

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2021/54368

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO |

29 July 2025

DATE

SIGNATURE

In the matter between:

CHIVAMBO: ALBERTO LEONARDO

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be the 29 July 2025

JUDGMENT

BOTSI-THULARE AJ

Introduction

- [1] This is a delictual claim for damages resulting from injuries sustained by the plaintiff, Alberto Leonardo Chivambo, as a result of a pedestrian vehicle accident which the plaintiff was a pedestrian. Negligence have become settled between parties and the matter is before this court on the aspect of quantum only. The issue of merits was settled 80% in favour of the plaintiff. The parties agree that jurisdiction is not in dispute. The parties agree that *locus standi* is not in dispute.
- [2] In a nutshell, this court is required to determine quantum in relation to general damages and past and future loss of earnings. The plaintiff also seeks a section 17(4)(a) undertaking for his future hospital and medical expenses in terms of his agreed and/or proven damages subject to the apportionment.

Factual background

- [3] On 25 November 2019 the plaintiff sustained injuries as a result of a pedestrian accident which happened along Mhlambi Street, Tembisa. Since the accident, it is alleged that the plaintiff complains of ongoing chest pain over the left chest wall, worse on physical exertion and during colder weather and the chest pain interferes with his ability to work as before.
- [4] The plaintiff also has scars and defects of the left hemithorax as a result of the accident. It is also alleged that an intercostal drain was inserted in the left hemithorax. The scar is hyperpigmented. Suture tract marks are available on either side of the scar. The scar is stable, with no areas of breakdown or adherence to the deeper underlying structures present. The scar is permanent and the scar is not amenable to surgical correction.

- [5] The plaintiff appointed experts whose reports have been submitted to this court as expert evidence. The defendant has not appointed any experts. Below is the summary of each of the expert reports.

Pulmonologist expert report

- [6] The Pulmonologist, Dr PJ Viviers, opined that the plaintiff sustained a blunt injury to the chest causing multiple left – sided rib fractures and a pneumothorax, together with a scalp laceration due to the accident. He received medical treatment from Tembisa Hospital, which included placement of an intercostal drain.
- [7] Dr Viviers stated that the plaintiff reports ongoing chest wall pain and states that the pain is sufficient to interfere with his daily functioning. Accordingly, a diagnosis of post - traumatic chest wall syndrome is relevant. Furthermore, despite optimal improvements in his lung function, neuropathic pain tend to follow a protracted course, with variable response to treatment.
- [8] Dr Viviers opined that despite 30% Whole Person Impairment (WPI), he qualifies for serious injuries under the narrative test. As a result, future medical treatment is foreseen and based on data regarding chest wall injuries, it is not certain whether he will ever be pain-free, given the time that has lapsed since the accident.
- [9] According to Dr Viviers, the plaintiff will in future require conservative treatment with analgesics and no further additional pulmonary or thoracic intervention is foreseen. To this end, Dr Viviers opined that therapy will include provision of analgesics and anti-inflammatory therapy at a cost of R2 400.00 per annum. Further, the plaintiff will need Tramadol medication which should cost R3 600.00 per annum. He will also need neuromodulatory aids, which cost R4 800.00 per annum, to alleviate neuropathic pain caused by blunt chest trauma.

Occupational Therapist expert report

- [10] The Occupational Therapist opined that it can be concluded that the plaintiff is currently restricted to sedentary, light and medium work. His pre-accident work

as a self-employed upholsterer is classified as medium and occasionally heavy work.

- [11] The Occupational Therapist further stated that the plaintiff is currently not suited for heavy occupations. Accordingly, it remains justifiable that he employed an assistant to assist him with heavier lifting because he will struggle to handle various items and he will be restricted to handling items of his safe lifting capacity of 20 kg.
- [12] According to the Occupational Therapist, the plaintiff's current work as a self-employed upholsterer is classified as medium work. He is expected to continue with his current work until normal retirement age. However, because medium work exacerbated the chest symptomology, it is expected that he may take longer to complete tasks due to the need for frequent rest breaks. His productivity and efficacy may therefore be affected.
- [13] The Occupational Therapist therefore concluded that the claimant may not be able to return to his pre-accident vocational potential. Any persistent pain and symptoms following treatment, will continue to impact on his work capacity in the future. If symptomology persists, he will continue to rely on an assistant for heavy work tasks. This will have a detrimental effect on his income generating capacity.
- [14] The Occupational Therapist stated that it should be noted that the plaintiff only has a Grade 7 level of education. His English proficiency levels are poor, especially expressive language, and he has only worked as a builder and upholsterer. Thus, he is restricted to manual work in the unskilled or low semiskilled domain. His career options have therefore been narrowed considerably should he ever want to return to the formal open labour market, as most unskilled or low semiskilled occupations fall in the medium to very heavy category of work. The accident has therefore caused occupational dysfunction.

Industrial Psychologist expert report

- [15] The Industrial Psychologist opined that, at the time of the accident, the plaintiff was working in a self-employed capacity as an Upholsterer. He reports that his duties included inter alia meeting with clients to discuss upholstery needs;

purchasing upholstery supplies and materials; dismantling and preparing furniture for reupholstering; measuring, cutting and stitching upholstery fabric; and conducting quality checks on completed orders. He reportedly enjoyed this work and continues to work in this capacity currently.

[16] According to the Industrial Psychologist, at the time of the accident, the plaintiff's income varied slightly from month to month depending on client demand for his services. He received cash payments for his services and was therefore unable to provide the Industrial Psychologist with documentary proof of his earnings. However, according to a signed affidavit dated 21 July 2022, the plaintiff reported that his average monthly profit amounted to R7 000.00, after expenses.

[17] The Industrial Psychologist opined that, over the course of his career, the plaintiff built up experience working as a Piece Worker, Trainee Upholsterer, and Upholsterer. At the time of the accident, he had been working in a self-employed capacity as an Upholsterer for nearly eight years. He planned to continue working in this capacity throughout the foreseeable future.

[18] Considering the plaintiff's low level of education (Grade 7), narrow skill set, and extended history of self-employment, the Industrial Psychologist is of the opinion that if the accident had not intervened, he would probably have continued working in his pre-accident capacity until retirement at the approximate age of 70.

[19] According to the Industrial Psychologist, it is therefore anticipated that the plaintiff would have continued earning at least around his premorbid levels throughout the duration of his working career. It is noted that his pre- morbid earnings fell slightly above the median of the salary scale for semi-skilled workers employed in the non-corporate sector. The Industrial Psychologist is, however, of the opinion that in the most probable scenario, based on his age (36), the plaintiff would have been able to work his way up to a ceiling falling below the upper quartile of the salary scale for non-corporate semiskilled workers, as he continued to build his skills and client base.

[20] The Industrial Psychologist stated that, according to the Quantum Yearbook by Robert Koch (2025 publication), the current salary scale for non-corporate semi-

skilled workers is as follows: R3 392.00 - R7 250.00 - R19 000.00 per month. For actuarial purposes, Industrial Psychologist recommends a probable earnings ceiling of approximately R14 000.00 per month (in 2025 terms). It is estimated that he would have reached this ceiling gradually by the age of 45, following which only inflationary adjustments would have applied until retirement.

- [21] The Industrial Psychologist opined that, but for the accident, the plaintiff would in all likelihood have continued functioning at his pre-accident levels of productivity and efficiency. In the event that he ever left self-employment at any point in his career, he would have been capable of securing alternative employment in line with his skills and experience elsewhere in the open labour market. He would additionally not have been physically limited in the type of work that he was able to perform.
- [22] According to the Industrial Psychologist, after adequately recovering from his accident-related injuries, the plaintiff resumed his premorbid self-employment as an Upholsterer, and he continues to work in this capacity currently.
- [23] However, as a result of the physical injuries sustained in the accident, the plaintiff is no longer able to work in confined spaces, assume awkward positions, or perform heavy physical tasks. He was, therefore, forced to hire an assistant in the post-morbid scenario, whom he continues to employ to date. Despite the ongoing assistance of his employee, the Plaintiff notes that there has been a significant decline in his work productivity, and he is therefore unable to take on as many client orders as before.
- [24] The Industrial Psychologist opined that although he now struggles to perform his work at the same level that he was capable of prior to the accident, the plaintiff reports that he plans to continue working in his present capacity for as long as possible. He relies on the income that his self-employment affords him to provide for himself and his family.
- [25] In the post-morbid scenario, the plaintiff's income continues to vary on a monthly basis depending on client demand for his services. He continues to receive cash payments for his services and was therefore unable to provide the Industrial Psychologist with documentary proof of his income. However, during a follow-up

conversation with the Industrial Psychologist in March 2025, he indicated that his business currently generates an average monthly revenue of R8 000.00.

- [26] The Industrial Psychologist stated that the plaintiff remunerates his assistant approximately R3 000.00, leaving him with an average gross monthly profit of R5 000.00 (in 2025 terms).

Actuary expert report

- [27] The Actuary provided the following summary of loss of income:

Past loss

Value of income but for the accident	R 549 919
5% Contingency deduction	<u>R 29 746</u>
	<u>R 283 808</u>
Value of income having regard to the accident	R 298 745
5% Contingency deduction	<u>R 14 937</u>
	<u>R 283 808</u>
Net past loss:	R 281 365

Future loss

Value of income but for the accident	R 2 721 904
15% Contingency deduction	<u>R 408 286</u>
Net value of income but for the accident	<u>R 2 313 618</u>
Value of income having regard to accident	R 1 078 564
25% Contingency deduction	<u>R 269 641</u>
Net value of income having regard to accident	<u>R 808 923</u>
Net future Loss	R 1 504 695
Total net loss:	R 1 786 060

[28] The Actuary stated that a contingency of 5% has been used for the past loss of earnings and a contingency of 15% and 25% has been applied to the prospective loss. The Industrial Psychologist recommends that a slightly higher than normal contingency be used for the prospective loss “having regards to the accident”. The total amount of compensation for the plaintiff’s past and future loss of earnings therefore amounts to R 1 786 060.00, having regard to the circumstances of the matter, together with the medico legal reports and evidence at hand.

Issues

[29] Against this background, this court is required to determine quantum regarding the following issues:

- a. General damages
- b. Future medical expenses; and
- c. Past and Future loss of earnings.

Law Applicable

[30] I deal with each of these issues below.

General damages

[31] It is trite that the assessment of the quantum of general damages primarily remains within the discretion of the court. In *Pitt v Economic Insurance Company Ltd*¹ the court stated the following:

“... [T]he Court has to do the best it can with the material available, even if, in the result, its award might be described as an informed guess. I have only to add that the Court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but must not pour our largesse from the horn of plenty at the defendant's expense.”

¹1957 (3) SA 284 (D) at 287E-F

[32] In *RAF v Marunga*² it was held that:

“[I]n cases in which the question of general damages arose, a trial Court had a wide discretion to award what it considered to be fair and adequate compensation to the injured party.

... .

There was no hard and fast rule of general application requiring a trial Court to consider past awards, although the Court might derive some assistance from the general pattern of previous awards.”

[33] In *Protea Assurance Co. Limited v Lamb*³ the court held:

“... [T]he Court may have regard to comparable cases. It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time, it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.”

[34] Against this background, I have considered decided cases with approximately similar facts as in this matter. For instance, in *Mgudlwa v Road Accident Fund*⁴, decided in 2010, the court made an award for general damages in the amount of R300 000.00. The plaintiff had sustained an extremely comminuted fracture of the lower end of the femur and scars on the upper end of the left tibia. The injuries had significant adverse effects on his legs, spine and hips. In *Torress v Road Accident Fund*⁵, a 24-year-old male who sustained a severe diffused brain injury,

² 2003 (5) SA 164 at 165B

³ 1971 (1) SA 530 (A) at 535H-536B

⁴ [2010] ZAECHMHC 13 (5 February 2010)

⁵ 2007 (6) QOD A4 – 11 [GSJ]

the soft tissue injury to the neck and soft tissue injury to the face was awarded an amount that equates to R1 344 000.00 on the 2022 terms.

[35] Whilst there are certain similarities between these cases and this matter, each of these cases differ on the facts and the considerations raised therein from the present. They nevertheless serve as a guide to the general trend in the value of awards made. To the extent that guidance may be derived from these matters I have therefore considered them.

[36] In deciding on the reasonable and fair compensation, I was cognisant that it was stated in *Wright v Road Accident Fund*⁶ quoting *Wright v Multilateral Vehicle Accident Fund* reported in *Corbett and Honey* where Broom DJP stated that when having regard to previous awards one must recognise that there is a tendency for awards now to be higher than they were in the past.

[37] I believe this to be a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than those in most other countries.

[38] Accordingly, on a consideration on all the facts of the present matter and awards previously made in similar matters, I have concluded that an award in the amount R 1 500 000.00 would represent fair compensation.

Future medical expenses

[39] Regarding the plaintiff's future medical/hospital expenses, the plaintiff seeks an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 (the RAF Act) as indicated by the experts in their medico-legal reports.

[40] Concerning the future medical treatment there appears to be no contentious issues there. Even though no operations are envisaged, the reports show that the plaintiff may need some pain medication and consultations from time to time for the management of pain. It has not been contested that the plaintiff is entitled

⁶ [2011] ZAECPHC 15 at para 23.

to a section 17(4)(a) undertaking. and I am accordingly satisfied that the claim on this head should succeed.

Loss of earning

[41] It is accepted that earning capacity may constitute an asset in a person's patrimonial estate. If loss of earnings is proven the loss may be compensated if it is quantifiable as a diminution in the value of the estate.⁷ Accordingly, for a claim to succeed, the injured person or plaintiff must prove that they suffered a reduction in the earning capacity which will result in the actual loss of income.

[42] It must also be noted that, in *Rudman v Road Accident Fund*⁸, it was stated that a physical disability which impacts on the capacity to earn an income does not, on its own, reduce the patrimony of an injured person. In other words, the plaintiff must prove that the reduction of the income earning capacity will result in actual loss of income. He must prove the physical disabilities resulting in the loss of earnings or earning capacity and also actual patrimonial loss.

[43] In this matter, the expert opinions are all of the view that the accident has resulted in long-term physical restrictions that significantly limit the plaintiff's ability to perform his work as a self-employed Upholsterer. In this regard, Dr Viviers (Pulmonologist) is of the opinion that the plaintiff now suffers from "post-traumatic chest wall pain syndrome" and concludes that "it is not certain whether he will ever be pain-free, given the time frame that has lapsed since the accident".

[44] Alternatively, the Occupational Therapist reports that the plaintiff is now "restricted to sedentary, light, and medium work", adding that his work as an Upholsterer is classified as medium work with occasional heavy physical work. Considering his inability to perform heavy physical tasks post-morbidly, the Occupational Therapist states that it is reasonable that the plaintiff currently employs an assistant.

[45] She goes on to note that while the plaintiff should be able to continue working in his current capacity until the usual retirement age, he is likely to experience an

⁷ *Prinsloo v Road Accident Fund* 2009 (5) SA 406 (SE) at 409C-410A.

⁸ 2003 (2) SA 234 (SCA) at para 11.

ongoing loss in work productivity and efficiency. She additionally notes that he will likely remain dependent on an assistant to help with the heavy physical tasks associated with his work.

Analysis

[46] Having regard to the abovementioned expert opinions, the Industrial Psychologist is of the opinion that, even with treatment, the plaintiff will probably remain limited to work of a medium physical nature. In the post-morbid scenario, he is therefore unlikely to ever be capable of performing the full range of tasks associated with his work as an Upholsterer and will remain dependent on the help of an assistant with regards to the heavy physical tasks associated with his work.

[47] The Industrial Psychologist is therefore of the opinion that the plaintiff should be compensated for the ongoing cost associated with employing an assistant in the post-morbid scenario. Accordingly, the Industrial Psychologist recommends that a monthly amount of R3 000.00 (in 2025 terms) be awarded to the plaintiff until such a time that he retires at the approximate age of 70.

[48] Furthermore, the Industrial Psychologist is of the view that it is unlikely that the plaintiff will ever achieve his pre-morbid potential in the post-morbid scenario. In the event that he attempts to perform aspects of his work exceeding his post-morbid physical capabilities, it will probably lead to increased levels of pain and discomfort as well as a general deterioration in his condition.

[49] He is therefore of the opinion that the plaintiff will in all probability continue earning around his current levels (R5 000.00 per month in 2025 terms) until retirement at the approximate age of 70. It is noted that his current earnings fall between the lower quartile and the median of the salary scale for non-corporate semi-skilled workers.

[50] Based on the above expert report of the Industrial Psychologist, the Actuary concluded that the total amount of compensation for the plaintiff's past and future

loss of earnings therefore amounts to R 1 786 060.00.

- [51] In this regard, it should be noted that it is trite that the actuarial calculations must be based on proven facts and realistic assumptions regarding the future. The actuary guides the court in making calculations. The court has a wide judicial discretion and therefore the final say regarding the calculations.
- [52] In this matter, the Actuaries relied on the opinion evidence of the Industrial Psychologists, who obtained information from the plaintiff as well the Pulmonologist and Occupational Therapist. Having said that, this court has a duty to ensure that the information and opinion evidence upon which the Actuaries relies on in their actuarial calculations is logical and properly motivated.
- [53] In fact, it has been stated that it is the duty of the trial court to ensure that the opinion evidence of the expert is properly motivated. In this regard, the Supreme Court of Appeal in *MEC for Health and Social Development, Gauteng v MM on behalf of OM*⁹ had the following to say with regard to opinion evidence:

“It is as well to recap the approach to be taken to expert evidence. Such testimony, in a medical matter, amounts to an opinion on how accepted medical principles apply to the facts. It is admissible where the person rendering the opinion is qualified to do so. The opinion must be properly motivated so that the court can arrive at its own view on the issue. Where the opinions of experts differ, the underlying reasoning of the various experts must be weighed by the court so as to choose which, if any, of the opinions to adopt and to what extent. The opinion of an expert does not bind a court. It does no more than assist a court to itself arrive at an informed opinion in an area where it has little or no knowledge due to the specialised field of knowledge bearing on the issues. In this regard, in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingbekämpfung MBH*, this Court held:

‘[A]n expert’s opinion represents their reasoned conclusion based on certain facts or data, which are either common cause, or established by their own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert’s bald statement of their opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which

⁹ [2021] ZASCA 128.

led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.'

With those factors in mind, the expert evidence must be evaluated."¹⁰ (Footnotes Omitted)

[54] Similarly, in *NSS obo AS v MEC for Health, Eastern Cape Province*¹¹ the Supreme Court of Appeal stated the following on the same topic:

"It is settled principle that in order to evaluate expert evidence, the Court must be appraised of and analyse the process of reasoning which led to the expert's conclusion, including the premises from which that reasoning proceeds. The court must be satisfied that the opinion is based on facts and that the expert has reached a defensible conclusion on the matter."¹²

[55] It should be noted that even in instances where there is no opposing report, as it is the case in this matter, it remains the duty of this court to analyse the report and be satisfied.

Reason for Order

[56] In my view, I am not satisfied with the opinion of the Industrial Psychologist that the earning capacity of the plaintiff had been lost to a point that his patrimony is reduced in due course.

[57] To my mind, the opinion of the Industrial Psychologist is not properly motivated at all. I am unable to agree with the conclusion reached by the Industrial Psychologist regarding the fact that the plaintiff should be compensated for the ongoing cost associated with employing an assistant in the post-morbid scenario. Further, his conclusion regarding the fact it is unlikely that the plaintiff will ever achieve his pre-morbid potential and in the event that if he attempts to perform aspects of his work exceeding his post-morbid physical capabilities, it will probably lead to increased levels of pain and discomfort as well as a general deterioration in his condition.

¹⁰ Id at para 17.

¹¹ 2023 (6) SA 408 (SCA).

¹² Id at para 25.

[58] In my view, these conclusions are based on information which the Industrial Psychologist was unable to verify. In other words, some of the Industrial Psychologist's conclusion were based merely on information which was supplied by the plaintiff only. The plaintiff has failed to provide any form of documentation to prove that he was making a particular amount of earnings pre-accident. All the past and future earnings which the plaintiff claims are based on the information supplied by the plaintiff alone and is not corroborated by any documentation from the plaintiff.

[59] Accordingly, it follows therefore that the actuarial calculations made by the Actuaries cannot stand since they were arrived at using the opinion of the Industrial Psychologist which is, in my view, not properly motivated at all.

[60] I am therefore not persuaded that the evidence supports the claim that the plaintiff has suffered any loss of earnings or earning capacity as a result of the injuries sustained in the collision. In my view, his injury has not affected his functioning, the ability to do his work and his chances of progressing up the ranks.

[61] In my judgment the injuries he sustained have not affected his earning capacity or career progression. The plaintiff has not proven that he is entitled to any compensation for loss of earning capacity. Consequently, the quantum claim for loss of past and future earnings stands to be dismissed.

Costs

[62] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there be good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances.

[63] The plaintiff was successful on the issues of general damages and future medical expenses; however, he was unsuccessful on the issue relating to the claim for loss of earnings. Considering this, it is in my view logical for the defendant to be ordered to pay the plaintiff's costs incurred in so far as the issues of general damages and future medical expenses is concerned.

Order

[64] In the result, I make the following order:

1. General damages are awarded to the Plaintiff in the amount of R1 500 000.00.
2. The Defendant is ordered to furnish the Plaintiff with an undertaking for future medical and hospital expenses in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996.
3. The Plaintiff's claim for damages for loss of Past and Future Earnings is dismissed.
4. The defendant is ordered to pay the plaintiff's costs limited to the issues of general damages and future medical expenses.



MD BOTSI-THULARE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

Counsel for the Plaintiff: Adv A Sewpersath

Instructed by: A Wolmarans Inc

Counsel for the Defendant: Mr M Madasele

Instructed by: Road Accident Fund/State Attorney SA

Date of Hearing: 30 April 2025

Date of Judgment: 29 July 2025

