

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

**Reportable / Not reportable
CASE No.:1671 /2018**

In the matter between:

FREDERIK HENDRIK FOUCHÉ

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

Coram: Van Rhyn J

Heard: 23 October 2024

Delivered: 1 November 2024

ORDER

1. The Defendant shall pay to the Plaintiff the amount of **R4 754 382.40 (FOUR MILLION SEVEN HUNDRED AND FIFTY-FOUR THOUSAND THREE HUNDRED AND EIGHTY-TWO THOUSAND RAND AND 40 CENTS)** in respect of the Plaintiff's claim against the Defendant for the following heads of damages:

Past and Future Loss of Earnings/Earning Capacity: R3 554 382.40

General Damages: R1 200 000.00

2. The amount of R4 754 382.40 shall be paid into the trust account of Plaintiff's attorney, particulars thereof being as follows:

Account Holder: VZLR INC

Bank: Absa Business Bank Hillcrest

Account number:3[...]

Branch code: 632005

Reference: MAT109272

3. In the event that the Defendant fails to, within 180 (one hundred and eighty) days from the date on which this order is handed down, make payment of the amount of R4 754 382.40, the Defendant will be liable for payment of interest on such amount at 11.50% (the statutory) rate per annum, compounded and calculated fourteen days from date of this order.
4. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs, as allowed by the Taxing Master, for the trial dates of 27 February 2024, 22 October 2024 and 23 October 2024, which costs shall include:
 - 4.1 The fees of Plaintiff's counsel in terms of Rule 67A(3)(a) of the Uniform Rules of Court, where so employed, on High Court Scale C.
 - 4.2 The reasonable qualifying fees of the following expert witnesses:
 - 4.2.1 Dr J Preddy (Orthopaedic Surgeon)
 - 4.2.2 Dr Huth (Neurologist);
 - 4.2.3 D van Coller (Grid Forensic Accounting);
 - 4.2.4 Dr I Wuso (Specialist Physician);
 - 4.2.5 Dr S C Davis (Cardiothoracic Surgeon);
 - 4.2.6 Dr S van Heerden (Plastic Reconstructive Surgeon);
 - 4.2.7 Dr P Steyn (Urologist);
 - 4.2.8 L Grootboom (Clinical Psychologist);
 - 4.2.9 Dr I Hasrod (Ophthalmologist);
 - 4.2.10 Y de Klerk (Occupational Therapist);

4.2.11 Ben Moodie (Industrial Psychologist);

4.2.12 Dr P J Viviers (Pulmonologist); and

4.2.13 Johan Sauer (Actuary).

5. In the event of default on the cost payment, interest shall accrue on such outstanding amount at the statutory mora rate on the date of taxation/settlement of the bill of costs, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended, per annum, calculated from the due date until the date of payment.
6. The issue of past medical expenses, as forth in paragraph 7.1 of the particulars of claim, is separated from the plaintiff's quantum claim in terms of Rule 33(4) and postponed to the pre-trial roll of 3 March 2025.

JUDGMENT

[1] The plaintiff, Frederik Hendrik Fouché, an adult male born on 3 November 1961, instituted action against the defendant in terms of the provisions of the Road Accident Fund Act 56 of 1996 (the 'RAF Act') for the payment of damages as a result of injuries sustained arising from a motor vehicle accident which occurred on 30 May 2017 at Ficksburg. In his particulars of claim the plaintiff averred that a collision occurred between a motor vehicle bearing unknown registration letters and -number, driven by an unknown driver and a motor vehicle bearing registration letters and -number 111[...] driven by the plaintiff.

[2] The issue of liability (merits) has been resolved, as per the court order dated 17 August 2021, with the defendant undertaking to pay 80% of plaintiff's proven or agreed damages. The defendant was ordered to furnish the plaintiff with an

undertaking in terms of the provisions of s 17(4)(a) of the RAF Act in respect of future medical, hospital and related expenses, limited to 80% of the costs of the future accommodation of the plaintiff in a hospital or nursing home or the rendering of future medical treatment or the supply of goods arising from the injuries sustained in the motor vehicle accident.

[3] It was agreed between the parties that the claim for past medical expenses be separated from the other aspects relating to the damages claimed against the defendant and that this aspect be postponed to the pre-trial roll of 3 March 2025. At the commencement of the trial Mr Potgieter, counsel on behalf of the plaintiff, handed up the amended pages of the plaintiff's particulars of claim in terms whereof the quantum of the plaintiff's claim, relevant to the trial, is calculated as follows:

(a) Past and future loss of earnings R5 098 893

(b) General damages R2 000 000

[4] The parties have furthermore settled the claim for general damages in the amount of R1.5 million. The court is called upon to determine the award to be made in respect of the claim for past and future loss of earnings/earning capacity.

[5] The defendant had not appointed any experts and did not file any expert reports. In such regard the plaintiff had prepared an application in terms of Uniform rule 38(2) which had been filed at the Registrar on the day of the trial. The defendant did not oppose the application and accepted that the medico-legal and expert reports of the plaintiff be admitted as evidence in terms of Rule 38(2), section 34(2) of the Civil Proceedings Evidence Act 25 of 1965, and section 3 of the Law of Evidence Amendment Act 45 of 1988. By agreement between the parties the

evidence of the following expert witnesses was admitted by way of affidavit in terms of rule 38(2):

- (a) Dr J Preddy (Orthopaedic Surgeon);
- (b) Dr M B Huth (Specialist Neurologist);
- (c) David van Coller (Grid Forensic Accounting);
- (d) Dr I Wuso (Specialist Physician);
- (e) Dr S C Davis (Cardiothoracic Surgeon);
- (f) Dr S van Heerden (Plastic Reconstructive Surgeon);
- (g) Dr Piet Steyn (Urologist);
- (h) L Grootboom (Clinical Psychologist);
- (i) Dr I Hasrod (Ophthalmologist);
- (j) Y de Klerk (Occupational Therapist);
- (k) Ben Moodie (Industrial Psychologist);
- (l) Dr P J Viviers (Pulmonologist); and
- (m) Johan Sauer (Actuary)

[6] The defendant has not filed any expert reports. The plaintiff was present in court but did not testify. It is not my intention to give a detailed summary of the evidence presented by the plaintiff's expert witnesses, save to mention the following: The plaintiff was ejected from the vehicle as a result of the collision. He sustained a head injury and lost consciousness. He has no recall of the events occurring immediately after the impact. He was taken from the accident scene by ambulance to the Mediclinic Hospital, Bloemfontein. He was assessed and stabilized in the emergency room at the hospital and a cervical collar was applied. A Glasgow Coma Scale of 12/15 was reported on arrival at the hospital.

[7] On examination he presented with the following injuries:

- (a) Lacerations on his face;
- (b) Laceration above his left eye;
- (c) Degloving wound on his scalp;
- (d) Avulsion of the frontal to mid part of his scalp;
- (e) Seizures;
- (f) Right eye racoon;
- (g) Wound on his chest;
- (h) Distended abdomen; and
- (i) Abrasions on the right side of the right hip and upper leg.

[8] Computerised Tomography scans of the plaintiff's brain, cervical spine, abdomen and pelvis were conducted on 31 May 2017 which revealed the following pathological findings as summarised in Dr Preddy's medico-legal report dated 29 October 2021:

Brain and cervical spine:

- (a) The patient is intubated with the ET tube well placed;
- (b) Nasogastric tube with the tip in the stomach;
- (c) Extensive soft tissue damage extra cranial;
- (d) Subcutaneous drain evident;
- (e) Oedema on the nasal mucosa;
- (f) Extensive degeneration on the cervical spine; and
- (g) Fracture of the lateral masses involving the transverse processes and pedicles on the left C6 and C7 and the lateral vertebral artery foramen.

Chest, abdomen and pelvis:

- (h) Bilateral basal atelectasis;
- (i) Comminuted fracture of the sternum;
- (j) Rib fractures of the 3rd, 4th and 7th ribs;
- (k) Associated fractures of the transverse process of the 4th thoracic vertebra;
- (l) Fat induration in the cecum area;
- (m) Intra-abdominal contusion;

- (n) Degeneration of L4/L5 and L5/S1 paravertebral joints; and
- (o) Spondylosis of the pars interarticularis L4 on the right.

[9] Magnetic Resonance Imaging of the plaintiff's cervical, thoracic and lumbar spine revealed the following pathological findings:

- (a) Circumferential disc bulge with facet joint degeneration on the C3-4 level causing bilateral exit foramina narrowing;
- (b) T4 anterior wedge compression fracture with less than 50% anterior vertebral body loss of height; and
- (c) Extradural lipomatosis in the thoracic and lumbar spinal cords on sagittal T2-weighted sequences with no significant spinal stenosis or nerve root compression.

[10] Plaintiff was diagnosed with poly-trauma, a head injury, closed fracture of the sternum, multiple rib fractures and respiratory failure. On 6 June 2017 an anterior cervical discectomy and fusion of C5/C6 and C6/C7 were performed. He was treated in hospital and required artificial ventilation support for lung contusion and bilateral haemo-pneumothorax. He was subsequently diagnosed with ventilator associated pneumonia. Intercostal drains were inserted. He received physiotherapy, occupational therapy and was treated in hospital for almost 6 weeks of which 22 days were in ICU and High Care and was discharged with a walking frame on 8 July 2017.

[11] Apart from the serious injuries sustained in the accident the plaintiff experienced far reaching sequelae as is evident from the medico-legal reports submitted by the plaintiff. The plaintiff experiences headaches associated with dizziness and loss of balance. He struggles to open his left eye as a result of the head injury. He experiences chest pains and shortness of breath which causes him to struggle to perform physical tasks. The plaintiff returned to his pre-accident occupation as a farmer after approximately 12-18 months. He can no longer do the physical work on the farm as the injuries sustained in the accident limit his movement and abilities to a great extent. He sold 755 of his cattle as he was unable to handle all the animals. He furthermore sold two of his farms and relies upon the assistance of his son to continue with his farming operations.

[12] Given the extensive sequelae of the injuries and the serious impairments to his residual work capacity it is opined by the orthopaedic surgeon that the plaintiff should only perform light duty whereas the occupational therapist indicates sedentary work with driving. Mention was made of the fact that the plaintiff suffered from post- traumatic epilepsy with the result that driving vehicles, not only on the farm but also on public roads, remains questionable. The neurologist indicates a severe head injury which is corroborated by the neuropsychologist who stated that the plaintiff is moderately compromised neuro-cognitively with regards to the following:

- (a) Focussed attention;
- (b) Auditory work memory;
- (c) Non-verbal working memory;
- (d) Visual scanning;
- (e) Complex visual memory;
- (f) Immediate verbal memory;
- (g) Pace control;
- (h) Self-monitoring;
- (i) Executive planning;
- (j) Selective attention.

These deficits impact upon his work and psychological functioning and should be regarded as irreversible. The plaintiff is unable to remember the formulas to calculate the dosage of herbicides and is no longer able to do basic calculations. He forgets specific tasks in the daily executive planning of functions on the farm. He is constantly searching for his keys. The plaintiff has been a farmer throughout his working life and farming has become a part of his identity and livelihood. The impact of his lack of performance has left him hopeless and despondent.

[13] Based on the recommendations of Ben Moodie, the Industrial Psychologist and Y de Klerk, the Occupational Therapist, a forensic accounting report was filed by the plaintiff. The annual financial statement for the financial years 2014 to 2023, the Notice of Income Tax assessments issued by the South African Revenue Services

for the period 2014 to 2023 and the reports compiled by Ben Moodie and Y de Klerk were provided to Mr David van Coller of Gid Forensic Accounting. Having regard to the information and documentation, Mr van Coller concluded that the past loss of earnings in actual terms and before tax amounted to R10 771 260.89 and the estimated future loss of earnings are based upon the following: uninjured profit per month, before tax, and adjusted to take inflation into account: R81 521.11; and the injured profit per month, before tax and adjusted to take inflation into account (R59 648.65).

[14] The only calculation done in respect of the claim for past and future loss of earnings/earning capacity was filed by the plaintiff as per the report of the actuary, Mr Johan Sauer who calculated the past loss of income as well the estimated future loss of income. Ms Banda, on behalf of the defendant, argued that the plaintiff's son is assisting him with the farming and there is thus no need for him to scale down on the farming activities. The plaintiff is able to delegate the work not only to his son but also the farm labourers. According to the defendant, the plaintiff suffered two seizures since the accident with the result that he will still be able to drive a tractor and operate other farming equipment. It was furthermore argued that some of the medico-legal reports submitted by the plaintiff were outdated. The plaintiff suffered two gunshot wounds prior to the accident and he already suffered from depression prior to the accident which may further impact upon his earning capacity and should therefore be taken into account.

[15] A further argument raised by Ms Banda is that the plaintiff will be able to appoint a farm manager to assist with the farming activities and that the plaintiff will be able to continue with the farming operations up until the age of 70 years. On behalf of the defendant, it was thus contended that these aspects should be taken into account in arriving at an award for past and future loss of income/earning capacity. No indication is provided how the future loss of income/earning capacity is to be calculated having regard to the further expenditure to appoint a farm manager or having regard to any of the arguments raised by Ms Banda. Ms Banda contended that an amount of R2 215 431.85 will be fair and reasonable compensation in respect of the claim for loss of earnings. There was no evidential basis provided by the defendant in support of the calculation of the amount of R2 215 431.85.

[16] On behalf of the plaintiff it was contended that the calculations for the pre-morbid retirement age of 70 years and the pre-morbid retirement age of 75 years should be addressed by working on the median between the two scenarios. The primary question or finding in this matter is whether the plaintiff's injuries incurred in the accident have any impact on his earning ability, and if so, to what extent his injuries affect his productivity as a farmer, a position he held before the accident.

[17] The court in *Southern Insurance Association v Ballie NO*¹ eloquently stated the following concerning loss of earning capacity: 'Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award.'

[18] The court in *Gwaxula v Road Accident Fund*,² stated that it is imperative that the court in its decision achieve equity and fairness to the parties and recognize the reality that there is no hard and fast rule regarding contingency allowances. It went on to say that "...there are also unforeseen contingencies based on factors such as errors in the estimation of future earnings and life expectancy, loss of earnings due to unemployment and sickness, retirement at an earlier age and hazards of life. The list can never be exhaustive".³

[19] Considering the defendant has not presented any expert evidence and that the only evidence presented was that of the plaintiff's experts, I am left with no

¹ *Southern Insurance Association v Ballie NO* 1984 (1) SA 98 (A) at 99A-C.

² *Gwaxula v Road Accident Fund* [2013] ZAGPJHC 240.

³ *Ibid* para 25.

alternative but to consider the expert opinions of the plaintiff's experts regarding the plaintiff's earning capacity. The said evidence of the plaintiff's experts must be evaluated and legally assessed for its veracity, and on whether the experts' opinions are based on the facts presented to them, or whether the experts endeavoured to make a case where there is none. There is no reason to doubt or discount the evidence of any of the plaintiff's expert witnesses, and particularly the evidence that he had to sell two of his farms, rent out a third farm as he was unable to continue working on the said farm, sold approximately 75% of his cattle herd and in effect discontinued his entire dairy operations.

[20] Based on the evidence presented during the trial by the Orthopaedic Surgeon, Dr Preddy, Ms Y de Klerk, the Occupational Therapist, and the Forensic Auditor, Mr D van Coller as well as the opinions expressed by the other experts, I see no basis for this court to conclude that the accident did not have a negative impact on the plaintiff's earning capacity. The plaintiff experiences pain and suffering, discomfort, loss of amenities of life and will continue to experience these as a result of the accident-related injuries. He has reduced physical work ability and is thus an unequal competitor and a very vulnerable competitor in the open labour market. The only remaining question is to what extent did the accident impact the plaintiff's earning capacity.

[21] The actuarial calculation carried out by Mr Johan Sauer, taking such assumptions into account, reflect a total future loss of earnings (after the RAF cap) in the amount of R3 787 063 in respect of a retirement age of 70 years and a total loss of earnings (after the RAF cap) in the amount of R5 098 893 in respect of a retirement age of 75 years. As to contingencies for the past losses a total reduction of 5% has been applied as well as 5% total deduction for future losses (pre-morbid). I agree with the submission on behalf of the plaintiff that the contingencies applied by the plaintiff are fair and equitable. No submissions in this regard were made on behalf of the defendant. The median between the two scenarios amount to a loss of earnings/earning capacity in the amount of R4 442 978.

[22] A 20% deduction in respect of the apportionment must be applied in respect of the plaintiff's loss of earnings/earning capacity as well as the amount in respect of

general damages, which amount of R1.5 million had been agreed upon between the parties shortly prior to the commencement of the trial. Accordingly the order will reflect the following;

General damages in the amount of	R1 500 000
Loss of earnings in the amount of	R4 442 978
Sub-total	R5 942 978
Less 20% apportionment	R1 188 595.60
Total	R4 754 382.40

[23] A further aspect that needs to be adjudicated upon by this court is the aspect regarding the reserved costs for the 27th of February 2024. The matter was set down for trial for hearing on 27 February 2024, 28 February 2024 and 1 March 2024. The issues that had to be adjudicated on the mentioned trial dates were the claims for past medical expenses, loss of earnings and general damages, which is basically the same issues which formed the issues in dispute when the matter was enrolled for trial some 8 months later. On 22 February 2024, being five days before the trial, the plaintiff provided the defendant with vouchers of the past medical expenses via email. Ms Banda indicated that she was not ready to deal with this head of damages because these vouchers were quite voluminous and received shortly prior to the trial date.

[24] I was informed that since February 2024 the plaintiffs claim in respect of the past hospital and medical expenses has not been settled. By agreement between the parties this aspect will have to be postponed to the pre-trial roll of 3 March 2025. Mr Potgieter argued that the defendant has made no attempt to evaluate the schedules as required by the RAF Act and its mandate to settle claims submitted in terms of the RAF Act. I agree with the arguments raised on behalf of the plaintiff that the defendant merely sits back and obviously did not prepare for the trial to proceed in respect of the past medical expenses. The matter was certified trial ready yet the defendant failed to actively participate in an effort to prepare for the trial. I am furthermore convinced of the plaintiff's argument that the matter was not ready to

proceed in respect of the plaintiff's claim for loss of earning on 27 February 2024. This is evident from page 3 of the heads of argument prepared by Mr Potgieter and filed on 26 February 2024.

[25] As to the claim for general damages suffered by the plaintiff, it is evident from the copies of the emails appended to the plaintiff's heads of argument that serious and continuous efforts were made since February 2024 to inform the assigned claims handler and the senior claims handler of the defendant of the trial dates, the seriousness of the matter and urged the defendant to timeously attend to the matter. This was done in an endeavour to curb the costs and expenses relating to expert witnesses and attending the trial. Ms Banda confirmed by way of WhatsApp messages, in many instances, that she had also not received any instructions from the defendant.

[26] Having considered the arguments on behalf of the parties and the reasons for the postponement, I am satisfied that the defendant should pay the costs occasioned by the postponement of the matter on 27 February 2024.

ORDER.

[27] In the result the following order is made:

1. The Defendant shall pay to the Plaintiff the amount of **R4 754 382.40 (FOUR MILLION SEVEN HUNDRED AND FIFTY-FOUR THOUSAND THREE HUNDRED AND EIGHTY-TWO THOUSAND RAND AND 40 CENTS)** in respect of the Plaintiff's claim against the Defendant for the following heads of damages:

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3. In the event that the Defendant fails to, within 180 (one hundred and eighty) days from the date on which this order is handed down, make payment of the amount of R4 754 382.40, the Defendant will be liable for payment of interest on such amount at 11.50% (the statutory) rate per annum, compounded and calculated fourteen days from date of this order.

4. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs, as allowed by the Taxing Master, for the trial dates of 27 February 2024, 22 October 2024 and 23 October 2024, which costs shall include:
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5. In the event of default on the cost payment, interest shall accrue on such outstanding amount at the statutory mora rate on the date of taxation/settlement of the bill of costs, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended, per annum, calculated from the due date until the date of payment.
6. The issue of past medical expenses, as set forth in paragraph 7.1 of the particulars of claim, is separated from the plaintiff's quantum claim in terms of Rule 33(4) and postponed to the pre-trial roll of 3 March 2025.

I VAN RHYN
JUDGE OF THE HIGH COURT,
FREE STATE DIVISION, BLOEMFONTEIN

Appearances

On behalf of the Plaintiff:

Instructed by:

Attorneys

Adv. J-H ROUX SC

Du Plooy

Bloemfontein

On behalf of the Defendant:

BANDA

Instructed by:

Ms. P

State Attorneys

Bloemfontein