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

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No: 297/2022

In the matter between:

COLLEN GUGUSHE Plaintiff

and

ROAD ACCIDENT FUND Defendant

HEARD ON: 15 AUGUST 2024

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for the hand-down are deemed to be 11h30 on 17 February 2025

[1] The matter served before me on 8 August 2024 for the adjudication of the plaintiff's claims for Past Hospital and Medical Expenses and past and Future Loss of Earnings. On 1 September 2023, orders were granted concerning the merits (80%), general damages (R520 000.00) and the Section 17(4)(a) Undertaking for future hospital and medical expenses.

[2] In the trial, the parties agreed that the plaintiff's claim for past hospital and medical expenses should be postponed to a future pre-trial date. They also agreed that the past loss of earnings was R226 690.00 as

reflected in the actuarial calculations. The only issue for adjudication was the appropriate contingencies for the future injured and uninjured earnings. The parties agreed that the past and future loss of earnings could be adjudicated upon the plaintiff's actuary's calculations, whose basis and assumptions were admitted as correct.

[3] The parties agreed that the joint minutes of the occupational therapists and industrial psychologists be admitted and accepted into evidence. These joint minutes formed the basis of the actuarial calculations.

[4] The industrial psychologists agreed that the plaintiff was mainly employable in unskilled and semi-skilled employment categories. Injuries sustained in the accident had a marked effect on all amenities, disrupting his career and future opportunities. A complete functional capacity assessment may need to be done at optimal recovery. Still, it appeared highly likely that the plaintiff would be unable to return to a job with high physical and mobility requirements. He would find himself a vulnerable, unequal competitor in the open labour market in jobs suited to his educational level, work experience and physical capacity. Although improvement could be expected to some extent, he would probably not return to his pre-morbid level of functioning.

[5] He would probably remain suited for jobs with sedentary to light physical requirements with aspects of medium work. He would, therefore, require realignment into a job suited to his physical abilities. The industrial psychologists concurred with the occupational therapists that the plaintiff would find himself a vulnerable, unequal competitor in

the open labour market in jobs suited to his educational level, work experience and physical capacity.

[6] The plaintiff's industrial psychologist was of the view that considering the plaintiff's level of education, which pre-disposed him to work in the unskilled employment category, which is physical with physical limitations, he was not a candidate for sedentary employment as he would have to compete with persons with degrees and candidates with diploma qualifications. The plaintiff was, therefore, practically unemployable in the open labour market as employers would prefer able-bodied and competent employees. The plaintiff was likely to experience difficulties securing and sustaining employment in his injured state.

[7] The defendant's industrial psychologist stated that the plaintiff would likely struggle to generate income in the open labour market, noting the report from the occupational therapist and that he would be competing against able-bodied individuals. Should he be fortunate to find an accommodative employer, his remuneration would likely be restricted to the low unskilled worker levels when considering his work experience, education and limitations. His employment would likely be characterised by periods of unemployment. His injuries were reported to be serious and long-term. Both experts noted that applying contingency deductions remained the court's prerogative or a matter for negotiation between the parties involved.

[8] Both the occupational therapists confirmed what was agreed upon by the industrial psychologists, as stated above. They decided that, at the time, the plaintiff presented with compromised mobility, agility, balance and load handling. His current physical-functional capacity did not meet the key requirements of his job in the stopping team in the mine. Although improvement in his condition could be expected to some extent, he would not return to his pre-morbid level of functioning. He would, therefore, be a vulnerable and unequal competitor in the labour market.

[9] Based on these minutes and reports, the actuary catered for two scenarios in the actuarial calculations. Premised on the plaintiff's industrial psychologist's opinion, the future loss of earnings was calculated at R 4 408 185.00. The second scenario, premised on the defendant's industrial psychologist's opinion, reflects the future loss of earnings as R 3 971 225.00. The contingencies employed before the accident occurred were 5% and 15% on past and future earnings, respectively, and 25% on future earnings thereafter.

[10] The plaintiff contended that there was merit in both scenarios 1 and 2 of the actuarial calculations. Therefore, the median between the two scenarios probably reflected the most accurate postulation. The contingencies applied in both scenarios were justified and should be accepted based on the experts' agreed facts and opinions. Although the experts disagreed on the issues of the plaintiff's employability in the injured state, both might be correct in their respective views. Hence, the submission that the truth lies in the middle of their respective

opinions and a median between the two scenarios should be accepted as a more accurate reflection of the injured scenario.

[11] The plaintiff prayed for an order that the amount of R 3 533 120.00 should be awarded in respect of his claim for past and future loss of earnings, which is calculated as follows:

Past loss of Earnings	: R 226 690.00
Future Loss of Earnings	: R 4 189 710.00
SUB TOTAL	: **R 4 416 400.00**
Less 20% apportionment	: R 883 280.00
TOTAL	**: R 3 533 120.00**

[12] The defendant submitted that a 35% pre-morbid contingencies deduction should be allowed because of occupation-specific contingencies such as:

1. The plaintiff was still in the establishment face of his career;
2. As an underground worker for a mining company, he would have had to pass frequent fitness tests to work underground;
3. His occupation carried more specific contingencies which could have resulted in him being unable to pass the regular fitness tests which may have directed his career path in a different direction;

4. It was well known that the Mining and Safety Act required tests which extended screen relating to eyes, audio/hearing, lungs/chest, glucose, blood pressure and head test;

5. The plaintiff might have developed any illness/medical condition (diabetes, TB, cholesterol, lung diseases) which have resulted in his passing the required tests. The industrial psychologists agreed that the plaintiff's health status might have affected his pre-morbid ability to work to 65 years old;

6. Mining is well known as a potentially dangerous industry that poses many occupational health and safety risks to workers.

[13] The defendant contended further that it was common cause that the plaintiff was not unemployable and did have a residual earning capacity. This could be deduced from the comment by the industrial psychologists that a higher post-morbid contingency should be applied. Such a comment would not have been made if no future income were foreseen. The plaintiff was 31 years old, had residual capacity, had demonstrated himself to learn new skills, and had various unskilled occupations for which he could contend. These favourable contingencies call for a lower deduction of 10% and not 25% in post-morbid income for which the plaintiff contended. This will result in a future loss of earnings of R 3 073 315.00, calculated as follows:

Agreed past loss of income	: R 22 690.00
Future loss of income	: R 2 846 625.00
Total	: R 3 073 315.00

[14] The amount of R 3 073 315.00 would be pre-apportioned, and after apportionment, it would amount to R 2 458 652.00 (R 3 073 315.00-20% = R 2 458 652.00).

[15] Having considered the above, it is clear that the plaintiff does have a residual earning capacity. I agree with the defendant that scenario 2 is more acceptable taking all the circumstances into account. As concerns the appropriate contingency deductions to be applied, and guided by the experts' joint minutes, I am of the view that the appropriate contingencies applicable in this matter should be as follows:

1. Uninjured: 20% on future earnings;
2. Injured: 25% on future earnings.

[16] Applying the above figures to scenario 2, the calculation of the total loss of the past and future earnings is as follows:

1.	Past loss of earnings	: R 226 690.00
2.	Future loss of earnings	: R 3 971 235.00
	SUB TOTAL	**: R 4 197 925.00**
	Less 20% apportionment	: R 839 585.00

TOTAL : **R 3 358 340.00**

[17] I, therefore, grant the following order.

Order:

1. The defendant is ordered to pay the plaintiff the amount of R 3 358 340.00(Three million five hundred and fifty-eight thousand, three hundred and forty rands) in full and final settlement of his claim for past and future loss of earnings / earning capacity.

2. The plaintiff's claim for past hospital and medical expenses is postponed to the Rule 37(8) pre-trial roll.

3. The amount in paragraph 1 above shall be payable within 180 (ONE HUNDRED AND EIGHTY) days of date of this order into the account of the plaintiff's attorneys with the following particulars:

Account Holder	: S.B Seshibe Attorneys
Bank name	: Nedbank
Branch code	: Central
Account Number	: 1[…]

Type of Account : Trust Account

Ref : Mr Seshibe/RAF162/2021

4. In the event that the defendant is in default to make payment of the amounts in paragraph 1 above within 180 (one hundred and eighty) days of the date of this order, interest will accrue on the said amounts at the prevailing legal interest rate of 10.50% per annum which is in accordance with the provisions of the Prescribed Rate of Interest Act 55 of 1975 read together with section 17(3) of the Road Accident Fund Act 56 of 1996 (as amended).

5. The defendant shall pay the plaintiff's taxed or agreed party and party costs on High Court Scale B of the action set down for the 6th, 7th & 15th of August 2024.

6. Fees and disbursements in this action (hereafter "costs") will include but not be limited to the following:

   a. Any and all costs incurred in obtaining payment of the costs and/or amounts mentioned herein;

   b. Counsel's/legal representations' costs in the course of litigation of this matter, including preparation and reservation;

   c. Reservation costs for the duration of the trial as set down in respect of the instructing attorney;

d. Fees levied by counsel will be calculated at scale B and include preparation, reservation and appearance for the matter set down for the 6th, 7th & 15th of August 2024.

e. Plaintiff and legal representations' travelling, and accommodation costs actually incurred, if applicable;

f. Costs for work done by the plaintiffs' legal representation in respect of preparation, compilation, pagination, sorting, binding, service, delivery, scanning and filing of copies of the pre-trial and trial bundles for use by the representing parties, their counsel and court;

g. Costs of travelling to, arranging, pagination and attending to pre-trial conferences, court appearances, expert appointments and settlement negotiations, including (if applicable) counsel's charges in respect thereof, for the Plaintiff.

h. Travelling costs of the Plaintiff and their witnesses as it relates to the attendance at trial (if applicable);

i. The qualifying and/or reservation fees attached to the procurement of medico-legal reports, addenda, and joint minutes, including the taxed or agreed costs of the plaintiff attending to the medico-legal examinations of the following experts:

6.1 Dr Bongobi (Orthopedic Surgeon);

6.2 Rene Walker (Occupational Therapist);

6.3 Optimum Talent Solutions (Industrial Psychologist), and

6.4 Munro Forensic Actuaries (Consulting Forensic Actuaries).

7. In the event that plaintiff's costs are not agreed, the plaintiff shall serve a Notice of Taxation on the defendant's attorney of record; and the plaintiff shall allow the defendant 14 (fourteen) court days to make payment of the taxed costs, failing which interest will accrue on the taxed costs at the prevailing legal interest rate of 10.50% per annum.

MHLAMBI, J

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