apportionment of damages would, in the circumstances, be reasonable.

27. The defendant's Counsel referred the court to the case of **McMurry v H L & H (Pty) LTD** 2000 (4) SA 887 (N), where the court had this to say about the reasonable man:

"One knows that the reasonable man generally expects and is entitled to expect reasonableness rather than unreasonableness, legality rather than illegality, from others. (**Solomon and Another v Musset and Bright LTD** 1926 AD 427 at 433; **Moore v Minister of Posts and Telegraphs** 1949 (1) SA 815 (A) at 826). The reasonable man certainly does not, in general, regard himself as obliged to take steps to guard against recklessness or the gross negligence of others. (**South African Railways and Harbours v Reed** 1965 (3) SA 439 (A) This notional reasonable man generally complies with the law and always acts

reasonably. We know that the reasonable man is not a timorous faint heart, always in trepidation lest he or others suffer some injury; on the contrary, he ventures out into the world, engages in affairs, and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise (per Van Heerden JA in **Herschel v Mrupe** 1954 (3) SA 464 (A) 490F).”

28. The author W.E. Cooper, in *Delictual Liability in Motor Law* 1996 edition, pages 193-194, writes about a pedestrian's duty when crossing the road: "*A pedestrian who intends crossing a road should do so at an opportune moment, and he must exercise reasonable care. He must use his senses to ascertain whether any motor vehicles are approaching. He should keep a proper lookout; he should acquaint himself with the vicinity and scan the road to ascertain whether any motor vehicle on the road may be an actual or potential risk to his safety. Usually, a pedestrian will look to the left and to the right before entering the road. Once he reaches the center of the road, he should devote his attention to motor vehicles approaching from his left*". The court finds that the plaintiff could not have contributed 40% to the accident as submitted by the defendant but at least a minimum of 30%, in that he failed to devote his attention to the insured vehicle approaching the stop street 50 m away.

29. In this case, the court finds that the plaintiff unreasonably exposed himself to the reasonable risk of a collision. The court also finds that the insured driver had a duty to keep a continuous lookout for pedestrians and to observe them even in circumstances where the road is relatively devoid of traffic. The insured driver must also be constantly alert in anticipation of

the possibility of coming upon a pedestrian on the side of the road, keeping a proper lookout.

30. Accordingly, the court finds that the defendant can only compensate 70% of the plaintiff's proven damages.

COMMON CAUSE SUSTAINED INJURIES

31. The Plaintiff, Mr Dewet Solomon Legemo, took to the stand and testified in support of his claim and described the sustained injuries as set out here above. The plaintiff was unconscious immediately after the accident. The plaintiff had an initial dense phase of post-traumatic amnesia of approximately ten days.

32. The plaintiff's initial Glasgow Coma Scale (GCS) was 7/15. The plaintiff's severe traumatic brain injury / severe diffuse axonal brain injury was complicated by multiple focal brain injuries. The plaintiff suffers from the following sequelae: difficulty with concentration, post-traumatic amnesia, and short-temperedness; the plaintiff presents with an 8% chance of developing epilepsy because of the severity of the traumatic brain injury. Neuropsychological examination revealed significant impairment to short-term memory, attention, concentration, and some executive functioning, which has remained as sequelae of his head injury. As a result of the severe trauma to the brain, the plaintiff has sustained sensory neural hearing loss in the left ear and loss of smell. The plaintiff suffered a displaced fracture of the right femoral shaft fracture.

33. The plaintiff suffers from chronic pain. His right thigh pain could be related to the nail's stress shielding of fracture union and poor healing of the soft tissues around the healed fractures. It is recommended that the plaintiff undergo treatment, including removing the locked femoral nail, hearing aids, psychotherapy, and occupational therapy.

ISSUES IN DISPUTE: LOSS OF EARNINGS AND OR EARNING CAPACITY

34. The factual issue for determination by this court is whether the plaintiff has proven his case on the balance of probabilities regarding his pre-accident employment and earnings, career progression, and earnings potential now that the accident has occurred.

35. The plaintiff was 34 years old at the time of the accident. The plaintiff went to 25 Yakatit Hossana High School in Ethiopia, where he completed his grade 12. At the time of the accident, the plaintiff was self-employed as a supermarket owner and Forever Living products distributor. He testified that at the end of 2013, he joined Forever Living after being recruited by a friend. He started as a distributor and then moved to supervisor, assistant manager, and manager. He was a manager when the accident occurred. He would spend R4 600.00 to buy products (body supplements and beauty skin products). He was remunerated with 8% of the R4 600 for every recruitment made. He did not have a bank account, so his first three months' pay was kept by Forever Living until he opened the bank account. At the time of the accident, he was appointed a manager per the appointment letter. This is because he had already recruited 75 people who were required for the appointment to the position. His duties as a manager encompassed, amongst others, training people, rebuilding, and recruiting. As a manager, he earned around R41 800.00 per month. Post-accident, he did not go back

to work. He had 15 employees, and he paid each of them +-R6000 for five managers and +-R4 500 for the security guards and general assistants, which was a total of 10.

36. The plaintiff operated four grocery shops in Soweto and Johannesburg CBD, trading under the registered name Ukubhukuda Trading and 45 Projects (Pty) Ltd, registered number 2011/009531/23. The plaintiff operated the four grocery shops on a cash basis, making a profit of R131,000.00 per month. He received his Forever Living Products distributor income of R41 000.00 monthly into the ABSA personal banking account. He distributed the products from 2013 to 2015.

37. The business and tax accountant report that "the client has no reliable fixed income as all businesses collapsed and he has been unable to recover fully.

38. The industrial psychologist, Ms B Selepe, took the stand and testified to support the plaintiff's claim. Her general findings and conclusion were that the plaintiff had been rendered functionally unemployable due to cognitive and physical challenges as a result of the accident. Physically and mentally, he was not well, and it took three years to be expected.

39. During cross-examination, the industrial psychologist was referred to the orthopaedic surgeons and clinical psychologist's recommendations regarding future treatment. It was told to the expert that following the recommended treatment would improve the plaintiff's condition. The expert insisted that the plaintiff had been rendered functionally unemployable. The defendant contends that the plaintiff's failure to contact Forever Living to obtain collateral information, the expert indicated that she was not furnished with the details by the plaintiff. Upon being pressed,

she noted that she was satisfied with the business card and ABSA bank account to confirm the earnings.

40. The plaintiff filed reports of the following experts to support his claim for loss of earnings. The plaintiff procured only medico-legal reports. The parties agreed that the reports are what they purport to be, without admitting the truth and content thereof, unless a party objects to a particular document in writing.

41. Dr E.A. Mjuza, an Orthopaedic Surgeon, notes that the plaintiff has healed surgical scars on his right thigh. He suffered acute pains that lasted for months after the accident and suffered from chronic headaches, loss of smell sense, and deafness in his left ear. He suffers from partial permanent impairment due to his injuries. The plaintiff has reached MMI, WPI=22%, and the injuries sustained resulted in long-term severe impairment or loss of body function.

42. Dr. Gaida Del Fabbro, Clinical Psychologist, notes that the plaintiff is suffering from some symptoms of trauma but, more significantly, has an impairment to short memory, attention, concentration, and some executive functioning, which has remained as sequelae of his head injury.

43. Dr. JH Kruger, the Neurosurgeon, notes that the plaintiff has struggled with cognitive mental problems, executive mental problems, and psychological/psychiatric complaints; he sustained a severe traumatic brain injury. The whole person impairment (WPI) rating of 10% reached the MMI. Therefore, his injuries qualify as severe long-term impairment or loss of body function, severe long-term mental, behavioural disturbance, or disorder.

44. Dr Ridwaan Essa, ENT, noted that the plaintiff appears to have had severe trauma to the brain, resulting in sensory neural hearing loss and loss of smell. Audio logical review suggests hearing loss to the left ear. The audiogram suggests a profound mixed hearing loss in the left ear, and he requires a high-resolution C.T. scan of the left temporal bone.
45. An audio and speech therapist, Dr. Melanie Van Dam, noted that the proper visual examination of the external ear and ear canal revealed no apparent abnormalities. The results are congruent with pure tone findings revealing air conduction thresholds more significant than 60 dB H.L. at these frequencies, and findings indicate that the plaintiff presents with mostly normal hearing thresholds in the right ear except for a mild notch at 6000 Hz and a profound to severe to profound mixed hearing loss in the left ear.
46. Mahlangu T. (O.T.) notes that the plaintiff can cope with light types of work. He will not cope with handling medium loads as he previously did. He also anticipated that he would have challenges with complex activities and likely would need help managing the supermarket business as he used to.
47. Mrs. Babitsanang Selepe (Industrial psychologist) notes that the prognosis and outcomes severely hamper the plaintiff's prospects of securing employment that will render him functional and virtually unemployable in an open labour market.
48. According to the Actuarial Report Prepared by Namir Waisberg, According to Scenario 1, had the accident not occurred, the plaintiff would have been able to continue working until a retirement age of 70 years, and Scenario

2, had the accident not occurred, the plaintiff would have been able to continue working until a retirement age of 65 years. It has been assumed that the plaintiff would expect an average life expectancy based on his socioeconomic circumstances (Life Table 2 Males – Quantum Yearbook 2024). The period of past loss of earnings is eight years, precisely the period between the Accident Date and the Calculation Date in Scenarios 1 and 2.

49. The Actuarial calculation quantifies the loss of earnings and or earning capacity. In this regard, the appropriate contingency to be applied to the actuarial calculation is uninjured income: Past loss of earnings is 5%. The future loss of earnings is 15%. Injured income: Past loss of earnings is 5%. Future loss of earnings is 0%

50. Counsel argued on behalf of the plaintiff that a fair and reasonable award would be arrived at when the average of the above two scenarios is calculated, that being an amount of Capped Loss R7 228 305.00.

51. Counsel for the Plaintiff further submitted that alternatively, if the court is inclined to apply a higher pre-accident contingency, the plaintiff submits that the appropriate contingencies to be applied to the actuarial calculation are uninjured income: Past loss of earnings is 25%. The future loss of earnings is 35%. Injured income: Past loss of earnings is 5%. The future loss of earnings is 0%, and the total Loss of Earnings is R6, 516,688.90.

52. Further alternative with higher contingency, uninjured income: past loss of earnings is 5%. The future loss of earnings is 15%. Injured income: Past loss of earnings is 5%. The future loss of earnings is 80%. Total Loss of Earnings R5, 408,593.70.

53. In this regard, the court is of the view that considering that the only collaterals provided were regarding the Forever Living distribution of products income of R41 000.00 per month, the calculations with high contingencies proposed by the plaintiff counsel, resulting in the amount of R5 408, 593.70, seem to be reasonable and acceptable in the circumstances.

54. The court accepts as alleged that the plaintiff earned R41 000 per month from Forever Living Products, as evidenced by the ABSA bank deposits from January to May 2015. These deposits were indeed before the accident.

55. A court has broad discretion that must be exercised judicially when it determines fair and reasonable compensation for loss of income or earning capacity; contingencies remain the court's prerogative.

56. The approach to generally assessing damages for loss of earnings has been stated in **Goldie v City Council of Johannesburg** 1948 (2) SA 913 (W) ("**Goldie**") at 920 and **Southern Insurance Association v Bailie** NO 1984 (1) S.A. 98 (A) ("**Bailie**") at 112E—114F.

57. It was held in *Goldie* it is wrong to calculate damages based on an annuity and that while such an actuarial calculation affords helpful guidance, the proper basis is what the court considers, under the case, to be a fair and reasonable amount to be awarded to the plaintiff as compensation. The court must try to ascertain the value of what was lost on some logical basis and not on impulse or by guesswork.

58. *Bailie* also held that any inquiry into damages for loss of earning capacity is speculative because it involves predicting the future without the benefit

of crystal balls. All that the court can do is to make an estimate, which is often very rough. It has opened to two possible approaches. One is for the Judge to make a round estimate of an amount that is fair and reasonable. That is entirely a matter of guesswork. The other is to assess through mathematical calculations based on assumptions resting on the evidence. The validity of this approach depends, of course, upon the soundness of the premises, which may vary from the strongly probable to the speculative.

59. The court in *Bailie* further held that the actuarial approach is preferable where it has before it material on which an actuarial calculation can be made. The actuarial approach has the advantage of an attempt to ascertain the value of a loss on a logical and informed basis as opposed to an educated guess.

60. The actuarial calculation approach is more appropriate where career and income details are available. A court must primarily be guided by the actuarial approach (which deals with loss of income/earnings) before applying a mere robust approach (which will instead cater for loss of earning capacity) as the court would want to compensate a plaintiff as closely related to the facts as it can.

61. A trial Court has broad discretion to award what it, in the particular circumstances, considers to be a fair and adequate compensation to the injured party for his bodily injuries and their sequelae. *Vide AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A) E te 809B – C.

62. In assessing loss of earnings, a plaintiff must provide a factual basis that allows for an actuarial calculation. A process designed to determine actuarial/mathematical calculations based on the evidence and overall

assumptions resting on such evidence (“**the actuarial approach**”). This approach comprises (i) providing a factual basis upon which the loss of earnings is calculated and then (ii) applying appropriate contingency deductions.

63. *In Radebe v Road Accident Fund*¹ the court held:

The common theme is that courts must jealously protect their role and powers. Courts are the ultimate arbiters in any court proceedings. The facts that caused the expert opinions in this case are vital. The plaintiff supplied it.

64. It is trite that the court must determine the percentage of contingencies to be applied. Contingencies are a method of arriving at fair and reasonable compensation. The question of contingencies was dealt with in *Southern Insurance Association Ltd v Bailey N.O.*²:

"Any inquiry into damages for loss of earning capacity is speculative because it involves predicting the future without the benefit of crystal balls, soothsayers, augurs, or oracles. All that the court can do is make an estimate, which is often very rough, of the present value of the loss. Where the method of actuarial computation is adopted, it does not mean that the trial Judge is 'tied down by inexorable actuarial calculations.' He has a large discretion to award what he considers right' (*per* HOLMES JA in *Legal Assurance Co Ltd v Botes* [1963 \(1\) SA 608 \(A\)](#) at 614F). One of the elements in exercising that discretion is making a discount for 'contingencies' or the 'vicissitudes of life.' These include the possibility that the plaintiff may have less than a 'normal' expectation of life and may experience periods of unemployment due

¹ (2457/2017) 2020 ZAFSHC (unreported)

² [1984 \(1\) SA 98 \(A\)](#) at 113G and 116G-117A

to incapacity due to illness or accident, labor unrest, or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* [1980 \(3\) SA 105 \(A\)](#) at 114 - 5. The discount rate cannot be assessed logically: the assessment must be essentially arbitrary and depend upon the trial Judge's impression of the case.

65.Regarding the application of contingency deductions, Counsel made submissions concerning *Southern Insurance Association v Bailey NO 1984 (1) S.A. 98 (A)* at 116 - 117, wherein Nicholas JA stated that: "Where the method of actuarial calculations is adopted, it does not mean that the trial Judge is tied down by "inexorable actuarial calculations." He has a "large discretion to award what he considers right." Furthermore, Counsel submitted that according to the learned author Koch, "*general contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, saving travel costs, loss of employment, promotion prospects and divorce. There are no fixed rules as regards general contingencies*".

66.In *De Jongh v Du Pisani NO [2004] 2 All SA 565 (SCA)*, it was stated that a court should exercise discretion on the appropriateness of quantum to be awarded and to do so with due regard to the previously decided cases of similar facts and law. As well as to fairness to the parties.

67.The evidence before the court shows that the plaintiff's disabilities will continue to impair his capacity to work, and this court is satisfied, on a balance of probabilities, that the plaintiff's earning capacity has been diminished due to the collision.

68. In addition, there are un-contradicted expert versions that the plaintiff needs to be rendered functionally unemployable.
69. Contingency deductions allow for the plaintiff to have less-than-normal expectations of life and may experience periods of unemployment due to incapacity due to illness or accident.
70. In the present matter, the court has evidence that an actuarial/mathematical determination of the plaintiff's actual loss serves as a guidance. The plaintiff has established a basis on the available facts and probabilities to demonstrate that an actuarial calculation can be made in this case.
71. This court had considered submissions made by the plaintiff's Counsel, the defendant's Counsel, and the authorities they referred the court and the fact that the plaintiff had the benefit of gaining stable income before the accident and now suffered both physically and mentally because of it and faces the real possibility of it interfering with the prospect of steady income.
72. Consequently, I conclude that the plaintiff has suffered damages for loss of earning capacity.
73. The amount of R5 408 593.70 proposed by the plaintiff's Counsel is fair and reasonable. Such an amount is, in fact, lower than that proposed by the actuary on both the original and amended calculations provided to the court.
74. The court will have to factor in and deduct 30% from the amount of R5 408 593.70 as a result of applying the apportionment of damages.

75. The amount due and payable to the plaintiff after deducting the 30% apportionment is the sum of R 3 786 015,59

76. Consequently, I make the following order:

ORDER

1. The defendant is ordered to pay 70% of the plaintiff's proven or agreed damages.
2. An undertaking for future medical expenses in section 17(4) (a) should be awarded.
3. The defendant shall pay the plaintiff R 3 786 015, 59 for the plaintiff's loss of earnings and earning capacity.
4. The sum referred to in (3) above shall be payable within 180 (One Hundred and Eighty) days from the date hereof.
5. The defendant shall not be liable for interest on the aforesaid amount, if paid as per item number (4) above. Should the Defendant fail to make payment as aforesaid, then the Defendant shall be liable to pay interest at the prescribed rate.
6. The Defendant shall pay the sum referred to in (3) above into the Plaintiff's attorneys of record's trust account as follows: -

Name of Bank : Standard Bank
Account Holder : Rose Nkuna
Attorneys
Account Number : 010 424 164
Branch Number : 051001
Type of Account : Trust Account
Branch Name : (PRETORIA)

7. The Defendant is liable for payment of agreed percentage of the reasonable costs of the Trustee appointed in respect of establishing a Trust and any other reasonable costs that the Trustee may incur in the administration thereof including its fees in this regard, which shall be recoverable in terms of Section 17(4)(a) Undertaking, and which shall also include and be subject to the following:
8. Subject to approval by the Master of the High Court of South Africa, the Trustee's fees for the administration of the assets of the trust are to be calculated at the rate of 1% per annum of the trust assets under administration. Such administration fees shall furthermore be subject to the provisions of the Trust Property Control Act, 57 of 1988 (the Trust Act), as amended from time to time.
9. The costs associated with the yearly audit of the Trust by a chartered accountant as determined in the Trust Deed.
10. The costs incurred in administering the Undertaking in terms of Section 17(4)(a).

11. From the capital amount, there will be a deduction of the Plaintiff's attorney's legal costs, where after an amount of R3 786 015, 59 will be paid to the Plaintiff, pending the establishment of the Trust.
12. The balance of the capital amount shall be payable to a Trust in respect of Legemo Solomon Dewet, to be established within 6 months from date of receipt of the balance of the capital amount.
13. Upon the establishment of the Trust by the plaintiff's attorneys and opening of a bank account for the Trust, the Plaintiff's attorneys shall pay the remainder of the capital amount including the accrued interest, into the said Trust's bank account.
14. The trust as mentioned *supra*, will: Be created on the basis of the provisions as more fully set out in the draft Trust Deed attached hereto marked **Annexure "A"**.
15. Have as its main objective, controlling and administering the capital amount on behalf of the PLAINTIFF.
16. Be terminated when the PLAINTIFF dies or when ordered otherwise by a competent Court (whichever event may happen first) and to accrue to the estate of the PLAINTIFF.
17. Have, as its trustee, **ABSA Trust**, with powers and abilities as set out in the draft Trust Deed attached hereto marked **Annexure "A"**.

18. The trustee will be obliged to furnish security to the satisfaction of the Master of the High Court of South Africa for the assets of the Trust and for the due compliance of all its obligations towards the trust.
19. The dissolution of the trust instrument is, subject to the leave of this Honourable Court.
20. Any amendment to the trust instrument is subject to the leave of this Honourable Court.
21. Until such time as the Trustee is able to take control of the capital sum and to deal with same in terms of the Trust Deed, the Plaintiff's attorneys:
22. Are authorized and ordered to invest the capital amount in an interest bearing account in terms of Section 86(4) of the Legal Practice Act, to the benefit of the minor child, with a registered banking institution, pending finalisation of the directives referred to *supra*.
23. Are authorised and ordered to make any reasonable payments to satisfy any of the needs of the Plaintiff that may arise and that are required in order to satisfy any reasonable need for treatment, care, aid or equipment that may arise in the interim.
24. Subject to the discretion of the taxing master, the Defendant shall pay Plaintiff's taxed or agreed costs on the High Court party and party scale up to and including 21, 23, 28 February and 6 March 2024, which costs may include:

25. The costs of Counsel up to and including the costs for 21, 23, 28 February and 6 March 2024.

26. The costs of the expert reports, addendum reports (if any), RAF4 reports and expert affidavits including reasonable travelling, accommodation and subsistence costs.

27. The costs of making bundles for trial.

28. The reasonable travelling costs including reasonable accommodation costs for the purpose of attending trial.

29. There is a valid contingency fee agreement entered into between the plaintiff and the attorney.



T. BOKAKO

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

APPEARANCES

Counsel for the Plaintiff	Adv. L Haskins
Counsel for the Defendant	Adv. D Sondlani

Date of Hearing:	21, 23, 28 February and 6 March 2024
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Date of Judgment:	24 June 2024
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