

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

Reportable/Not reportable

Case number: 6085/2022

In the matter between

BENNET MZWAKHE MXOSANA

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

Coram: Loubser J

Heard: 13 November 2024

Delivered: 13 February 2025

Summary: Contingencies where claimant still fit and able to work.

ORDER

1. The Draft Order as set out below, is made an order of Court, as amended.

JUDGMENT

LOUBSER J

[1] On 2nd February 2018 the Plaintiff was driving in the area of Welkom when his vehicle collided in an intersection with a motorcycle which had failed to stop at a stop sign when entering the intersection. At the time of the accident, the Plaintiff was 37 years old and he was employed as a long-distance truck driver at Baker's Transport.

[2] The Plaintiff suffered a serious injury to his right knee in the accident, which is described as a compound fracture of the right patella. According to a report by an

orthopaedic surgeon, this injury will adversely affect his chances of any promotion or advancement in his career or gaining any future employment, and will have a profound impact on all aspects of his life. It is further mentioned that the Plaintiff suffers from scarring and disfigurement over the right leg and knee.

[3] Eventually the Plaintiff issued summons against the Defendant for the damages he suffered as a result of the injuries he sustained in the accident. In the summons, he claimed R1 640 368 for the estimated future medical and related expenses, R3 954 182 for past and future loss of earnings or earning capacity, and R700 000 for general damages. The total sum claimed under these headings amounts to R6 294 550.

[4] When the matter came before this Court, the Court was informed by the legal representatives of the respective parties that the only issue that remained to be adjudicated was the contingencies to be applied in respect of the loss of earnings. To this end the legal representatives also agreed that the expert reports provided by both sides could be submitted to the Court, together with the required confirming affidavits, without the need for the experts to testify in open court. The Court granted this request in terms of the provisions of the Court Rule 38(2).

[5] On behalf of the Plaintiff the expert reports of an orthopaedic surgeon, an occupational therapist, an industrial psychologist and an actuary were placed before the Court. On behalf of the Defendant only the report of an industrial psychologist was handed in. More importantly, the two industrial psychologists featuring on both sides provided the Court with a joint minute, to which further reference will be made later herein.

[6] As a result of these developments, the legal representatives of the parties only presented argument when the matter was heard, and no witnesses were called. Ms. Banda, appearing for the Defendant, mainly criticized the expert reports of the Plaintiff on the basis that all the information furnished therein were not verified. She suggested that, had the accident not happened, a contingency of 20% should be applied to the future loss of earnings, while having regard to the accident, a contingency of 45% should be

applied to the future loss of earnings.

[7] On the other hand, Mr. Ploos van Amstel, appearing for the Plaintiff, submitted that the expert reports of the Plaintiff stand uncontested and unchallenged. He referred to the report of the Plaintiff's occupational therapist, and pointed to the fact that collateral information is contained in the report, which information was used by the Defendant's own industrial psychologist. He suggested that, having regard to the accident, a contingency of 35% should be applied to the future loss of earnings.

[8] This brings me to the joint minute produced by the two industrial psychologists on 2 July 2024. In this document, they agreed on the following, having considered the various expert reports put at their disposal:

1. The Plaintiff completed Grade 12.
2. He worked as a truck driver at the time of the accident.
3. He earned according to his payslip dated 20 October 2018.
4. The Plaintiff will continue to work as such, and seeing that he was still in his thirties and had sought out better paying opportunities in the past, his income would have increased to reach the Paterson B3 Basic Median level by 55 years of age. From there his income would have increased in line with salary inflation until he retired at 65 years of age. He would have continued to earn the additional income as listed on his payslip.
5. After the accident the Plaintiff could not work for 11 months and he did not receive any income in that period.
6. He returned to work and is currently earning in line with the income noted on his payslip dated 28 February 2023.
7. His income will increase in line with salary inflation until he retires at 65 years of age.

8. Contingencies should be applied with regards to possible further loss of income due to sick leave or possible job loss.

[9] Following receipt of this joint minute, the Plaintiff's attorneys requested their actuary to re-calculate the loss of earnings on the basis of what was agreed to in the joint minute. He provided his revised calculations on 8 July 2024. He made no provision for contingency deductions, remarking that it is omitted for negotiations or decision of the Court. He indicated the past earnings had the accident not occurred as R2 994 482, and the future earnings had the accident not occurred as R9 103 804, resulting in a total of R12 098 286. Having regard to the accident, he indicates the past earnings as R2 389 344 and the future earnings as R5 754 760, resulting in a total of R8 144 104. The difference in the two totals amount to R3 954 182, which figure then represents the loss of earnings. As indicated above, contingency deductions still have to be applied to these figures.

[10] Before the recalculation was done, the actuary indicated the loss of earnings as R3 742 732, and no contingency deductions were done in that calculation as well. To further complicate matters, a notice of retrenchment was handed in at the hearing, showing that the Plaintiff's employment with Bakers Transport was terminated due to operational requirements, and not due to his injuries, on 30 April 2024. It is clear that this retrenchment happened some three months before the actuary provided his revised calculations. He was obviously not informed of the retrenchment. Nor was the Court provided with any further information surrounding the Plaintiff's retrenchment. For instance, the Court is in the dark as to whether the Plaintiff has managed to find alternative work, and if so, what he is currently earning. The Court also does not know whether the Plaintiff received any payment from his employer at the time of retrenchment.

[11] However, the Plaintiff was not retrenched because of the injury he sustained in the accident, and consequently his retrenchment cannot have an effect on his claim for loss of earnings and on the contingencies to be applied. In these respects, the joint minutes provide valuable information for the Court in the form of an agreement between the respective industrial psychologists.

[12] A careful reading of the joint minutes makes it patently clear that the Plaintiff could not work for 11 months after the accident, during which period he received no income. After that period he returned to his work and he continued to work for a period of approximately 6 years until he became retrenched. It is not suggested in the minutes that the Plaintiff was unable to do his work or that he could lose his job in the future due to the injury he has suffered in the accident. Contingencies should only applied with regards to possible further loss of income due to either sick leave or possible job loss not related to his injury. The Plaintiff can therefore still work until his age of retirement. The Court is nevertheless mindful of the findings of the occupational therapist that the Plaintiff will be an unequal competitor in the open market because he should not perform work which exceeds light work.

[13] As for the issue of contingencies, it is settled law that the provision of contingencies is a matter of judicial discretion, which of necessity is a rough estimate.¹ They are arbitrary and highly subjective.²

[14] In applying the contingencies decided upon by the Court, the Court will make use of the revised calculations provided by the actuary. The Court will apply a 20% contingency on the future earnings of the Plaintiff in the pre-morbid scenario, thereby coming to a total of R10 277 526. In the post-morbid scenario the Court has regard to all the circumstances of the Plaintiff as far as his future earnings are concerned, and a contingency deduction of 20% seems to be equally justified. Under this heading the total future earnings in the post-morbid scenario amounts to R6 993 152. When this figure is deducted from the total of R10 277 526 earnings in the pre-morbid scenario, the total loss of earnings amount to R3 284 374.

[15] Mr. Ploos van Amstel has provided the Court with a Draft Order, which will be made an order of Court as amended to reflect the Court's decision on the contingencies. The following order is made:

¹ Road Accident Fund v Guedes 2006(5) SA 583 SCA paras 5 and 8

² Road Accident Fund v Kerridge [2018] ZASCA 151 at para 42

[16] The Draft Order as set out below, is made an order of Court, as amended.

1. The Defendant is liable for payment of 100% (HUNDRED PERCENT) of the Plaintiff's proven or agreed damages resulting from a motor vehicle collision that occurred on **2 February 2018**.

2. The Defendant shall provide an undertaking in terms of Section **17(4)(a)** of the Road Accident Act **56 of 1996**, ("the undertaking"), to compensate the Plaintiff for 100% (HUNDRED PERCENT) of the costs relating to the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service, or supplying of goods to the Plaintiff, after the costs have been incurred and on proof thereof and arising from the collision which occurred on **2 February 2018**.

3. The Defendant is ordered to pay to the Plaintiff the amount of R3 284 374 (**THREE MILLION TWO HUNDRED AND EIGHTY-FOUR THOUSAND AND THREE HUNDRED AND SEVENTY-FOUR RANDS**) for loss of earnings/earning capacity.

4. The aforesaid amount is to be paid into the following bank account:

Name of account holder:	VENTERS INC.
Name of bank:	ABSA Bank
Account number:	4[...] (TRUST)
Branch code:	632 005 – ABSA Universal
Reference number:	JVB 41 MXO

5. Should payment as aforesaid not be made within **180 days** from the date hereof, the Defendant shall be liable for payment of interest on the amount of **R3 284 374** calculated at the prescribed rate, from 14 days after the date of this court order, till date of payment.

6. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs, on a High Court scale to date of this order, which shall include the reasonable qualifying fees (where applicable) of the following experts:

Dr LF Oelofse

Orthopaedic Surgeon

L van Zyl	Occupational Therapists
A van der Bijl	Industrial Psychologist
W Loots	Actuary

7. The Defendant shall pay the Plaintiff's counsel fees on scale B.
8. The Plaintiff shall allow the Defendant **180 days (ONE HUNDRED AND EIGHTY)** calendar days to make payment of the taxed or agreed High Court costs.
9. Should payment as aforesaid not be made within 180 days from the date of settlement/taxation, the Defendant shall be liable for payment of interest calculated at the prescribed rate, from 14 days after the date of settlement/stamped allocatur, to date of payment.

P.J. LOUBSER, J

For the Plaintiff:	Adv. P. C. Ploos van Amstel
Instructed by:	Venters Inc, Century City c/o Venters Bloemfontein Inc, Bloemfontein

For the Defendant:	Ms. N. P. Banda
Instructed by:	State Attorney, Bloemfontein