



**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

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

25 September 20025
DATE


SIGNATURE

**APPEAL CASE NO: A80/2024
CASE NO: 3119/2022**

In the matter between:

SIMMON SAAZHOPE QWABE

APPELLANT

and

THE ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT

MSIBI AJ

[1] This is an appeal against the judgment and order of Mashile J of this Division (court *a quo*) granting an absolution from the instance in respect of the appellant's loss of earnings. The appeal is with leave of the court *a quo*. The respondent opposes the appeal.

Background

[2] The following are common cause facts. On 10 October 2020, the appellant was a front-seat passenger in a motor vehicle which was involved in an accident. As a consequence of the negligence of the insured driver, he suffered bodily injuries to the side of his head, to his lower lip, right hand, lower back, chest and a fracture of the right lower arm. The appellant lodged a claim against the respondent under various headings, including loss of earnings.

[3] Before the trial, the parties informed the court that the respondent would be 100% liable for all damages that the appellant may prove. The question of future medical treatment had been resolved on the basis that the respondent would provide the appellant with a Certificate in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 as amended. General damages were settled at an amount of R700 000.00. What was left for determination by the court *a quo* was the loss of future earning capacity.

[4] Prior to the hearing, on 8 November 2023, the parties filed a joint detailed Statement of Issues in terms of Rule 37A(9)(a)(i) and (ii) of the Uniform Rules of Court in which the respondent recorded at paginated record pages 65 to 66 at paragraph 4.2.3, as follows:

“Prior accident the plaintiff was fully able to perform his duties on his employment as an unqualified plumber. The industrial psychologist is of the view that he will no longer be able to achieve his pre-accident career. He has been compromised and rendered an equal competitor no longer suited for his pre accident career. However, the plaintiff has decided to pursue self-employment as an unqualified

plumber. Therefore, the defendant is of the view that he is able to achieve his pre-accident career.

On that basis, the defendant is of the view that the plaintiff did not suffer any total loss of earnings. Defendant agrees that the plaintiff is compromised and that he is an unqualified competitor as a result of the accident. However, the plaintiff will be able to continue to work in his current capacity with limitations. The defendant further agrees with the industrial psychologist that higher than normal post-accident contingency deductions should be applied. The matter must proceed only on contingencies.”

[5] The appellant’s pre-morbid income was not contested. The appellant led evidence regarding his post-morbid income. The respondent did not lead evidence in this regard, nor did it appoint experts. The court was informed that the respondent was prepared to use and consider those reports that the appellant obtained, being: the orthopaedic surgeon, plastic surgeon, neurologist, occupational therapist, industrial psychologist, and Actuary.

[6] The appellant testified that after losing his job, he became self-employed and hired assistants as needed. Following the accident, he was no longer able to perform tasks alone and required assistance.

[7] The appellant further presented expert evidence regarding his loss of income, stating that before the accident, his monthly income was R14 550.00. After the collision, his average monthly income was R7000.00. During his evidence in chief, the appellant at page 298, paragraphs 11 to 14 and 17, stated as follows:

“The amounts received in my bank account are not constant as lengths of contracts differ, but I can state that I earn approximately R7,000 per month on average for myself after I have paid my running costs and my assistance.

Do you confirm that?

Yes, I confirm.”

[8] In support of the aforesaid, the appellant produced a copy of his bank statement for the period of 25 August to 17 November 2023, which reflected the deposits made by his clients for the plumbing services that he had rendered.

[9] His current income was corroborated by documentary evidence of his bank statement. The respondent presented no evidence in rebuttal, whether oral or documentary. The court *a quo* found that the respondent was only liable for the appellant's general damages in the amount of R700 000.00. In granting an absolution from the instance, the court *a quo* at paragraph 9 of its judgment stated as follows:

"It is evident that Qwabe has been an independent contractor since 2020 or 2021. It is therefore incorrect to characterise him as an unemployed person. The issue should be to determine whether he is generating income that is more than what he earned pre-morbid or whether such income has declined since the accident. It cannot be unreasonable to expect that a self-employed individual, either he or his accountant, would keep records for purposes of submission of tax returns to South African Revenue Services (SARS)"

Ground of appeal

[10] The appellant submitted in the application for leave to appeal that the court *a quo* erred in finding that the appellant had not proven that the R7000.00 represents his current earnings and in directing that there should be an absolution from the instance.

The applicable legal principles

[11] It is trite that in civil cases, the plaintiff bears the burden of proving their claim on a balance of probabilities. In this case, the appellant presented both oral testimony and documentary evidence, specifically his bank statements, to substantiate his reduced earnings following the accident. The lack of any rebuttal or opposing evidence from the respondent strengthens the appellant's position. The court *a quo*'s conclusion that the appellant failed to prove his current earnings does not

meet the required evidentiary standard, considering the best available evidence was before the court and remained unchallenged.

[12] In his heads of argument, Counsel for the appellant referred this court to several decided cases; I will refer to a few.

In *Esso Standard SA (Pty) Ltd v Katz*,¹ the court referred with approval to *Herman v Shapiro & Co*,² Stratford J stated as follows:

“Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate, but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where the evidence is available to the plaintiff which he has not produced; in those circumstances, the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit a mathematical calculation of damages suffered, still, if it is in the best evidence available, the Court must use it and arrive at a conclusion based upon it.”

[13] In *Hedricks v President Insurance Co Ltd*, the court held as follows:³

“Our Courts have long recognised that there are cases which either by their nature or due to their particular facts make the assessment of damages difficult. Where it is clear that damages have been suffered but the *quantum* of those damages is not conducive to precise calculation or even certain reliable estimation, the wrongdoer will not be relieved of the necessity to pay by reason of the difficulties in assessing the *quantum*. Courts will do their best with the material placed before them, scanty though it may be, provided only that plaintiff has placed before the Court all the evidence reasonably available to assist the court in its task”

¹ *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 969E-G.

² *Herman v Shapiro & Co* 1926 TPD 367 at 379.

³ *Hedricks v President Insurance Co Ltd* 1993 (3) SA 158 (C) at 163H-I.

[14] In *Burger v Union National South British Insurance Company*,⁴ the court stated as follows:

“I do not think, however, where the available evidence established a likelihood of some fact, situation or event as a consequence of the collision which is incapable of quantification within narrow limits, that I am obliged, because the *onus* is on the plaintiff, to act on the possibility least favourable to her. Causation is one thing and quantification is another, although I readily concede that it is not always possible to distinguish clearly between them in cases like the present one. It has never, within the range of my knowledge and experience been the approach of our courts when charged with assessment of damages, to resolve by an application of the burden of proof such uncertainties as I have referred to. I am not dealing with a case in which the plaintiff could have called evidence to remove the uncertainty but neglected to do so. I am referring to cases like *Turkstra Ltd v Richards* 1926 TPD 276, in which the plaintiff has laid before the Court such evidence as was available, but that evidence has necessarily failed to remove uncertainties with regard to matters bearing upon the *quantum of damage*. *The Court, in such a case, does the best it can with the material available. If it can do no better, it makes the “informed guess” referred to by Holmes J.A, in Anthony and Another v Cape Town Municipality* 1967 (4) SA 445 (AD).”

[15] Counsel for the appellant submitted that the appellant presented prima facie proof or evidence that required a response from the respondent. This became conclusive proof on the issue, as it was not rebutted. Furthermore, the court *a quo* was able to determine the quantum of the appellant’s damages. Any remaining uncertainty regarding the exact quantification of the appellant’s earning capacity could be properly addressed by applying contingency figures to the estimated pre- and post-morbid earnings, to the extent that the court, exercising its prerogative and discretion, deemed appropriate.

⁴ *Burger v Union National South British Insurance Company* 1975 (4) SA 72 (W) at 74G- 75A.

[16] The respondent had, after all, admitted before the trial that the appropriate way of addressing the appellant's loss of earning capacity was by applying appropriate contingency deductions.

[17] The respondent, in its heads of argument, acknowledged the findings by the Occupational Therapist that the appellant demonstrated residual physical limitations that prevent him from performing demanding tasks.

[18] In his heads of arguments, Counsel for the respondent also referred this Court to the matter of *Rudman v Road Accident Fund*,⁵ wherein the trial court determined that any losses from the accident affected the company, not the plaintiff's private estate. The court stated the plaintiff failed to prove his injuries diminished his private estate, and thus, he was not entitled to damages.

[19] In *Dippenaar v Shield Insurance Co Ltd*,⁶ the court stated as follows:

"In our law, under the *Lex Aquilia*, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes his estate."

[20] In *Ntsele v Road Accident Fund*,⁷ with regard to two mutually destructive versions, the court quoted the *National Employers General Insurance v Jagers* judgment, where Eksteen AJP stated as follows:

"In civil cases the onus is obviously not as heavy as it is in a criminal case, but where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the

⁵ *Rudman v Road Accident Fund* [2002] ZASCA 129; 2003 (2) SA 234 (SCA) para 9.

⁶ *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) para 9.

⁷ *Ntsele v Road Accident Fund* [2017] ZAGPJHC 49.

other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether the evidence is true or not, the court will weigh up and test the plaintiff's allegations against the general probabilities"

[21] Counsel for the respondent, with reference to the Rudman case (*supra*), argued that the fact that the appellant had proven physical limitations or disabilities does not equate to a personal loss of earning capacity. It was further contended that the R7000.00 claimed by the appellant as an unqualified plumber, after the accident, lacked any basis or proof. Therefore, the appellant failed to establish a case for loss of earnings.

[22] It was further argued on behalf of the respondent that the burden was on the appellant to produce credible evidence, especially since there were two mutually contradictory versions.

Analysis

[23] From the detailed Statement of Facts and the concessions made by the respondent before the court *a quo*, the following facts are common cause:

[23.1] That the appellant would no longer achieve his pre-accident career.

[23.2] That he had been compromised and rendered an unequal competitor and no longer suited for his pre-accident career.

[23.3] That if he did not suffer a total loss of earnings, he would still be able to continue with his career, but with limitations. As such, his loss should be dealt with on a contingency basis by applying a higher-than-normal contingency deduction.

[23.4] That from his post-morbid monthly income, he still had to pay running expenses and salaries for his assistants.

[24] The appellant testified under oath and presented his bank statement, supporting his claim that he remained with an average of R7000.00 per month after paying for running costs and his assistants. The respondent did not provide evidence in rebuttal.

[25] There is no evidence that the appellant prepared accounting records or tax returns in his possession, nor that he was able to produce them in court, but he still chose to withhold them. There was no request from the respondent for the applicant to provide these during the trial.

[26] As was held in *Esso (supra)*, the appellant presented the best evidence available to him at the time of trial. The respondent cannot be allowed to escape liability due to evidential shortcomings. In such a case, the court is expected to assist him, and in a situation of uncertainty, to estimate in his favour. See *Hendricks (supra)* and *De Klerk v Absa Bank Ltd and Others*.⁸

[27] Even if the appellant's evidence failed to eliminate uncertainties regarding quantum, our courts are expected to do their best with the material available and make an informed guess, as stated in *Burger (supra)*. As previously suggested by the Industrial Psychologist, the uncertainty could have been addressed by applying higher than normal contingency figures.

[28] The court ought to have found that the evidence adduced by the appellant in support of his claim for loss of earnings adequately established a prima facie case that he had suffered a loss of earnings.

[29] There were no mutually destructive versions before the court *a quo*, as argued by counsel for the respondent. On the contrary, the only version before the court was that of the appellant. In keeping with the joint detailed Statement of Facts, the respondent presented no version or expert reports.

[30] In light of the foregoing, the issue of loss of earnings ought to have been decided in the appellant's favour; with the court applying higher than normal contingency figures as indicated by both parties.

⁸ *De Klerk v Absa Bank Ltd and Others* [2003] 1 All SA 651 (SCA); 2003 (4) SA 315 (SCA).

[31] I am therefore of the view that the court *a quo* misdirected itself in finding that the appellant had failed to establish loss of earning capacity. It goes without saying that the court also erred in finding that there should be an absolution from the instance.

[32] This finding entitles this court to interfere with the decision of the court *a quo*. As a result, this Court will proceed and determine the issue that was before the court *a quo*, namely the appellant's future loss of earnings.

[33] During the proceedings in the court *a quo*, the respondent's counsel confirmed that the respondent did not have an issue with the amount of R700 000.00 claimed for general damages. For this reason, the appellant is entitled to general damages as claimed. The appellant's counsel requested this Court to make orders in respect of the outstanding issue of loss of earnings.

[34] This request was made based on what is already on record and the evidence presented during the trial proceedings. There was an undertaking by the respondent that the reports by the expert witnesses were not in dispute. What the court needed to decide was the applicable contingency figures. For this purpose, I will pause to consider the contents of the expert reports.

Medical expert reports

[35] The Orthopaedic Surgeon, Dr Oelofse, observed that the severity of injuries to the appellant's right forearm, wrist, and lumbar spine affects his daily activities and pre-accident occupation as a plumber. The expert believes that the appellant would only be able to perform sedentary to light manual work until the retirement age of 65. He will not be able to return to his pre-morbid work as a plumber without assistance. He opined that the appellant's whole person impairment is 30%.

[36] The Plastic Surgeon, Dr Irsigler, stated that the appellant used to lift weights and run as a form of exercise. He can no longer engage in these activities. The appellant had no scars before the accident. Due to the scarring on his head, he can no longer cut his hair as he used to. He is self-conscious about the injuries on his face. The expert believed that the facial scarring on the appellant's forehead and lip, and the deformity on his right arm, would require correction through surgery. He will need two weeks of sick leave to recover and four weeks to fully heal.

[37] The Neurologist, Dr Rosman, noted tenderness on the left side of the appellant's forehead. Whenever he pressed on it, the appellant experienced pain that radiated to the back of his head. He sometimes experienced tinnitus in his left ear. The rest of his general examination was regular. He did not display neuropsychological problems.

[38] The Occupational Therapist, C du Randt, states that the appellant's pre- and post-accident work as a plumber is classified as light to occasional medium-weight handling, requiring significant mobility and agility. Due to the accident, he is now better suited for sedentary to lightweight handling tasks with greatly limited mobility and agility. Because of the injury to his spine and upper limb, the appellant cannot work in confined spaces. The expert believed that, owing to the degenerative nature of the appellant's orthopaedic injuries, he is unlikely to return to his pre-accident role as a plumber without assistance or the use of assistive devices. The expert also noted that the appellant is at a disadvantage in the open labour market because he lacks the physical and therefore functional ability to obtain or maintain employment of a similar physical nature to his pre-accident role.

[39] The Industrial Psychologist, D de Vlamingh, believed that the appellant will no longer be able to achieve his pre-accident career and earning potential. Due to

accident-related difficulties, the appellant had been compromised and rendered an unequal competitor in the open labour market and is no longer suited for his pre-accident employment as a plumber. The industrial psychologist noted that the appellant had been able to use his extensive experience as a plumber to secure informal piece jobs, but with the help of a full-time assistant. The expert further noted that the appellant's current level of income represents his post-accident earning peak, which will remain at this level until his retirement age of 65 years. The expert suggested a much higher than normal post-accident contingency deduction to address the risk.

Loss of future earnings

[40] The court assesses loss of earnings by estimating what the appellant would have earned had the accident not occurred, compared to his current earning potential. The principles governing these calculations were reinforced in *Southern Insurance Association Ltd v Bailey NO*,⁹ where it was held that the courts rely on either a broad estimation or a mathematical calculation based on evidence, acknowledging that both involve an element of speculation.

[41] In *Road Accident Fund v Guedes*,¹⁰ it was held that the court exercises a broad discretion when it assesses the quantum of damages due to loss of earning capacity and has a considerable discretion to award what it considers just and reasonable. The courts have adopted the approach that, to assist in such a calculation, an accurate record of computation is a helpful basis for establishing the quantum of damages; even then, the trial court has a broad discretion to avoid what it believes is just.

⁹ *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A).

¹⁰ *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at para 8.

[42] In *Mvundle v Road Accident Fund*,¹¹ it was held that damages for loss of income are awarded when a person's employment situation changes substantially, affecting job security and career options.

[43] These cases reinforce the fact that the appellant's post-accident employment limitations justify his claim for loss of earnings, given his diminished work capacity and reduced career prospects. I find, therefore, that the appellant is entitled to compensation for the loss of profits that he suffered as a result of the accident.

[44] The Actuary, Mr Potgieter, at page 255 of the paginated bundle, calculated the value of the appellant's loss of income as on 1 August 2023, which is two years ago. He did not apply contingencies.

[45] The appellant's claim for loss of income is supported by expert reports from medical, occupational, and industrial psychology, alongside established legal principles. Given his diminished employability and the precedent for awarding damages in similar cases, I agree with Counsel for the appellant that an award of R1 985 496.00 is justified in the circumstances to compensate for his loss of future earnings. The amount is not far from the quantum that was sought in 2023.

Contingencies

[46] In *Ralph v Road Accident Fund*,¹² a detailed approach on the determination of contingencies was set out as follows by Molitsoane J:

"[20] The court in *Oosthuizen v Road Accident Fund*¹³ gave a useful summary of case law on contingencies, and I refer extensively as follows:

'Matters which cannot otherwise be provided for or cannot be calculated exactly, but which

¹¹ *Mvundle v Road Accident Fund* [2012] ZAGPPHC 57.

¹² *Ralph v Road Accident Fund* [2023] ZAFSHC 102.

¹³ *Oosthuizen v Road Accident Fund* 2015 JDR 1717 (GJ).

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).

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 (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)'."

[47] The determination of contingencies includes factors such as the appellant's age, the extent of the injuries, the prospect of finding new employment suitable to his diminished employment capacity, his qualifications or lack thereof and his mental health.

[48] Having carefully considered the above, I find that after applying a higher-than-normal contingency figure of 30%, the amount arrived at is R1 389 847.20 minus

R18 160.00 (which consists of disability grant payments and one month's salary).
The quantum of the appellant's loss of future earnings is R1 371 687.20.

[49] The general principle is that a party that is successful in litigation is entitled to its costs incurred in the litigation proceedings. I find no reason to deviate from the general principle. The respondent is to pay the costs of the appellant.

The Order

[50] For the reasons above, I propose the following order:

50.1 The appeal is upheld.

50.2 The order of the court *a quo* is hereby set aside and replaced with the following:

1. The defendant is ordered to pay the plaintiff the following amounts:
 - A. R700 000.00 for general damages.
 - B. R1 371 687.20 for loss of future earnings.
2. A certificate in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, as amended, for future medical treatment.
3. The defendant is ordered to pay the plaintiff's costs on a party and party scale.



SM MSIBI AJ

ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

I agree, and it is so ordered.



TV RATSHIBVUMO DJP

JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

I agree



MB MADAVHA AJ

ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Appearances

For the appellant: Advocate G. Lubbe

Instructed by: Frans Schutte & Matthews Phosa Inc.
Mbombela

For the respondent: Advocate R.C. Mathevula

Instructed by: The State Attorney
Mbombela

Heard on: 08 August 2025

Delivered on: 25 September 2025