

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

Reportable / Not reportable

Case Number: 1550/2020

In the matter between:

SETONA ZACHARIA MOLOI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Coram: Reinders, J

Heard on: 23 August 2024

Delivered on: This judgment was handed down in open court on 21 February 2025 and distributed to the parties via electronic mail communication.

Summary: Claim for past and future loss of income- contingencies.

ORDER

As set out in paragraph [18] of the judgment

JUDGMENT

Reinders, J

[1] On 12 November 2017 the plaintiff (aged 28 at the time, currently aged 35) was a passenger when a motor vehicle accident occurred, causing him to sustain, amongst others, a knee injury. The defendant conceded liability for 100% of plaintiff's proven or agreed upon damages. The quantification of plaintiff's claims for past and future loss of income and future medical, hospital and related costs, had to be determined. The latter was settled by way of an undertaking by defendant in terms of sec 17(4) of the Road Accident Fund, 56 of 1996. I was called upon to adjudicate the plaintiff's claim for loss of past and future earnings, with reference also to the contingencies to be applied.

[2] To prove his claim the plaintiff employed the services of four expert witnesses who compiled their respective medical-legal reports, namely Dr LF Oelofse (orthopaedic surgeon); Mrs L van Zyl (Rita van Biljon Occupational Therapists); Dr EF Jacobs (industrial psychologist) and Mr WH Boshoff (Munro Actuaries). At the commencement of the trial the Plaintiff applied in terms of Uniform Rule of Court 38(2) that his evidence be presented by way of affidavits (wherein the experts confirmed their respective reports), with no objection thereto from the defendant. I granted the application and the plaintiff closed his case. The defendant did not employ the services of any expert witnesses (and consequently no reports were filed) and closed its case without having led any evidence.

[3] The evidence presented by the plaintiff thus comprised of:

(a) The report of Dr Oelofse dated 14 June 2018 (including plaintiff's serious injury assessment report (the prescribed RAF4-form) evenly dated;

(b) Reports of Rita van Biljon Occupational Therapists (dated respectively 14 November 2018, 28 September 2020 and 7 December 2022);

(c) The report and an addendum report of Dr Jacobs dated respectively 5 October 2020 and 13 February 2023; and

(d) The report of Munro forensic Actuaries dated 26 July 2023 (having considered the afore mentioned reports and calculating the plaintiff's loss of income).

[4] The parties provided me with comprehensive heads of argument for which I am indebted. In submission by defendant, two main attacks are launched against plaintiff's presented case. Firstly, it was submitted that the plaintiff had failed to place evidence before the court in respect of the six (6) weeks the Plaintiff was not attending work whilst recuperating after the accident. Due to the aforementioned, so the argument goes, the plaintiff did not prove that he had suffered any damages and the amount so calculated by the actuary should be disregarded. The defendant secondly alluded thereto that the early retirement indicated by Dr Oelofse, namely between 10 and 15 years earlier than 65, was based on assessing the plaintiff on 14 June 2018 (some 7 months after the accident) at a time when Maximal Medical Improvement ("MMI") had not been reached yet. A similar attack was launched against the occupational therapist's assessment of the plaintiff. Accordingly, it was argued that the basis for the actuary's calculations cannot be correct. Included in the proposed calculations done by defendant in the heads of argument, are the contingency deductions as suggested by the defendant.

[5] The plaintiff submitted that it is evident that these attacks on the plaintiff's case are in respect of factual allegations in the reports of the experts which forms part and parcel of the evidence presented by the plaintiff to the court. My attention was invited to the judgment of VanZyl, J in Z.V.S. v Road Accident Fund¹ where the court concluded that no dispute of fact arises where evidence in rebuttal of factual allegations is not presented. The court held in para [26]:

¹ (5489/2019) [2023] ZAFSHC 94 (31 March 2023).

“Insofar as the defendant is attempting to discredit the expert witness with regard to the respective opinions based on the aforesaid facts and their own respective evaluations, that cannot be done now either, without having cross-examined the said experts in order to have given them the opportunity to defend their respective opinions and without having called countering expert witnesses of its own.”

I align myself with the views expressed by Van Zyl J, and likewise conclude that *in casu* the plaintiff's evidence through its expert witnesses, stands uncontested.

[6] Dr Oelofse in completing the serious injury assessment report on 14 June 2018, in response to the question: “Has the patient reached MMI?” answered in the affirmative. Defendant did not present any evidence to upset this medical finding by Dr Oelofse. He was not cross-examined hereon and no contrary expert findings served before court. Accordingly, I accept the evidence by Dr Oelofse that MMI had indeed been reached at the time when he assessed the plaintiff.

[7] The uncontested evidence of Dr Jacobs in his first report confirmed that the plaintiff informed him that he was paid **R3 270.00** per month at the time of the accident, annexing the pre-accident payslips of the plaintiff in the amount of **R3 207.97**. Likewise, no evidence was presented by the defendant to counter the claim by the plaintiff that he was not compensated during the period of his recuperation. Put differently, any submissions made by the defendant that the plaintiff ought to have been compensated in whatever other manner, or even worse, was for a fact compensated whatsoever, is mere speculation.

[8] The plaintiff's career path prior to, at the time and after the accident are evident from the expert reports.

(a) At the time of the accident, he was employed as a general assistant merchandiser for Radius Sales and Merchandiser. He resumed his duties in the same capacity upon his return to work. At the time, his work was categorized as

predominantly “medium work”. It thus exceeded his ability as reported by Dr Oelofse. The occupational therapist furthermore concluded that the Plaintiff is not suited for his work as a general assistant merchandiser.

(b) The second report of the occupational therapist reveals that the Plaintiff hereafter in 2019 worked as a general worker at OBC Chicken and Meat Butchery and that his work there can be categorized as “medium work with aspects of heavy to very heavy work”, thrice weekly when having to carry carcasses or buckets of meat. She concluded that the Plaintiff is not suited to do either of these occupations post the accident and having sustained the injuries to his knee.

(c) The plaintiff obtained work as a general worker at the farming entity VKB Bethlehem (VKB) and was later upgraded as a forklift driver. The occupational therapist in the third report on 7 December 2022 concluded that the Plaintiff is not suited to either his work as general worker or to his current work as forklift driver with VKB. She specifically alluded thereto that he is still expected to carry 50 kg bags of animal feed in his current position as a forklift driver. He is thus still doing work beyond his capability. Moreover, she opined that it is also highly unlikely that the Plaintiff would be able to secure work within his residual work capacity.

(d) Dr Oelofse opined that if the plaintiff is accommodated in a light duty sedentary capacity he will be able to work until the retirement age of 60 years. If not so accommodated, he will only be able to work for another 10 to 15 years.

[9] It is undisputed that the plaintiff was, post the accident, not accommodated in a light duty sedentary position. The industrial psychologist’s finding that since early retirement is foreseen, and for calculation purposes early retirement should be considered ten to fifteen years from date of Dr Oelofse’s report of 14 June 2018. Counsel for the plaintiff submitted that, given the work that the Plaintiff has performed after the accident, it is clear that he is only trying to put food on the table despite the fact that the demands of his work exceed his residual capacity.

[10] That the plaintiff's earning capacity has been impaired and this has resulted in a loss, is not disputed by the Defendant and I am satisfied that the plaintiff has so proven. Based on the conclusion reached by the orthopaedic surgeon, occupational therapists and industrial psychologist as indicated above, the actuary made calculations and was requested to apply contingency deductions as instructed to by the plaintiff's attorneys.

[11] The legal principles in respect of contingencies have crystalized over the years. It is trite that a court has a wide discretion in awarding contingencies depending on the court's impression of what is fair and just in the circumstances and on the facts of the matter at hand.

[12] Recently this court in *Quinton Supra v Road Accident Fund*² gave a thorough exposition of the applicable case law and principles as enunciated therein when adjudicating on loss of earnings and contingencies. I take the liberty of quoting from the judgment (numbering of footnotes may differ from the quoted judgment):

“[19] The enquiry into damages for loss of earning capacity is by its nature speculative. ³ The court in *Oosthuizen v Road Accident Fund*⁴ gave a useful summary of case law on contingencies and I refer to it extensively as follows:

“Matters which cannot otherwise be provided for or cannot be calculated exactly, but which may impact upon the damages claimed, are considered to be contingencies, and are usually provided for by deducting a stated percentage of the amount or specific claims. (De Jongh v Gunter 1975(4) SA 78 (W) 80F).

² 910/2016 [2023] ZAFSHC 150 (25 April 2023).

³ *Southern Insurance Association v Bailey* N.O. 1984(1) SA 98(AD) on page 113G.

⁴ 2015JDR 1717 (GJ).

Contingencies include any possible relevant future event which might cause damage or a part thereof or which may otherwise influence the extent of the plaintiff's damage. (Erdmann v SANTAM Insurance Co Ltd 1985 3 SA 402 (C) 404-405; Burns v National Employers General Insurance Co Ltd 1988 3 SA 355 (C) 365).

In a wide sense contingencies are described as “*the hazards that normally beset the lives and circumstances of ordinary people*”. (AA Mutual Insurance Association Ltd v Van Jaarsveld 1974 4 SA 729 (A); Van der Plaats v SA Mutual Fire & General Insurance Co Ltd 1980 3 SA 105 (A); Southern Insurance Association Ltd v Bailey 1984 1 SA 98 (A) 117). Contingencies have also been described as “*unforeseen circumstances of life*”. (De Jongh v Gunther 1975 (4) SA 78 (W) 80F).

The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%, depending upon the facts of the case. (AA Mutual Association Ltd v Maqula 1978(1) SA 805 (A) 812; De Jongh v Gunther 1975(4) SA 78 (W) 81, 83, 84D; Goodall v President 1978(1) SA 389 (W) 393; Van der Plaats v SA Mutual Fire & General Insurance Co Ltd 1980(3) SA 105(A) 114-115A-D).

Contingencies are usually taken into account over a particular period of time, generally until the retirement age of the plaintiff (Goodal v President Insurance Co Ltd 1978 1 SA 389 (W) 393; Rij NO v Employers' Liability Assurance 1964 (4) SA 737 (W); Sigournay v Gillbanks 1960 2 SA 552 (A) 569; Smith v SA Eagle Insurance Co Ltd 1986 2 SA 314 (SE) 319).

Often, what is described as a “*sliding scale*” is used, under which it is allocated a “1/2% for year to retirement age, i.e 25% for a child, 20% for a youth and 10% in middle age”. (Goodall v President Insurance Company Limited 1978(1) SA 398(W) and Road Accident Fund v Guedes 2006(5) SA 583(A) 588D-C. Likewise, see Nonwali v Road Accident Fund (771/2004) [2009] ZAECHMHC 5 (21 May 2009) (para 23))

Colman J provided a useful exposition Burger v Union National South British Insurance Co 1975 (4) SA 72 (W) 75 of the approach to be adopted by the Court:

“A related aspect of the technique of assessing damages is this one; it is recognized as proper, in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said on a preponderance of probability that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind. If, for example, there is acceptable evidence that there is a 30 percent chance that an injury to the leg will lead to amputation, that possibility is not ignored because 30 percent is less than 50 percent and there is therefore no proved preponderance of probability that there will be an amputation. The contingency is allowed for by including in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty. That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure.”

But the difficulty with this approach was appreciated by Margo J in Goodwill v President Insurance Co Ltd 1978(1) SA 389 W at 392H:

“In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art of science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office”.

The advantage of applying actuarial calculations to assist in this task was emphasized in the leading case of Southern Insurance Association Ltd v Bailey 1984 1 SA 98 (A) 113H-114E, where the Court stated :

“Any enquiry into damages for loss of earning capacity is of its nature speculative

.....

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 of course 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.

.....

In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an 'informed guess' it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's 'gut feeling' (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess."

[13] The actuary applied contingency deductions of 15% in respect of future loss of earnings in the uninjured scenario, and 25% in respect of the injured scenario. The defendant argued that a contingency deduction of 20% in the uninjured and 10% in the injured scenario would be just under the circumstances.

[14] Dr Jacobs in his last report stated that the Plaintiff was dismissed at OBC Chicken because of the fact that he could not cope with the physical demands of his job. The collateral information confirms that the work is probably too heavy for the Plaintiff. It was submitted by counsel for the plaintiff that, since Dr Jacobs highlighted that the national unemployment rate at the end of 2022 was 33.9%, it necessarily follows that should the Plaintiff lose his work and since he is not qualified to do sedentary work, he will battle to find work. He argued that the latter has a

significant impact and necessitates the higher contingency as suggested as was applied by the actuary in respect of the plaintiff's future loss of income. I am in agreement with him. I furthermore accept the 12,5 years early retirement as basis for the actuary's calculation.

[15] Counsel for defendant submitted that an additional an additional 15% in respect of the usual contingency deduction (10%) as suggested by the defendant, is not fair and just in the circumstances. Reliance was placed on *Magorosi v Road Accident Fund*⁵ wherein Zietsman AJ found it not to be fair to the defendant to apply higher contingencies deductions to the prospective future injured scenario where early retirement had already been foreseen on the facts of that matter.

[16] I have considered the submissions of both parties in respect of the contingency deductions to be applied herein. In exercising my discretion I am satisfied that the contingency deductions as submitted by the plaintiff and applied by the actuary, are fair in the circumstances of this matter based on the accepted reports of the plaintiff's expert witnesses as was fully dealt with herein above.

[17] It is trite that costs should follow the event, and in my view the plaintiff's employment of a senior counsel warrants such costs of counsel to be on Scale C.

[18] Accordingly the following order is made:

1. The defendant is liable for payment to the plaintiff in the amount of **R 1 516 405.00** [hereafter "the capital amount"] in full and final settlement, as set out hereunder:

1.1 **R 5 300.00** in respect of past loss of income

1.2 **R 1 511 105.00** in respect of future loss of income,

resulting from a motor vehicle collision that occurred on **12 November 2017**.

2. The defendant is ordered to furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for 100% of the costs of

⁵ *Magorosi v Road Accident Fund* (185/2018) [2024] ZAFSHC 113 (25 April 2024)

the future accommodation of the plaintiff in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to the plaintiff arising out of injuries sustained by him in the motor vehicle collision mentioned above, in terms of which undertaking the defendant will be obliged to compensate him in respect of the said costs after the costs have been incurred and on proof thereof.

3. The defendant shall 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 The reasonable qualifying and reservation fees and expenses (if any) of the following experts:

3.1.1 Dr LF Oelofse (orthopedic surgeon);

3.1.2 Drs Van Dyk & Vennote Ing (Radiologists)

3.1.3 Mrs L van Zyl of Rita van Biljon Occupational Therapists;

3.1.4 Dr EJ Jacobs (industrial psychologist);

3.1.5 Munro Forensic Actuaries.

3.2 The cost of counsel as on scale C of the Uniform Rules of Court.

4. The payment provisions in respect of the foregoing 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	-	Trust Account
Bank	-	Nedbank, Maitland Street, Bfn
Branch Code	-	11023400
Account No.	-	1[...]
Reference	-	HL Buchner/J03863

(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 11.25% (the statutory rate per annum), 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

Appearances:

On behalf of the plaintiff:

Instructed by:

Adv L. le R. Pohl SC

Honey Attorneys

BLOEMFONTEIN

On behalf of the defendant:

Instructed by:

Mrs C. Bornman

State Attorneys

BLOEMFONTEIN