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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

CASE NO. 407/2023

Not reportable

In the matter between:

EMILIO DESMOND GEORGE

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Rugunanan J

[1] Placed before this court is a calculation by an actuary in which the plaintiff's claim for loss of income is postulated on two scenarios (the calculation). In scenario 1 the plaintiff's total loss amounts to R2 812 400 (for past and future loss, respectively the sum of the amounts of R96 900 and R2 715 500), and in scenario 2 the total loss amounts to R2 765 160 (also the sum of the respective amounts of R96 900 and R2 668 260 for past and future loss). Scenario 1 is postulated on the plaintiff's retirement at age 55 and scenario 2 is postulated on retirement at age 60.

[2] In quantifying the plaintiff's claim for loss of income (the claim), the issue for determination involves the appropriate percentage contingency factor to be set-off against the applicable scenario.

[3] On 23 February 2021, in Uitenhage (now Kariega), the plaintiff, a constable employed by the South African Police Service (SAPS), was conveyed as a passenger in a motor vehicle that left the road and collided with a wall. At the time the plaintiff was on duty, and was conveyed in the vehicle in the course and scope of his employment.

[4] As a result of the collision, he sustained bodily injuries, more particularly: a displaced intra-capsular fracture of the neck of the right femur in the right hip which necessitated replacement surgery, and lacerations to the right knee and right lower leg. His further injuries involved a post-traumatic stress disorder with associated depressive and anxiety disorders.

[5] In an order taken by agreement on 17 October 2024, the defendant was declared liable for damages suffered by the plaintiff as a result of his injuries. In addition, the defendant was ordered to pay the plaintiff the amount of R650 000 for general damages and to furnish a certificate of undertaking for future

medical treatment and expenses. The order made provision for an interim payment of R500 000 in respect of the plaintiff's claim for loss of income.

[6] In the amended particulars of claim, the plaintiff's claim for loss of income is pleaded as follows:

‘9.1 ...

9.2 But for the collision:

9.2.1 He would have continued with his career in the South African Police Service, achieving promotions to the rank of Warrant Officer 2.

9.2.2 He would have retired at age 60.

9.3 Having regard to the collision:

9.3.1 He was unable to return to work immediately after the collision, and he lost out on various allowances which he would otherwise have received;

9.3.2 He has returned to his employment with the South African Police Service, where he is now accommodated in a light duty position, but his career progress will be slow and it will take longer to achieve promotions;

9.3.3 He may be forced to retire early;

9.3.4 He is now vulnerable and disadvantaged in his position in the South African Police Service and in the open labour market, and it would be appropriate to apply a higher contingency deduction to anticipated earnings having regard to the collision.’

[7] As indicated, the plaintiff's loss is set out in the calculation which is postulated on two differentiated retirement scenarios. At the conclusion of the trial this was, by way of a concession from the defendant, narrowed down to

scenario 1, entailing in that instance, the determination of an appropriate percentage contingency deduction in respect of the plaintiff's future loss of income in the injured (post-morbid) state.

[8] In his opening address counsel for the plaintiff stated that the claim is formulated on the basis that the plaintiff would have continued in his employment with SAPS until retirement at age 60 achieving the rank of 'Warrant Officer 2' but that he may be forced to retire early; and having regard to his injuries occasioned by the collision, he no longer receives a service allowance for 'danger pay'.

[9] In pursuing the claim, the plaintiff testified as the only primary factual witness. The remaining evidential substrate comprised of a salary advice for 31 July 2024 handed in from the bar and a bundle of expert reports that included the calculation. The salary advice indicates that the plaintiff holds the rank of constable and that he contributes to a medical aid scheme. The import thereof will become apparent later in this judgment. The calculation includes assumptions and allowances integrating the plaintiff's basic salary progression to 'Warrant Officer B2' and was not disputed. The evidential value of the bundle of reports was not disputed either. Presumably, this may have occasioned the concessions made by the defendant during argument, but exactly what was admitted in the reports was, deplorably, never clarified by either of the parties during the trial, but more particularly the plaintiff on whom the onus rested. Equally deplorable was the tardiness of the defendant's legal representative who arrived late at court.

[10] Broadly stated, the plaintiff's testimony focussed on his ability to cope in his current employment sphere and whether he has had medical treatment to date. Ordinarily, a factual witness would be expected to have direct, personal

knowledge of the matters in question. The plaintiff was not an entirely satisfactory witness. His testimony on these matters was internally inconsistent and contradictory. Breaking into tears, whether due to stress or to gain sympathy, does not diminish the effect of purposeful questioning. Except for the reports transiently mentioned by plaintiff's counsel in argument, the lack of clarification as to what was admitted in the remaining reports has the outcome that the court is unable to determine their relevance and/or probative value. The rationale is that expert opinion is unpersuasive where the factual foundation presented by the primary witness is internally inconsistent or self-contradictory.

[11] It is common cause that the plaintiff's injuries necessitated his absence of five months from active service. He testified that prior to the collision he was employed in the SAPS 'flying squad'. Post-collision, in his injured state, he has been accommodated in the diving unit at the instance of his captain. The unit has not been established as yet, but it comprises of 10 members located in different departments in Gqeberha. The plaintiff stated that 50% of his work entails performing administrative functions such as maintaining equipment inventories. The remaining 50% entails filling diving cylinders and attending scenes for recovering and carrying 'bodies'. Nothing more was elicited from him.

[12] It was only during argument that reference was made to the report by Occupational Therapist, Nicolé Boreham. Commenting on the plaintiff's post-earning capacity she states:

'In his position that he is working in now, 50% of his work is considered administrative and 50% consists of physical work. By the description he provided for the work that was defined as physical, it is apparent that he is performing work that is defined as medium which in my opinion is unsafe for him to be executing. He should not be lifting 30 kg of oxygen cylinders nor should he be having to walk long distances over uneven terrain or climbing on the back of [a] vehicle, having to bend and arrange equipment or working in any form of a squatting

position or on his haunches. Any of these actions are dangerous for someone who has had a hip replacement and many of the positions or actions he has to perform should be avoided.’

[13] When testifying on his post-accident physical ability to cope with his duties in his current employment sphere, the plaintiff readily stated that he is able to do so but needs to exercise caution. On being asked if he was coping emotionally, his response was in the negative. Yet again, no more was elicited from him. In cross-examination he confirmed, without elaborating, that he was not coping emotionally – but twice denied having affirmatively stated that he was coping physically. On being questioned by the court ‘Why did you say yes when Mr Niekerk led you? Do you wish to retract that answer?’, he responded evasively: ‘It is a tricky question if I can say so, M’ Lord’.

[14] The plaintiff’s current complaint is that he experiences pain in his right hip, back, and right knee. He is unable to run, pick up things, drive long distances, and sit for prolonged periods. On being asked by his counsel whether he received further medical treatment since his discharge from hospital, he responded in the negative. It was put to him in cross-examination that his negative response meant that his current post-accident condition is not as bad as he would want the court to believe. To this the plaintiff responded long-windedly in the following terms (repetition omitted):

‘Like I said, M’ Lord, the amount of pain that I have to deal with every day, I always have to limit myself and what I do. I tried to push myself to do things I cannot do. But when I do it I have to think about I am not going to hurt myself again That is why I am saying that it is difficult for me every day do something, ... so not receiving treatment, I am not a professional in that matter to what to do, but it is always a struggle for me to think what must I do or how must I do it not hurting myself. So that goes through my mind every day But the person I am today is that I cannot make an excuse for what happened to me, even if that means that I have to hurt myself again, but I want to be a better person in terms of where I work, and if I do not do that, I will not reach my dream that I always had as a police official. So that is why I am saying that it is not an easy thing, if I can put that to M’ Lord.’

[15] Not satisfied with the plaintiff's response, and quite understandably, the cross-examiner put it to the plaintiff: '... So my question to you is that if the limitations are so severe why have you not been undergoing any treatment to date?' The plaintiff responded: 'I do not know ... I cannot say why I did not go for treatment....'

[16] In response to questioning by the court, the plaintiff stated that he last submitted to medical treatment in 2021 and has since not undergone any further treatment. From the bar his counsel announced that the certificate of undertaking previously ordered had not had been furnished by the defendant despite numerous requests. This does not redact the plaintiff's laxity in seeking medical treatment to relieve his symptoms – it is at odds with his professed desire 'to be a better person in terms of where I work'.

[17] The limited and superficial presentation of the plaintiff's evidence presents considerable failings and apprehensions. The plaintiff raises present complaints but inexplicably makes no attempt to seek medical treatment to ameliorate his pain and suffering despite his access to a medical aid benefit. While it is common cause that his injuries necessitated his absence of five months from active service, he did not state exactly when he commenced being accommodated in the diving unit. No attempt was made to elicit this evidence from him though it may reasonably be assumed that this was in August 2021. It is also uncertain what he meant to convey by stating that the unit has not been established. This is something the plaintiff ought to have clarified considering that it is his pleaded case that he, 'is now vulnerable and disadvantaged in his position in the South African Police Service and in the open labour market.' Alternatively, evidence ought to have been led from his senior who initially approached him. It is confounding that what appears to be an adequately equipped unit, though not established, operates with a complement of 10 members and is staffed by three administrative assistants, one of whom includes the plaintiff. While this

invites intriguing questions about the creation and allocation of public service portfolios and the use of public funds, this is not the occasion for delving into the issue.

[18] There is a further aspect of the plaintiff's evidence that deserves mention. In her report, Industrial Psychologist Amorei Engelbrecht notes:

'Prior to the accident Mr George intended to work as a diver in the flying squad diving unit. He has been approached for training by the captain but reported that he is not prepared to undergo training in the injured state.'

[19] To this the plaintiff responded:

'I am not sure if I said that M' Lord, but the captain approached me and, after the accident he approached me and said what I will do. My doctor as well advised me that the swimming or cycling will be the most effective way to, or what I can do during my life period. When the captain approached me and asked me about the diving unit, I then said yes, because it was my only option if I can say so, M' Lord at the time.'

[20] After vacillating what he meant by this response, he was asked by the court 'Are you prepared to undergo training in your injured state?', to which he replied, 'Yes, M' Lord'. While he attempts to disclaim what his expert has noted, it is apparent that the plaintiff now assents to submitting to some form of activity-based training such as cycling or swimming, as recommended by his doctor. Postulating that he currently copes in his workplace, his deference to a routine of the suggested activities may augment his physical competence to meet the current exigencies of his position in the dive unit.

[21] Notwithstanding the limited scope of the evidence but taking into consideration the future hip replacement surgery proposed in the report by orthopaedic surgeon, Dr Aslam, counsel for the plaintiff contended for a finding that the plaintiff be awarded damages on the basis of scenario 1 of the calculation predicated on retirement at age 55. His argument was pillared on the

risk that ‘degeneration’ will not enable the plaintiff to work until normal retirement at age 60. In point, the plaintiff never testified that his working lifespan may be truncated. (The defendant, in any event, conceded that loss should be calculated until age 55. It is assumed that this aligned with the expert reports).

[22] Turning to the calculation, the actuary indicates his instructions to factor contingency deductions of 20% and 30% against future loss, respectively in the uninjured and injured earnings scenarios. A contingency factor is a matter for determination by the court. Plaintiff’s counsel contended, however, that the calculation was reasonable and advocated for its acceptance by the court. Setting off the interim award of R500 000 achieves a net award of R2 312 400, which counsel contended should be awarded to the plaintiff as and for damages.

[23] It appears that the higher contingency of 30% is the driving force behind the allegation in paragraph 9.3.4 of the particulars of claim. And its effect is that it attracts a higher amount signifying the plaintiff’s loss.

[24] To the contrary, it was submitted for the defendant that a contingency factor of 25% be applied against future loss of earnings in the plaintiff’s injured state. The result amounts to R2 504 010. Setting off the interim award of R500 000 achieves a net award of R2 004 010, which it was contended should be awarded to the plaintiff. The result is based on scenario 1 of the calculation with the concession that the plaintiff is presently accommodated in his current employment position and may retire at age 55, and the further concession that the 20% contingency applied against future loss in the uninjured state is no longer contested.

[25] Tritely, the determination of a suitable contingency deduction falls within the discretion of the court, and is a method used to arrive at fair and reasonable compensation having regard to the specific facts and circumstances of a case.¹

[26] Having heard the parties' submissions and after doing the math, it is immediately apparent that they were cavilling about a 5% difference that amounts to R308 390.00 (ie R2 312 400 less R2 004 010). In my considered assessment, the percentage differential serves as a brake against overcompensation from the public purse and the 25% contingency driven by the defendant is fully justified on the basis of the reasoning employed in this judgment. The motivation for proceeding to trial was that the defendant resisted settling the matter on the terms proposed by the plaintiff. This is difficult to accept taking into consideration the plaintiff's words:

‘... I do not live for the money ... I am not a person that is negative ... I am not here for the money because it is not going to bring my life back of what I could have been.’

[27] In the circumstances, and having regard to scenario 1 of the calculation, a finding ensues that: (a) the plaintiff would probably retire at age 55; (b) a contingency factor of 20% (as conceded) shall be applied against his future loss of income in the uninjured state; and (c) a discretionary factor of 25% shall be allocated and applied against future loss in the injured state. Setting off the interim award of R500 000 achieves a net amount of R2 004 010.

[28] The allocated 25% discretionary contingency factor is underpinned by the plaintiff's evidence that he is physically coping at his workplace, and that since 2021 he has not undergone or appreciated the need for further medical treatment. In addition, ever since being accommodated in the dive unit in 2021, there has, in the passage of almost five years to date of trial, been no threat of his removal from his current position. These findings are borne from the limited

¹ *Bulane v Road Accident Fund* (2088/2023) [2025] ZAFSHC 83 (6 March 2025) paras 76-77 and 79.

reach of the evidence, and were addressed in argument for the defendant without recourse to extraneous matter. My own observation is that the absence of any circumstance or threat of removal from the diving unit singularly contradicts paragraph 9.3.4 of the particulars of claim and repudiates the argument favouring a higher contingency against anticipated earnings, post-accident. Moreover, the plaintiff has given no direct evidence on whether his current emotional state has impeded his performance at his workplace. The nature and effect, if any, of his depressive disorder on his ability to discharge his employment obligations was not dealt with in evidence and was not addressed in argument.

[29] The absence of depth and substance in the evidential matrix will not be moderated by it being expected of the court to trawl through the bundle of expert reports. The reports are certainly not inconsiderable in volume and content.² Their blanket admission does not leave it open to the court to find material favourable to the plaintiff. To do so may result in speculative findings on factual matters that were not directly traversed in oral evidence or in cross-examination.

[30] At the conclusion of argument, plaintiff's counsel presented a draft order. Paragraph 1 of the order at the end of this judgment reflects the award to the plaintiff, which differs from the draft by counsel. The defendant indicated that paragraphs 2, 3, and 4 of the proposed draft were not contentious. The inclusion of paragraph 5 should serve as a reminder that non-compliance with the rules of practice in this division will not lightly be condoned. Metallic devices such as prong fasteners are primarily designed to hold documents together but if not properly and securely covered by tape or some other acceptable material, their sharp edges have the propensity to cut fingers.

² Some 142 pages in total.

[31] In the result it is ordered that:

1. The defendant shall pay to the plaintiff the amount of R2 004 010 for loss of earnings and earning capacity, being the difference between the amount of R2 504 010 less the interim payment of R500 000.

2. Payment of the aforesaid amount shall be made to the plaintiff's attorneys, Jock Walter Inc., whose trust account details are as follows:

Account name: Jock Walter Inc.

Bank: Standard Bank

Account number: 0[...]

3. Interest shall run on the aforesaid amount at the prescribed legal rate from a date 14 days of the date of this order to date of payment.

4. The defendant shall pay the plaintiff's taxed party and party costs of suit together with interest thereon from a date 14 days after *allocatur* to date of payment, such costs to include:

4.1 The costs of counsel on Scale B; and

4.2 The reasonable and necessary qualifying fees and expenses, if any, of the following expert witnesses:

4.2.1 Dr Mahmood Aslam;

4.2.2 Willem Annandale;

4.2.3 Nicolé Boreham;

4.2.4 Amorei Engelbrecht; and

4.2.5 Actuary Willem Boschhoff of Munro Forensic
Actuaries.

5. The costs in paragraph 4 shall exclude those incidental to and in respect of attendances for the indexing and preparation of the court papers due to non-compliance with rule 23(j) of the Joint Rules of Practice for the High Courts of the Eastern Cape.

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Mr Niekerk, Instructed by Jock Walter Inc., Gqeberha

For the Defendant: Mr Dlamini, Instructed by The Office of the State Attorney,
Gqeberha

Date heard: 06 February 2026.

Date delivered: 03 March 2026.