

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

Not reportable

Case no: 301/2019

In the matter between

SM S[...]

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

Neutral citation: S[...] v RAF (301/2019) [2025] ZAFSHC 202 (30 June 2025)

Coram: Mpama AJ

Heard: 25 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 12h00 on 30 June 2025

Summary: liability of the defendant – claim for loss of income and future medical costs – contingencies

ORDER

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

2 The claims for future loss of income and medical expenses are separated from the remainder of quantum in terms of rule 33(4) and the claim for general damages is postponed to the pre-trial roll of Monday, 7 July 2025.

3 The defendant shall pay the plaintiff an amount of R 3 839 957 (three million eight hundred and thirty-nine thousand nine hundred and fifty-seven rand) in respect of loss of future income.

4 The defendant shall pay the abovementioned amount into the plaintiff's attorney's trust account. The plaintiff's attorney's trust account details are as follows:

Account holder:	VZLR INC
Branch:	Absa Business Bank Hillcrest
Branch Code:	632005
Type of Account:	Trust Account
Account number:	3[...]
Reference:	MAT125079

5 The payments shall be made by the defendant to the plaintiff within 180 days from the date of this order into the trust account of the plaintiff's attorneys failing which the defendant shall become liable to pay interest a tempore mora on the capital amount aforesaid at a rate of 7% per annum from the date of this order to date of final payment.

6 The defendant is to furnish the plaintiff with an undertaking in terms of section 17(4) of Act 56 of 1996, in respect of future accommodation of the minor in a hospital or nursing home or treatment of or rendering of a service or supplying of goods of a medical nature to the minor (and after the costs have been incurred and upon submission of proof thereof) arising from the injuries sustained by the minor in the motor vehicle collision on 07 April 2018.

7 In the event that the defendant does not, within 180 days from the date on which this order is handed down, make payment of the capital amount, the defendant will be liable for payment of interest on such amount at 11,25% (statutory rate per annum) compounded and calculated fourteen days from the date of this order.

8 The defendant shall pay, subject to the discretion of the Taxing Master, the plaintiff's taxed or agreed party-and-party costs, on High Court scale up to date, when the order is granted by court, including but not limited to:

8.1 the costs of Counsel on Scale B

8.2 the reasonable qualifying fees of the following experts:

8.2.1. Dr Deacon

8.2.2 Ms Claire Hearne

8.2.3 Ms Lida Roos

8.2.4 Ms Anel Booysen

8.2.5 Dr AC Strydom

8.2.6 Mr Johan Sauer

9 In the event of default on the costs payment, the interest shall accrue on such outstanding amount at the statutory mora rate on the date of taxation/ settlement of the bill of costs, as per Prescribed Rate of Interest Act 55 of 1975, as amended, per annum, calculated from due date until date of payment.

JUDGMENT

Mpama AJ

[1] The plaintiff (also the insured driver) is Mr T[...] K[...] S[...], suing in his representative capacity as the father and guardian of the minor child, S[...] M[...] S[...] (the minor).

[2] The defendant is a statutory body, established in terms of s 2(1) of the Road Accident Fund Act 56 of 1996 (the RAF).

[3] On 7 April 2018, at R30 between Vierfontein and Orkney, the minor was a passenger in a motor vehicle driven by his father, the plaintiff. He was involved in an accident when the plaintiff swerved to avoid hitting an animal and lost control of the vehicle.

[4] As a result of the accident, the minor sustained a fractured right clavicle and left femur. The plaintiff instituted action proceedings against the defendant claiming loss of

income, general damages, past and future medical costs.

[5] On the date of the hearing, Ms Booysen, appearing for the defendant, informed the court that she has no instructions from the defendant and requested to be excused. I acceded to her request.

[6] The plaintiff informed the court that the merits have not been conceded and the seriousness of the damages was not accepted or rejected by the defendant. He requested that the general damages be separated in terms of rule 33(4) of the Uniform Rules of the Court and I granted the order for separation of issues.

[7] Resultantly, the issues for determination are the liability of the defendant, future loss of income and medical costs.

[8] The plaintiff bears an onus to prove that the insured driver's negligence was the sole cause of the accident. The defendant must disprove this.

[9] The plaintiff, in his particulars of claim, averred that the accident was caused solely by the negligence of the insured driver in the following respects *inter alia*:

- (a) He travelled at a high speed;
- (b) He omitted to keep a proper lookout;
- (c) He omitted to keep his motor vehicle under proper control lookout; and
- (d) He failed to avoid an accident when by the exercising of reasonable care, he should and could have done so at the time of the accident.

[10] Another relevant piece of information as to how the accident occurred is to be found in the accident report (AR). In the AR it is alleged that the accident occurred whilst the driver was driving and suddenly an animal got inside the road. The driver lost control of the vehicle and it rolled until it stopped outside the road.

[11] Section 17(1) of the Road Accident Fund Act 56 of 1996 (the RAF Act) places a duty on the defendant to compensate a third party for bodily injuries arising from negligent driving of a motor vehicle. The minor child was a passenger in the driver's vehicle. It is not in dispute that he sustained bodily injuries as a result of a motor vehicle accident. What is required is for the plaintiff to show that the insured driver was

negligent. He only needs to establish at least 1% of the negligence.

[12] On how the accident occurred, there is no evidence adduced to controvert the plaintiff's evidence. I can hardly think of any situation where a passenger in a motor vehicle accident can be held to be liable or have contributed to the cause of an accident. It is my view that the accident was due solely to the driver's negligent acts as alleged. Accordingly, the defendant is liable for the plaintiff's 100% proven or agreed damages.

[13] Next to be determined is whether the plaintiff sustained patrimonial loss and, if so, the amount of such loss. The duty to prove this lies with the plaintiff. In regards to loss of future income, in *Rudman v Road Accident Fund* [2002] ZASCA 129; [2002] 4 ALL SA 422; 2003 (2) SA 234 (SCA), *Jones AJA*, at para 11, said:

'I believe that this conclusion is correct. The fallacy in Mr *Eksteen's* criticism is that it assumes that Rudman suffers loss once he proves that his physical disabilities bring about a reduction in his earning capacity; thereafter all that remains is to quantify the loss. This assumption cannot be made. A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured. It may in some cases follow quite readily that it does, but not on the facts of this case. There must be proof that the reduction in earning capacity indeed give rise to pecuniary loss.'

[14] The plaintiff brought an application in terms of rule 38(2) of the Uniform Rules of the Court. Having heard the application, I granted the application. Consequent to my order, the following affidavits and experts' reports were admitted to form the evidentiary material of the plaintiff: Dr AC Strydom (industrial psychology), Dr Deacon (Orthopaedic surgeon), Ms Anel Booysen (occupational therapist), Ms G Hearne (clinical psychologist), Ms L Roos (educational psychologist) and Mr J Sauer (an actuary).

The experts' reports

Dr Deacon

[15] He examined the minor on 8 August 2019 and stated the following:

(a) At the time, the minor was 15 years old. He reported that the minor was doing grade 9 at the time of the accident. He was away from school for four months as a result of the accident. On his return to school, he complained of difficulty walking long distances due to the injury in his left upper leg. The minor and his father reported that the minor continued to experience pain in his right shoulder and when walking long distances and

that cold weather aggravated the pain in his left upper leg.

(b) He perused the hospital records in possession of the plaintiff. The records revealed that the minor was treated conservatively. The treatment included bed rest, traction applied to his left leg and physiotherapy. He also received analgesia and non-steroidal anti-inflammatory medication.

(c) According to the father, the minor sustained a head injury but there were no medical records to confirm. He also suffers from chronic pain associated with his head, right shoulder and left upper leg.

(d) The doctor conducted a radiological examination and observed the following: on the right shoulder there was evidence of a previous fracture to the medial aspect of the right clavicle; bony remodelling noted with some hypertrophy and the minor was skeletally immature. He concluded that there was evidence of a previous fracture of the medial third of the right clavicle close to the sternoclavicular joint with bony remodelling and hypertrophy.

(e) On the left upper leg there was shortening of the femur, evidence of a previous fracture of the distal third of the femur, shortening of the femur with varus angulation, subsequent deformity demonstrated at the left femur fracture site and pelvic tilt due to shortening of the left femur. He concluded that there was evidence of a previous fracture of the left distal femoral diaphysis, the fracture has united with a varus deformity as well as significant shortening of the left femur, a pelvic tilt and bowing of the left femur.

(f) He opined that the minor has a united right clavicle fracture with residual pain, malunited left distal femur with residual knee pain, leg length discrepancy of 4 centimetres and 20-degree varus angulation.

(g) A probability existed that the minor will in future develop secondary left knee and hip problems as well as mechanical back pain. Due to biochemical stress in the lateral compartment of the knee as well as length discrepancy on the leg, there was a definite probability, more than 50% chances that the minor will develop osteoarthritis in the lateral compartment of his knee joint. He recommended corrective osteotomy of the distal femur, limb lengthening procedure and an orthotist for a built-up shoe.

(h) His final conclusions were that the minor sustained injuries to the head, right shoulder and left upper leg. He continues to suffer from the sequelae of his injuries and the injuries on his left upper leg had a profound impact on the minor's productivity, working ability and the amenities of life. That if he enters the workforce, he must be accommodated in a permanent light duty and sedentary working environment as determined by the occupational therapist.

Dr Claire Hearne

[16] She assessed the minor on 8 August 2019 and stated as follows:

- (a) She reported that according to the information obtained from the minor's parents, the minor was in good physical health prior the accident. There were no reports of psychiatric and psychological history prior the accident. There was no indication of previous trauma. She was able to establish that the minor's gross developmental milestones followed a normal trajectory.
- (b) After examination she concluded that the minor was struggling to adjust to the injuries and sequelae thereof. He presented with symptoms of anxiety and depression. Cognitively, he performed in the average range overall in both verbal and non-verbal domains. These difficulties would interfere with his ability to study to his premorbid potential. He presented with barriers to his learning, which influenced his performance negatively. He was at a risk due to his emotional dysfunction. She recommended psychotherapeutic intervention to assist him to cope with the effects of the accident.

Ms Lida Roos

[17] She assessed the minor on 21 July 2020 and stated as follows:

- (a) At the time the minor was 16 years old. The intention was to determine if the accident had a negative impact on the minor's cognitive, emotional, social and academic function.
- (b) She established that the minor at the time of the accident was attending school at Leseding Technical Secondary School, in grade 8 and did not repeat the grade. He was away from school for several week but on his return his teachers and fellow learners assisted him with his studies. The minor's father reported that the minor's academic performance declined initially after the accident but improved again.
- (c) The school's post-accident reports were made available and they showed that the minor achieved the learning outcomes in grade 8, 9 and 10 with moderate achievement.
- (d) She concluded that prior the accident, the minor was a child with average learning potential. He had the intellectual potential to complete matric with endorsement and progress to obtain a tertiary certificate (NQF 5). He would have been able to find employment post-qualification in his field of study. He has an above average non-verbal potential and studies in a practical career (like an artisan) would have been realistic. That post-accident, the minor was still a learner with adequate average potential. He was coping with his academic demands. There were identified fall-outs and he would benefit

from extra support. His learning was somehow negatively influenced in some areas. She concluded that generally, his learning was adequate but not fully on his level pre-accident, intellectually he was still able to progress and obtain NQF 5 if he undergoes the recommended therapy. However, his career options would be influenced by his orthopaedic injuries.

Dr AC Strydom

[18] He assessed the minor on 18 February 2022 when he was 18 years old and stated as follows:

(a) His intention was to evaluate the effects of the accident and its sequelae on the employability and earning capacity of the minor. At the time of the assessment, the minor was studying towards civil engineering.

(b) He concluded that the minor would reach the same potential as pre-morbidly in his studies with the recommended therapy and learning support. However, his career options according to his strengths and above average non-verbal aptitude would be influenced by his orthopaedic injuries. His post-accident career and employment options were limited due to the accident. Therefore, the accident had a negative effect on his future employability. The minor would be able to handle work demands falling in the sedentary to light category with frequent breaks if frequent sitting and standing are required. Noting his physical difficulties as well as the prognosis by the orthopaedic surgeon, he will battle to meet the job demands of construction work which falls within the medium to heavy category of work. Since the minor was still very young, he will be able to perform work that falls within his residual work capacity and his current studies may not be appropriate given his residual work capacity.

(c) He concluded that the minor must be accommodated in a permanent light duty and sedentary working environment. Due to the constant pain and discomfort, he was exposed to, he was unable to perform at his best or the required standard. He stood a risk of being dismissed due to poor performance or he might resign prematurely or take an early pension.

Ms Anel Booysen

[19] She evaluated the minor on 24 March 2020 and stated as follows:

(a) At the time the minor was doing grade 11. The purpose of her investigation was to determine the extent of the minor's functional limitations as a result of the accident-related injuries and the sequelae thereof and to comment on the loss of quality of life, the

impact on his earning capacity as it relates to the accident.

(b) She observed that the minor walked with a limp due to leg length discrepancy. She noted asymmetry in the spine due and that the minor frequently shifted weight towards the end of assessment due to pain in his leg and lower back.

(b) The minor informed her that he wanted to become a construction worker and builder as he enjoyed manual labour.

(c) Since this form of work falls within medium to heavy and sometimes very heavy category of work, she found that the minor will significantly battle to meet the job demands. This kind of work required frequent standing, crouching, elevated work forward bend, standing, walking over uneven terrain and managing heavier weights. He will also be required to work on scaffolding or a ladder.

(d) She concluded that the minor will be able to handle work demands falling only in the sedentary to light category and not his intended job in construction. The minor also presented with psycho-social difficulties and that upon entering the open labour market this could impact his relationship with his peers and managers. He recommended that the minor be mentored in terms of social skills. Lastly, she concluded that due to the minor's his physical limitations, he will be an unfair competitor in open labour market compared to his healthy peers; and

Mr Johan Jacobus Christoffel Sauer

[20] He did the actuarial calculations after considering the reports of the other experts.

[21] The expert evidence demonstrates the minor's injuries and the *sequalae* thereof. This evidence is uncontroverted. The minor sustained bodily injuries. This is the opinion of Dr Deacon, after he conducted physical and radiological examination of the minor. The occupational therapist and industrial psychologist have explained how these injuries have impacted the minor's career of choice and his potential income.

[22] When the minor was assessed by the occupational therapist whilst still at school, he expressed his wish to get a qualification in construction. He is now pursuing his studies in civil engineering. Expert evidence suggests that the minor will obtain the qualification, nevertheless, the injuries will interfere with his chosen career.

[23] Civil engineering involves large scale infrastructure projects like building dams, bridges tunnels and large water management systems. It also encompasses light work

like building roads, residences and small bridges. However, engineers use their technical knowledge to develop solutions and oversee the implementation of engineering projects. At times they are required to perform tasks that are physical in nature on the field.

[24] It has long been the minor's settled intention to pursue this vocation and he cannot be held at fault for acting upon his bonafide aspirations. Notwithstanding the accident, he survived to effectuate his chosen career path.

[25] It is undisputable that the minor's chosen sphere of employment is of a physical nature, mandating his periodic presence in the field. I find the expert evidence adduced on behalf of the plaintiff unimpeachable and accordingly accept it unreservedly, in the absence of contrary evidence. Accordingly, I am satisfied, on a balance of probabilities that the plaintiff has established his claim for loss of income.

[26] What remains to be determined is the total of loss and contingency deduction to be applied. It is trite that, despite the actuarial calculations, the court has a wide discretion to award what it considers right. Contingency deductions play a critical role in calculating damages, especially for future loss of earnings. In *Southern Insurance Association v Bailey* NO 1984 (1) SA 98 (A) at 116G-H, Nicholas JA expressed as follows:

'Where the method in actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial Judge is tied down by "inexorable actuarial calculation". He has a 'large discretion to award what he considered right'. One of the elements in exercising that discretion is the making of a discount for 'contingencies' or differently put the 'vicissitudes of life'. These includes such matters as the possibility that the plaintiff may in the result have less than a normal expectation of life, and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic condition. The amount of any discount may vary depending upon the circumstances of the case.'

The plaintiff has urged the court for a 15% pre-morbid and higher post-accident deduction of 35%. There is no contrary submission.

[28] The actuarial calculations are not binding to this court as the court has a wide discretion to award what it considers to be fair and reasonable compensation. It is my opinion that the actuarial calculations with the contingency deductions as advocated by the plaintiff represent a reasonable, fair and adequate compensation for the plaintiff. Resultantly, an amount of R3 839 957 is a reasonable amount for loss of earnings in the

circumstances of the plaintiff.

[29] In the circumstances I order as follows:

1. The defendant is liable for the plaintiff's 100 % proven damages.
2. The claims for future loss of income and medical expenses are separated from the remainder of quantum in terms of rule 33(4) and the claim for general damages is postponed to the pre-trial roll of Monday, 7 July 2025.
3. The defendant shall pay the plaintiff an amount of R 3 839 957 (three million eight hundred and thirty-nine thousand nine hundred and fifty-seven rand) in respect of loss of future income.
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8. The defendant shall pay, subject to the discretion of the Taxing Master, the plaintiff's taxed or agreed party-and-party costs, on High Court scale up to date, when the order is granted by court, including but not limited to:

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8.2 the reasonable qualifying fees of the following experts:

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9. In the event of default on the costs payment, the interest shall accrue on such outstanding amount at the statutory mora rate on the date of taxation/ settlement of the bill of costs, as per Prescribed Rate of Interest Act 55 of 1975, as amended, per annum, calculated from due date until date of payment.

MPAMA AJ

Appearances

For the plaintiff: Adv A. Sander

Instructed by: VZLR Inc, Pretoria
c/o Du Plooy Attorneys, Bloemfontein.

For the defendant: no appearance