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

Reportable/Not Reportable
Case no: 5492/2022

In the matter of:
DERRICK NAGEL **PLAINTIFF**

and

THE ROAD ACCIDENT FUND **DEFENDANT**

Neutral citation: *Nagel v RAF* (5492/2022) [2025]

Coram: Benade AJ

Heard: 16 April 2025

Delivered: This judgment was handed down in Court and electronically by circulation to the parties' representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be on **22 May 2025**.

Summary: Adjudication of quantum only – plaintiff's claim in respect of loss of earnings.

ORDER

1 The defendant is 100% liable for the plaintiff’s proven or agreed damages.

2 The defendant is to pay the plaintiff the sum of R88 556 in respect of the plaintiff’s claim for past loss of earnings.

3 The defendant is to pay the plaintiff the sum of R1 567 111 in respect of the plaintiff’s claim for future loss of earnings.

4 The defendant has already paid to plaintiff the sum of R800 000 in respect of the plaintiff’s claim for general damages.

5 Payment will be made directly to the trust account of the plaintiff’s attorneys of record, within 180 days from the date of this order, the details are as follows:

Holder	:	Pretorius Attorneys Incorporated
Bank and branch	:	ABSA Bank, Century City
Account number	:	4[…]
Code	:	632 005
Reference	:	PA 329

6 Interest *a tempore morae* shall be calculated in accordance with the Prescribed Rate of Interest Act 55 of 1975, read with s 17(3)*(a)* of the Road Accident Fund Act 56 of 1996, 180 days from the date of this order.

7 The defendant is ordered to furnish the plaintiff with the 100% undertaking in terms of s 17(4)*(a)* of the Road Accident Fund Act 56 of 1996, for the costs of 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 arising out of the injuries sustained by the plaintiff in the motor vehicle accident which occurred on 22 December 2019.

8 The plaintiff entered into a valid contingency fee agreement with Pretorius Attorneys Incorporated on 3 May 2021. The defendant is to pay the plaintiff’s agreed or taxed high court costs as between party and party, such costs to include the plaintiff’s reasonable travel and accommodation costs to attend appointments and trial, the preparation and qualifying fees of the expert consequent upon obtaining the plaintiff’s reports and addendum reports, *inter alia* by:

8.1 Dr Labuschagne (neurosurgeon);

8.2 Dr Pienaar (neuropsychologist);
8.3 Dr van Biljon (occupational therapist);
8.4 Dr E Jacobs (industrial psychologist);
8.5 Mr R Kock (actuary);
8.6 The costs of counsel on Scale B and trial costs up to 16 April 2025, including costs of the subsequent heads of argument filed.

JUDGMENT

Benade AJ

Introduction

[1] The matter was set down for adjudication of quantum only, specifically the plaintiff's claim in respect of loss of earnings namely the plaintiff's claim for past loss of earnings and his claim for future loss of earnings.

[2] The parties managed to settle the dispute relating to merits, the undertaking in terms of s 17(4)*(a)* of the Road Accident Fund Act 56 of 1996 in respect of future medical expenses, as well as the claim relating to general damages.

[3] The plaintiff proceeded with an application in terms of rule 38(2) of the Uniform Rules of Court which was granted by me in chambers on 16 April 2025. The parties then agreed to submit heads of argument in respect of the contingencies the court needs to apply to the calculation, and which heads have duly been filed. This court is only called upon to determine the contingency that needs to be applied to the calculation of the pre-morbid future loss of earnings.

Precedent

[4] The determination of allowances for contingency involves a process of subjective impression and/or estimation rather than an objective calculation. Contingencies of whatever nature generally serve as a control mechanism to adjust the loss to the circumstances of the individual claimant in order to achieve justice

and fairness to the parties.[1]

[4] The provision for contingencies falls squarely within the subjective discretion of the trial judge as to what is reasonable and fair.[2] In coming to a contingency calculation, there are no fixed rules and direct evidence cannot be given by an actuary. Actuarial evidence only serves as a guide to the court.[3]

Application

[5] The plaintiff was 27 years at the time of the accident and will now be turning 33 years of age in December 2025. He planned to retire at 65 years old, but is now not able to work with the same earning capacity and will in all likelihood become unable to sustain employment – as confirmed by the joint minutes compiled by the parties' experts. The period of risk can be calculated at 32 years. The industrial psychologist noted that the life expectancy of the plaintiff will not be influenced by the collision.

[6] In a joint minute dated 20 May 2024 between industrial psychologist (Dr E J Jacobs and Mr S J Sethintsha), they took note from the medical experts that the plaintiff sustained orthopaedic injuries and/or moderate head injury and agreed that the plaintiff is no longer an equal competitor in the open labour market with his opportunities curtailed. Dr Jacobs had the opinion that the plaintiff might struggle to sustain employment as he already lost his job several times after the accident. For calculation purposes, they agreed to consider his pre-morbid income of R66 000 per annum in 2019 (with no progressions) as his residual earning capacity, but recommended a further contingency deduction due to the risks, namely the risks that he may lose his job and face periods of unemployment.

[7] Dr Everd Jacobs, an industrial psychologist, in a report, provided the information that the plaintiff completed grade 8 at Orkney High School and was, at the time of the accident, employed as a farmworker at Armoed Boerdery earning R5

[1] *Hall v Road Accident Fund* [2013] ZAGPJHC 129 para 52.
[2] *Southern Insurance Association v Bailey* 1984 (1) SA 98 (A) at 116.
[3] *Shield Insurance v Hall* 1976 (4) SA 431 A at 443A.

500 per month. He was not able to work for about two months after the accident and his employer asked him to resign at the end of February 2020 mainly due to his shoulder injury as he could not handle the heavy loads and perform normal functions on the farm. He thereafter, around February 2021, obtained work as assistant mechanic in Bultfontein where he is performing lighter duties. He has no formal qualifications as mechanic and indicated that he has regular headaches. At the time of the report, he has managed to sustain that job for almost two years.

[8] The industrial psychologist also pointed out that, in accordance with Dr J J Labuschagne (the neurosurgeon), the claimant suffered moderate head injury with secondary residual memory and concentration disturbances. He also displays neurocognitive effects from the head injury. A neuropsychologist pointed out that he sustained a traumatic brain injury (with skull-base fracture).

[9] Ms A Jansen (an occupational therapist) noted that his range of movement in the right shoulder is moderately reduced, he favours the left leg for loading and therefore presents with an asymmetrical posture. He also has a limping gait and his right-hand grip strength score is lower than the norm for his age.

[10] It is clear that, although the plaintiff is currently employed, he is not on par with his peers in the open labour market and is an unfair competitor in the open labour market. Should he lose his current employment, it might be hard to find another sympathetic employer in his line of work given his physical and mental disabilities. He is best-suited for employment in a back-friendly sedentary environment but it is unlikely that he will obtain and sustain a sedentary position requiring some administrative capacity and skills as he has no such skills or experience to offer the labour market and he has low schooling. Before the injury, he was destined to use his physical capacity to earn a living doing unskilled to semi-skilled work. This is now restricted as a result of the accident and he is in danger of unemployment. Should he lose his job, he will struggle to find alternative jobs.

[11] Having considered the heads of argument and submissions by Ms Bornman for the defendant and Ms Sander for the plaintiff, I am of the opinion that the actuarial calculation as done by Koch Consulting Actuaries CC is appropriate in the circumstances, with 5% contingency deduction in respect of past loss of income, and 15%/50% contingency deduction in respect of the future loss of income.

Order

[13] In the result, the following order is made:

1 The defendant is 100% liable for the plaintiff's proven or agreed damages.

2 The defendant is to pay the plaintiff the sum of R88 556 in respect of the plaintiff's claim for past loss of earnings.

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8 The plaintiff entered into a valid contingency fee agreement with Pretorius Attorneys Incorporated on 3 May 2021. The defendant is to pay the plaintiff's agreed or taxed high court costs as between party and party, such costs to include the plaintiff's reasonable travel and accommodation costs to attend appointments and trial, the preparation and qualifying fees of the expert consequent upon obtaining the plaintiff's reports and addendum reports, *inter alia* by:

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8.5 Mr R Kock (actuary);

8.6 The costs of counsel on scale B and trial costs up to 16 April 2025, including costs of the subsequent heads of argument filed.

BENADE, AJ

Appearances

For the plaintiff: I Sander
Instructed by: Van Wyk & Preller Attorneys

For the defendant: C Bornman
Instructed by: State Attorney, Bloemfontein.