IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no: 3006/2018

In the matter between

L A MOGOTLOANE **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

Coram: MAJOSI AJ

Heard: 04 JUNE 2024

Delivered: 05 December 2024. This judgment was handed down in court and electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 15h00

Summary: Past and Future loss of income - Quantum for future loss of income adjudicated.

JUDGMENT

Majosi AJ

[1] The plaintiff instituted action proceedings against the defendant for damages suffered as a result of a motor vehicle accident that occurred on 19 August 2017. On 24 February 2024, merits and general damages were separated in terms of rule 33(4) of the Uniform Rules of Court (Rules).

[2] The defendant was ordered to pay 100% of the plaintiff's proven or agreed damages and was awarded general damages in the amount of R1 080 000. Past and future loss of income remained in dispute and was postponed to a later date; this is the subject matter of this court adjudication.

[3] The matter was accordingly set down for three days, but on the first day of trial, the attorney of the defendant requested to withdraw as attorney of record due to a lack of instructions. This application was granted and the matter proceeded on a default basis.

[4] The plaintiff presented the evidence of two experts, namely Ms. De Klerk, an occupational therapist, and Dr Strydom, an industrial psychologist, during the trial together with the evidence of the plaintiff and his wife.

[5] The following medico legal reports filed by the plaintiff were admitted as exhibits in terms of rule 38(2) of the Rules, namely:

A1& A2	Y De Klerk	Occupational Therapist
B1&2	Dr Strydom	Industrial Psychologist
C	Dr Oelofse	Orthopaedic Surgeon
D	Dr Labuschagne	Neurosurgeon
E	Dr. Hoffman	Plastic and reconstructive surgeon
F	Dr. Grootboom-	Clinical Psychologist
G	J Sauer -	Actuary
H	MB Deacon	Orthopaedic Surgeon

[6] Mr. Mogotloane, testified that he was involved in a motor-vehicle accident on 17 August 2017, wherein he sustained orthopaedic injuries to his right wrist, right knee, lower leg and ankle. His medical records revealed that he was 46 years of age at the time of the accident and he is currently 53 years old.

[7] He indicated that before the accident, he was self-employed and ran several businesses with an approximate monthly income of R100 000.00 per month. He conceded that no proof of past earnings was available nor was same provided to his experts as he did not keep proper records thereof.

[8] Following the accident, he found employment as a property specialist with

Vodacom which requires him not only to drive long distances, but also to walk around properties on uneven terrain, which aggravates his physical injuries sustained after the accident. He also reported that he suffers from frequent headaches and this results in him spending more time completing his administration work. He also supplements his income by doing consulting work with another company and will in all probability have to work beyond the age of 65 years as he did not invest in a retirement plan due to him being self-employed for a number of years. Furthermore, Mrs. Mogotloane also testified that since the accident, her husband's personality underwent a change and when he is under pressure at work, he becomes argumentative and consumes excess amounts of alcohol.

[9] Ms. De Klerk, an occupational therapist testified that she conducted an interview with the plaintiff and did a range of physical tests to assess his mobility after the motor vehicle accident. She also had due regard to his diagnosis as given by the orthopedic surgeon which was indicated as a united right distal radius fracture of the wrist joint and a united right tibia fracture with residual knee and ankle pain, atrophy of the calf and ankle joint and healed facial and ribs fractures.

[10] It was reported to her that his current symptoms include pain in his knee and ankle when walking or standing for long periods of time, with pain in the lower back when sitting for long periods, and in his right shoulder when handling weights as well as pain in the right-hand side wrist with reduced movement. The pain in his leg also increased when kneeling, bending, climbing stairs and walking on uneven terrain.

[11] She further opined that the plaintiff would be more suitable for light duty in the sedentary category which would not require a lot of physical activity and movement due to him experiencing pain, which is aggravated by standing and walking for extended periods of time. She noted that his current employment is not completely sedentary, but requires him to drive long distances and walk on uneven terrain at times. In her report, she concluded that, and the nature of his work, may require him to retire five years earlier than the normal retirement age, but deferred loss of income and his earning potential to an industrial psychologist for calculation.[1]

[12] Dr. Strydom, an industrial psychologist, intimated that the plaintiff's career history

[1] Exhibit A, Medico legal report compiled by Jani De Klerk, p 166.

spanned from the years 1992-2009, working as a waiter in various restaurants with the last two years thereof as a manager where he earned up to R12 000.00 per month. The later part of his career he spent as self-employed running his own companies. Before his accident, he a reported an income of R100 000.00 per month, but no financial documents in the form of bank accounts, financial statements or tax documents were provided in support thereof.

[13] A year after his accident, he managed to secure employment with Vodacom as a property specialist, despite him only having grade 12 as a qualification. This new employment commenced from August 2018 where he started earning a nett salary R35 000.00 per month. His current income was verified in her updated report with a salary advice dated 19 January 2024 which is now puts his current nett earnings at R38 359.94 after normal deductions for tax and a retirement fund.

[14] Due to this, she opined that a generic approach would be to have to be applied and his earnings are to be compared to that of a semi-skilled worker, but she concluded that this would be an unfair comparison. Furthermore, she indicated that his past loss of income could not be calculated as no benchmark was provided and, had it not been for the accident, he may have continued running his business; his pre-morbid retirement age may have gone past the normal retirement age of 65 years and may have continued working to the age of 70 or 75 years of age. Post-morbid, she determined that he thus has suffered loss of earning capacity due to the injuries that he sustained and his lack of productivity due to the cognitive disturbances as highlighted by other experts.

[15] She thus indicated that his current earnings should be regards as his future earnings and in the absence of proof of pre-morbid earnings, it is not possible to determine the difference between pre-morbid and post morbid earnings on the C1 and C3 level. She suggested that a higher contingency deduction be implemented to accommodate fluctuation in earnings, pain and discomfort and should be regarded as less competitive as he was considered a vulnerable employee in the open labour market.

[16] Dr. Labuschagne, a neurosurgeon, diagnosed the plaintiff’s head injury as a moderate head injury with neurophysiological and neurocognitive deficits which exerts a negative impact on his productivity and working ability, as he cannot concentrate. He, however, referred the plaintiff for an in-depth neuropsychologist assessment to determine the full extent thereof.

[17] Dr Oelofse, an orthopaedic surgeon, indicated that the plaintiff presented with a united distal radius fracture, united tibia fracture and post traumatic osteoarthritis of the ankle joint and suffered a total loss of income whilst recovering from his injuries. He opined that the injuries sustained would result in the plaintiff being on permanent light duty where work is concerned and underscored the plaintiff's complaints of sitting and walking for long periods and that the plaintiff would in all likelihood have to retire five years early.

[18] Dr Deacon made mention of the very same injuries, but indicated that the plaintiff presented with multiple rib fractures and a mandible fracture, head injury , splenic rupture and right mid shaft tibia fracture and non orthopaedic injuries to head and face, chest and abdomen with a recurring headaches from his head injury.

[19] Ms. Grootboom, a clinical psychologist, opined in her report that her assessment of the plaintiff indicated that he had mild to moderate neurocognitive and neuropsychological outcomes and that his memory problems are likely to affect attempts at acquiring new skills. Furthermore, it would likely reduce his productivity due to executive functioning deficits associated with frontal lobe impairments from the motor-vehicle accident, when considering his facial fracture injuries.

[20] Mr. Saucer, an actuary, presented various calculations in his initial report in the year 2022 and more recently the year 2024. His earlier report included the plaintiff's unverified past income of R100 000, with contingencies at 10% / 40% for future earnings and the 2024 report made provision for future loss of earnings based on basic salary packages within his skill level in two different scenarios. Firstly, retirement at the ages of 70 and 75 with contingencies of deductions of 5% / 35% and secondly, a normal retirement age of 65 years with exactly the same contingencies.

[21] I was further referred to relevant case law where contingencies are concerned namely *Southern Insurance Association Ltd v Baily N.O.,*[2] *Legal Insurance Co Ltd v Botes,*[3] *Van Plaats v South African Mutual Fire and General Insurance Co. Ltd*[4] and *Dlamini v Road Accident Fund*.[5]

[2] *Southern Insurance Association Ltd v Baily N.O.* 1984 (1) SA 98 (A).
[3] *Legal Insurance Co Ltd v Botes* 1963 (1) SA 608 (A).
[4] *Van Plaats v South African Mutual Fire and General Insurance Co. Ltd* 1980 (3) SA105 (A).
[5] *Dlamini v Road Accident Fund* [2015] ZAGPPHC 646.

[22] Counsel for the plaintiff submitted that given the plaintiff's age, educational level and other factors that the contingency deduction should be 5% pre-morbid and 45% post morbid for a retirement age of 70-75, as he believed this would be a fair and reasonable considering the plaintiff's testimony that he may have to keep working beyond the normal retirement age of 65 years until he dies.

[23] In *Goodall v President Insurance Co Ltd*,[6] the court said:

'In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by authors of a certain type of almanack, is not numbered among the qualifications for judicial office.'[7]

[24] This case highlights the difficulties that judicial officers face when adjudicating heads of damages. The challenge with the plaintiff's claim is that there is no amount to work from where past loss earnings are concerned as the court has just been provided with an amount which is not substantiated with business financial records during the years that he was self-employed.

[25] The Supreme Court of Appeal, in *RAF v Kerridge*,[8] faced similar difficulties where the actual past income could not be provided to the trial court and the consequent award for damages was found to be incompatible with the evidence led. Ultimately, it was reduced and higher contingencies were applied by the appeal court. The court stated at para 44:

'Some general rules have been established in regard to contingency deductions, one being the age of a claimant. The younger a claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings they include, inter alia, a downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill health, death, and the myriad of events that may occur in one's everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in a pre-morbid scenario, generally awarded higher contingencies, the younger the age of the claimant. This court, in Guedes, relying on Koch's Quantum Yearbook 2004, found the appropriate pre-morbid contingency for a young man of 26 years was 20 per cent

[6] *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W).
[7] Ibid at 392H-393A.
[8] *RAF v Kerridge* [2018] ZASCA 151 paras 48-49.

which would decrease on a sliding scale as the claimant got older. This, of course, depends on the specific circumstances of each case but is a convenient starting point.'

[26] I agree with the approach laid out by the Supreme Court that each case is to assessed on its own merits and that pre-morbid and post morbid contingencies ought to be applied with a sliding scale with specific regard to the age of the plaintiff and until his eventual retirement age.

[27] The plaintiff at the time of the accident was 46 years old and suffered injuries that negatively effects his wrist and right knee and leg together with a mild head injury which has as per the expert reports reduced his working ability and productivity as he has neurocognitive disturbances coupled with post-traumatic stress. This resulted in him closing his business as he could not cope with its demands.

[28] Although it is not known what his exact loss is as far as past loss of income is concerned, I am of the view that with his residual injuries of the wrist and right leg and neurocognitive disturbances, he has made out a case for loss of earning capacity as he was no longer capable of running his own business and, in all likelihood, will not get a promotion due to his inability to concentrate and retain memory. This aspect was also covered in the industrial psychologist report wherein it was indicated by his employer that his work is not on par with his work place standard and, thus he can be classified as an unequal competitor in the labour market.

[29] Though it was contended by counsel that the plaintiff does not have a pension fund to fall back on, he would have to work beyond the retirement age of 65 years as he did not build up a provident fund whilst he was self-employed. This is not accurate, as the report by the industrial psychologist reveals that the retirement age at Vodacom is 65 years. The plaintiff's recent salary advice also shows that since his employment with Vodacom, he is contributing to a retirement fund and is likely, given his current age, more that 10 years away from retirement.

[30] Though I am satisfied that higher contingencies ought to be applied, I am of the view that it would be reasonable and just to apply contingencies of 5% pre-morbid and 35% post-morbid as this is in line with the plaintiff's age and reduced earning capacity. The updated actuarial calculations by Sauer also makes provision for these contingencies and takes into consideration the applicable RAF cap to be deducted, which

is an amount of R2 679 022.00 for his loss of income. This would accordingly be calculated as follows:

Pre-morbid: Retire at age 65

	Pre-morbid	Post- morbid	Loss (Difference)
Future earnings	6 333 392	4 488 246	
Minus contingencies deductions of (5%/ 35%)	- 316 665	- 1 570 886	
Future loss of earnings	6 016 627	2 917 360	3 099 267
Total loss of earnings			3 099 267
Minus effect of RAF cap			420 245
Total loss of earnings after RAF cap			2 679 022

[31] It is trite that costs follow the result and I am inclined to order that the defendant pays the costs.

[32] Accordingly, it is ordered that:

1. The Defendant shall pay the Plaintiff the sum of R2 679 022.00 in respect of loss of earning capacity.

2. Interest on the aforesaid amount at the prescribed rate of interest of 10.75% (at the mora rate above the repo rate on the date of this order as per the Prescribed rate of Interest Act 55 of 1975 as amended) calculated from the date of this order to date of payment.

3. The defendant shall pay this amount into the Plaintiff's Attorney's trust account with details:

ACCOUNT HOLDER: **VZLR INC**

BRANCH: **ABSA BUSINESS BANK HILLCREST**

BRANCH CODE: **632005**

TYPE OF ACCOUNT: **TRUST ACCOUNT**

ACCOUNT NUMBER: **3[…]**

REFERENCE: MAT 1127737

4. The defendant shall pay the Plaintiff's taxed or agreed party and party costs up to and including the trial date of 4 June 2024 which costs shall include:

4.1 Counsel fees on Scale B

4.2 The reasonable qualifying and reservation and appearance fees of the plaintiff's experts and their reports;

4.2.1 Ms. Y De Klerk - Occupational Therapist

4.2.2 Dr AC Strydom – Industrial Psychologist

4.3 The reservation fees of the following experts

4.3.1	Dr. LF Oelofse & Deacon	- Orthopedic Surgeon
4.3.2	Dr. JJ Labuschagne	- Neurologist
4.3.3	Dr. Grootboom	- Clinical Psychologist
4.3.4	Dr. Hoffman	- Plastic and Reconstructive Surgeon
4.3.5	Mr. Sauer	- Actuary

5. In the event of default of the payment, interest shall accrue at the prescribed rate of interest (at the mora rate above the repo rate on the date of this order as per the Prescribed rate of Interest Act 55 of 1975 as amended) per annum from the due date to date of payment.

MAJOSI AJ

Appearances

For the Appellant:	Mr. D. J. Marx
Instructed by:	VZLR Incorporated C/O Du Plooy Attorneys Bloemfontein
For the Respondent:	No appearance
Instructed by:	