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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case Number: A49/2023

In the matter between:

WILLEM PIETER MARAIS

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: VANZYL *et* REINDERS, JJ *et* MAJOSI, AJ

JUDGMENT BY: REINDERS, J

HEARD ON: 19 APRIL 2024

DELIVERED ON: 18 OCTOBER 2024

This judgment was handed down in open court and distributed to the parties via electronic mail communication.

[1] This is an appeal against the order and judgment granted by a single Judge of this Division (hereafter the trial judge or the trial court) on 12 September 2022. The appeal came before us with leave from the Supreme Court of Appeal.

[2] The appellant in his notice of appeal dated 6 April 2023 relied on several grounds of appeal in respectfully averring that the learned trial judge had erred. Counsel for both parties provided us with able and comprehensive heads of argument for which we are indebted, and proffered compelling arguments in submission before us. It is common cause that, prior to the commencement of the trial and at the proverbial doorsteps of the court, the parties verbally agreed to certain terms (the settlement) regarding the issues to be determined by the trial court with a view of curtailing the proceedings, and informed the trial judge thereof. In our view the overarching question evident from the criticism levelled by the appellant, is whether the trial judge had erred by adjudicating issues outside the ambit of what had been agreed upon between the parties prior to the commencement of the trial. Put differently, whether the trial court had erred by not confining its adjudication of the issues to be determined, to the settlement between the parties. During argument before us it was submitted by the appellant that the answer to the question must be in the affirmative, whilst the respondent submitted that the judgment and order of the trial court cannot be faulted.

[3] The appellant as plaintiff issued summons as a result of a motor vehicle collision that occurred on 7 August 2015 on the R702 road between Dewetsdorp and Bloemfontein.

[4] According to the amended particulars of claim (the particulars) the respondent is the Road Accident fund who in terms of s 17 of the Road Accident Fund Act 56 of 1996, as amended, (the Act) is liable to pay appellant for the damages he proves that he has suffered. As is clear from the above, the appellant is the plaintiff and the respondent is the defendant in the aforementioned action. For sake of convenience, I intend to refer to the parties as in this court.

[5] In his particulars, the appellant averred that the collision was caused by the sole negligence of the insured driver on the grounds as stated in the particulars. He averred that as a direct result of the collision, he sustained physical injuries as it appears from the medico-legal report compiled by orthopaedic surgeon

which was attached to the particulars. It is further averred that, as a result of the collision and subsequent injuries, he suffered damages in the amount of R 6 883 196.42 which consisted of past medical and hospital expenses, future medical and hospital expenses, past and future loss of income (calculated to be R 4 621 300-00) and general damages in the amount of R 500 000-00.

[6] The Respondent filed a plea and save for admitting that it is the Road Accident Fund in terms of the Act, that a collision occurred and its failure to pay the claimed amount, denied the allegations in the particulars.

[7] The minute of a pre-trial meeting held between the parties on 28 September 2021 reveals that the respondent conceded that it is liable for payment of 100% of appellant's proven or agreed damages. What was required from the trial court was to adjudicate the quantum of the appellant's damages.

[8] It is indeed common cause that the merits of the case were separated from the rest of the issues, and on 25 April 2019 Mathebula J granted judgment on the merits (100%) in favour of the appellant. This was followed by an order (by agreement) of Daffue J on 4 April 2022 settling the plaintiff's claim for general damages, an undertaking by the defendant in terms of sec 17(4)(a) of the Act for future hospital and medical expenses and an interim payment in the amount of R 1 000 000-00 in respect of appellant's claim for past and future loss of earnings.

[9] The matter was ultimately enrolled for 19 and 20 July 2022 and served before the trial court. According to the record, reports of the following experts were admitted into evidence: Dr JJ Schutte (general surgeon), Dr LF Oelofse (orthopaedic surgeon), Addendum medico-lego report compiled by Dr LF Oelofse and Dr MD Deacon (orthopaedic surgeons), Ms L van Zyl (occupational therapist), Munro Forensic Actuaries (actuarial report) and that of Dr EJ Jacobs (industrial psychologist). The record reveals that appellant's counsel on 20 July 2022 informed the trial court that the expert reports, including the report of the actuary, was admitted by the respondent save for the contingencies to be applied and the report of Dr E Jacobs, the industrial psychologist.

[10] The record reveals the following:

'MR ZIETSMAN: Thank you M'Lady, the Road Accident Fund has indicated, or let me put it differently, my learned colleague has indicated that she received instructions from the defendant the Road Accident Fund to proceed with this case on the basis that the reports as I have previously placed on record including the report of Monro Actuaries are admitted into evidence save for the contingencies to be applied and this agreement obviously does not include the aspects of Dr Jacobs *verslag* as I have already indicated also this morning in court, so yes and we are ready to proceed on that basis, we also agreed the fund has indicated that they are not going to call witnesses and they will argue the contingencies at the end of the case. It is for that reason M'Lady, we will present the evidence, the parties will then, both parties will close their case after I have presented the evidence for the plaintiff...'

[11] The court was thus informed that appellant was to proceed with the matter on the aforementioned basis and that the respondent was not going to call any witnesses and would argue the contingencies at the conclusion of the matter. Certain procedural arrangements were discussed pertaining to the preparation of heads of argument and a postponement to argue the matter. On a question of the trial judge to the respondent's legal representative, the latter confirmed the aforementioned communications. According to the appellant (and is evidenced from the record) the limited issue raised by the respondent with regards to the industrial psychologist's report turned on incapacity procedures followed by the plaintiff before he resigned and the question of what would be the consequences had the appellant, before he resigned, followed any internal remedies of his employer. The appellant then testified, whereafter Dr Jacobs was called as a witness for the appellant and confirmed his report. Both the appellant and respondent closed their cases.

[12] The appellant's career path was not in dispute. At the time of the accident, he had been employed with the Department of Public Works for a period of 30 years, and at that date as a construction project manager. Post-accident, after having been discharged from hospital, he returned to work for a period of two years, but resigned

in 2017. He started a handyman business with his son, but terminated his position herein (in a supervisory position) in 2019 and had since been unemployed.

[13] The common cause medical evidence was the reports of experts filed by the plaintiff and admitted into evidence by the trial court. The orthopaedic surgeon Dr Oelofse diagnosed injuries to the cervical spine, lumbar spine, right shoulder and left knee. He confirmed that after appellant had returned to work following the accident, he struggled to execute his work-related tasks, particularly when doing inspections on building sites with tasks such as climbing ladders and getting into a roof, using his hands above his head when inspecting ceilings and lifting heavy loads when doing the sampling due to pain in his right shoulder. Due to daily headaches he struggled to concentrate with administrative work. The occupational therapist's report was likewise common cause and admitted, which included her opinion that as a result of the injuries suffered by appellant, he could not perform his post-accident work as a construction project manager nor is he suited to perform aspects of light work in a supervisory role of his handyman's business. The injuries sustained would have a negative impact on appellant's productivity and workability and as a result he is an unfair competitor in the open labour market and he should not perform work exceeding sedentary work. Appellant is disadvantaged in the competitive workplace in respect of efficiency and effectiveness, compared to uninjured persons. As mentioned, the aforementioned was common cause between the parties. The industrial psychologist testified *viva voce*. His uncontested evidence is that it is highly unlikely that appellant would obtain and sustain a sedentary position requiring some administrative capacity and skills and although the orthopaedic surgeon suggested a three-year early retirement, Dr Jacobs was of the view that appellant would remain unemployed for the remainder of his career.

[14] The actuarial calculation was conducted by Munro Actuaries and based on the actual common cause earnings of the appellant and the report of Dr Jacobs. The actuarial calculation was not in dispute, save for the contingencies to be applied.

[15] The trial court ultimately issued the following order:

- '1. *Absolution from the instance is ordered.*
2. *Leave is granted for the plaintiff to proceed on his claim on the same papers duly amplified should he be so inclined.*
3. *Each party to pay their own costs.*
4. *The plaintiff's claim for past medical and hospital expenses is postponed to the pre-trial roll of 24 October 2022: 14h15.'*

[16] In a comprehensive judgment the trial court found that the appellant caused his own loss by resigning from his employment and that there is a lack of evidence to prove a causal link between the injuries sustained and loss suffered by the appellant. The resignation by the appellant from his employment was considered to be a *novus actus interveniens*.

[17] In ***Filta -Matix (Pty) Ltd v Freudenberg & Others***¹ the principle was stated that a party is bound by an agreement to limit the ambit of its case and will not be allowed, save in special circumstances, to resile from an agreement.

[18] Since the judgment of the trial court was delivered, the Constitutional Court in ***Mafisa v Road Accident Fund and Another***² has repeated and ordained how a trial court should evaluate, consider and deal with issues between litigating parties. Although not on all fours with facts of this appeal (the Constitutional Court held the application to concern whether a court may unilaterally amend a settlement agreement concluded by litigating parties), the legal principles enunciated in respect of agreements finds application.

[19] In discussing the principles relating to a compromise, the following was held:³

¹ 1998 (1) SA 606 (SCA) at 614 B-D

² (CCT 156/22) (2024) ZACC

³ At paragraph 35.

"The High Court in *Le Grange* cited the statement made by the Appellate Division in *Schierhout*, where it was said that "[t]he law, in fact, rather favours a compromise (*transactio*), or other agreements of this kind; for *interest rei publicae ut sit finis litium* [it is in the public interest that there be an end to litigation]". The court's authority is limited to the issues in the action brought before the court and the issues that the parties have specifically raised in their pleadings.'

and further in paragraph [36]:

"Contractual agreements concluded freely and voluntarily by the parties ought to be respected and enforced. This is in accordance with the established principle pacta sunt servanda (agreements must be honoured)."

[footnotes omitted]

[20] Counsel appearing for the appellant reiterated that the trial court, by agreement between the parties, was simply called upon to make a finding in respect of the contingencies whereafter it was to be referred to the actuary for calculation. The court however and notwithstanding this agreement, adjudicated the defences even though none of the defences were pleaded nor pursued by the respondent in evidence, so the argument went.

[21] There seems to be merit in these submissions in my considered view. The evidence of the orthopaedic surgeon and the occupational therapist was admitted by the respondent. Their evidence was that the appellant, post- accident, was not suited to perform his pre-accident work as a result of the injuries that he had sustained. Having informed the trial judge that the mentioned reports as well as the report of Munro actuaries are common cause, save for the contingencies to be applied, this evidence should have been accepted.

[22] I conclude therefore that the trial court ought to have followed the guidelines enunciated in *Filta-Matix* and *Mafisa* supra. In any event, I am satisfied that the admitted (and therefore common cause) facts in the expert reports, prove the

appellant's case, save for the contingencies to be applied.

[23] It follows that paragraph 1-3 of the trial court's order is incorrect and should be set aside.

[24] We are satisfied that this court is in a position to make the order that the trial court should have made as it is fully appraised of the relevant facts. Although the assessment of contingencies is arbitrary and depends upon a court's impression of the case, such discretion should remain a judicial discretion. In ***Southern Insurance Association Ltd v Bailey N.O.***⁴ the following principles were enunciated:

- Any enquiry into damages for loss of earning capacity is of its nature speculative, as it involves a prediction as to the future. The Court can only make an estimate, which is often a very rough estimate, of the present value of the loss.
- Where the method of actuarial computation is adopted in assessing damages, it does not mean that the trial judge is tied down by actuarial calculations. The court has a large discretion to award what the court considers right.
- In exercising that discretion one of the considerations is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that a plaintiff may as a result have less than a "normal" expectation of life, may experience periods of unemployment by reason of incapacity due to illness or accident, to labour unrest or general economic conditions.
- Depending on the circumstances of the case, the amount of any discount may vary. The rate of discount cannot be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial judge's impression of the case and may be favourable or less favourable to a plaintiff.

[25] The technique of assessing damages involves consideration of relevant

⁴ 1984 (1) SA 98 (A).

events which may occur, or conditions which may arise in the future. Even when it cannot be said to have been proved, on a balance of probability, justice may require that what is called a contingency or allowance, be made for a possibility of that kind⁵. Contingencies will apply to the different earning scenarios, namely the uninjured and injured. In line with the disabilities suffered, certain risks may attach more likely to certain plaintiffs.

[26] The appellant suggested that in the event the appeal finds favour with us, we should consider the contingencies to be applied having regard to the accident in respect of the injured scenario to be the following:

- During October 2017 the appellant received a Government Employees Fund pay out.
- The actuaries have spread the lumpsum payment on an actuarial neutral basis from the first month after retirement since it should not be allocated to a single year's loss. This was done assuming a monthly amount that increases with inflation and after discounting and mortality gives the same present value as the lump sum.
- The appellant's injured earnings in the past and future scenarios include the lump sum award already received.
- The actuarial calculation was done on 31 March 2021 wherefore the injured future scenario does not include any injured future earnings as the appellant had been unemployed since December 2019.
- The amount reflected in the injured future scenario represents only the lump sum award already received, apportioned evenly over time.
- Regarding the past injured scenario, the amount includes the appellant's handyman's earnings from October 2017 until December 2019 and the income from the Department of Public Works from date of the accident until retirement date of September 2017.

[27] In respect of the uninjured scenario, the contingencies to be applied "but for the accident", the appellant suggested that contingencies should only be applied to

⁵ See: *Burger v Union National South British Insurance Co* 1975 4 SA 72 (W) at 75.

the uninjured past and future scenario. The appellant urged us, in determining contingencies, to take into account that:

- The Appellant was 49 years old at the time of the accident.
- He had 16 years remaining until retirement age.
- Should the accident be disregarded no pre-existing conditions would have prevented the appellant from earning an income in the remaining work years.
- The appellant, prior to the accident, was employed by the Department of Public Works for 28 years.
- The appellant, but for the lumbar fusion, enjoyed good health and on the available evidence his career was not at risk.
- The industrial psychologist opined that the appellant would most likely have been employed in the capacity of a project manager at the Department of public Works until normal retirement age of 65 years.
- Before the accident the appellant had a lumbar fusion, pre-existing spondylosis of the cervical spine, signs of degeneration of his shoulder joint and degeneration of this left knee. He was free of pain and able to perform physical tasks which all changed after the accident.

[28] Having regard to all the above, the appellant submitted that the so-called normal contingencies as referred to by Dr Robert J Koch's Quantum Yearbook 2013 (at p106) be applied namely 5% for past loss and 15% for future loss in the uninjured state.

[29] Counsel representing the respondent in submission before us and in his heads of argument did not seriously attack the approach of the appellant in respect of the suggested contingencies. He, understandably so, rather focused on and suggested that the trial court was correct to have made the orders it did. In the judgment of the trial court (paragraph 14 thereof) the arguments advanced by the legal representative for the respondent in respect of the contingencies to be applied, was quoted verbatim from the heads of arguments filed:

'46. It is the submission of the Defendant, that it cannot be held liable for the

loss suffered by a person who in no manner mitigated, but in fact exasperated his loss. The evidence which flows from the Plaintiff's own testimony in Court, cannot simply be ignored, and only be addressed by contingencies. The Defendant respectfully submit that the only fair outcome would be to instruct the Actuary Counsel to do the following calculations:

- 1) Had the Plaintiff follow internal remedies and the employer have accommodated him, and he continued working on the same salary and postulations and before the accident, with 3 years early retirement;
- 2) Had the Plaintiffs services been terminated on the basis of ill-health retirement;

52. *(sic)* A fair outcome would lie in the median between the above-mentioned calculations.

53. Should the Honourable Court not be inclined to make such an order, then it is important to note that Dr Oelofse apportioned only 50% of the sequelae of the cervical spine injuries as attributable to the accident. He also only attributed 50% of the sequelae of the knee injury to the accident, considering pre-accident Osteoarthritis, which was also present in the injured, right knee. The Lumber spine injury and fusion occurred prior to the accident.

54. It would then be the submission of the Defendant that much higher contingencies be applied to the uninjured scenario.

55. Dr Jacobs did not in any manner verify the Plaintiffs alleged post-accident income, by requesting bank statements or tax returns. This should also be considered by the Court when applying contingencies."

[30] From the aforementioned quotation it is evident that the respondent did

not dispute the fact that no contingencies should be applied to the injured scenario. In respect of the uninjured scenario the respondent suggested higher contingencies than 5% for past and 15% for future loss. Having considered the aforementioned suggested contingencies of the appellant as well as that of the respondent as argued in the trial court, I am of the view that the evidence placed before the trial court indeed calls for higher contingencies to be applied in respect of the uninjured scenario as submitted by respondent's legal representative in the trial court. We deem contingency deductions of 10% and 25% to be fair and just, and the intended order to be granted would therefore reflect these figures and subsequent referral for a recalculation by the actuaries. The appellant provided a draft order to accommodate for the contingencies to be applied by the actuary as may be ordered by this court.

[31] In respect of costs, there is no reason why costs should not follow the event. Having considered the nature of the appeal we deem it appropriate that the cost of counsel should be on Scale B.

[32] The result is that the appeal succeeds and paragraphs 1, 2 and 3 of the court order dated 12 September 2022 is to be set aside. I would therefore make the following order:

1. The appeal is upheld with costs on Scale B, such costs to include the costs of the application for leave to appeal before the court a quo and the costs of the application for leave to appeal before the Supreme Court of Appeal.

2. Paragraphs 1, 2 and 3 of the order dated 12 September 2022 is set aside and replaced with the following:

- '1. The plaintiff's claim for past and future loss of earning capacity is referred¹ to Munro actuaries to be calculated, within 20 days of the date of this order, in accordance with the actuarial report dated 31 March 2022 (Ref M53899, p 189 - 194 of the expert bundle filed of record) which calculation is to be done with reference to date of this order, and applying the following

contingency deductions:

Uninjured - past 10% Uninjured - future 25%

Injured - past 0% Injured - future 0%

2. Upon receipt of the actuarial calculation the parties are to approach court to make the actuarial calculation of the plaintiff's claim for past and future loss of earning capacity an order of court. It is recorded that the aforementioned actuarial calculation will be inclusive of the R 1 000 000,00 interim payment ordered by Daffue J on 4 April 2022. When the parties approach the court to make the actuarial calculation an order of court the interim payment of R 1 000 000,00 must be deducted from the said actuarial calculation.

3. The defendant to pay the plaintiff's taxed or agreed party and party costs on the High Court scale, until date of this order, including but not limited to the costs set out hereunder:

- 3.1.1 Dr JJ Schutte (General Practitioner);
- 3.1.2 Dr LF Oelofse and Dr MB Deacon (Orthopaedic surgeons);
- 3.1.3 Ors van Dyk and Partners Inc. (Diagnostic Radiologists);
- 3.1.4 Burger Radiologists Inc. (Diagnostic Radiologists);
- 3.1.5 Lucindy van Zyl of Rita van Biljon (Occupational Thereapists);
- 3.1.6 Dr EJ Jacobs (Industrial Psychologist);
- 3.1.7 Munro Forensic Actuaries.

4. The payment provisions in respect of the afore going are ordered as follows:

- 4.1 Payment of the capital amounts shall be made without set-off or deduction, within 180 (hundred and eighty) calendar days from date of the granting of this order, directly into the trust account of the plaintiff's attorneys of record by means of electronic transfer, the details of which

are the following:

Honey Attorneys Bank
 Branch Code Account No. Reference
 Trust Account
 Nedbank, Maitland Street, Bfn 11023[...]
 11024[...]
 HL Buchner/J03699

(please quote the reference at all times)

4.2 Payment of the taxed or agreed costs shall be made within 180 (hundred and eighty) days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney

5. Interest shall accrue at 7% (the statutory rate per annum), compounded, in respect of:

5.1 the capital of the claim, calculated from 14 (fourteen) days from date of this order

5.2 the taxed or agreed costs, calculated from 14 (fourteen) days from date of taxation, alternatively date of settlement of such costs.'

C REINDERS, J

I concur.

C VAN ZYL, J

I concur.

O MAJOSI, AJ

It is so ordered.

On behalf of the Appellant:	Adv PJJ Zietsman SC
Instructed by:	Honey Attorneys BLOEMFONTEIN

On behalf of the Respondent:	Adv MS Mazibuko
Instructed by:	State Attorneys BLOEMFONTEIN