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

CASE NO: **130475/2023**

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED.

DATE: 21/04/2026

SIGNATURE:

In the matter between:

MATETO A TSEBO

(ID NO: 8[...])

PLAINTIFF

And

THE ROAD ACCIDENT FUND

NR-O: 0411202524509

DEFENDANT

JUDGMENT

CORAM: ZITHA, AJ
Heard on: 09th December 2025
Delivered: 21st April 2026

INTRODUCTION

[1] This is a delictual claim for damages as a result of a motor vehicle collision which occurred on the 29th of October 2022. The matter appeared before Court by a way of Default Judgment application on the 09th of December 2025.

PARTIES

[2] The Plaintiff is **Matetoa Tsebo** an adult male, who was born on **24 July 1981** ("the Plaintiff") and who is currently 44 (forty four) years of age. At the time of the collision, the Plaintiff was 41(forty one) years old.

[3] The Defendant is the **ROAD ACCIDENT FUND**, a juristic person established in terms of section 2(1) of the Road Accident Fund Act 56 of 1996 ("*the Act*") with full legal personality and of address 3[...] I[...] Street, Menlo Park, Pretoria, Gauteng.

ISSUES TO BE DETERMINED

- [4] Liability/ merits of the matter
- [5] Past medical expenses
- [6] Future medical expenses
- [7] Loss of earnings (Past and Future)

- [8] General damages will have to be postponed sine die, as the Defendant has not made a determination about the seriousness of the injuries.

**APPLICATION TO ADMIT EVIDENCE BY WAY OF AFFIDAVIT IN TERMS OF
RULE 38 (2) OF THE UNIFORM RULES**

- [9] The Plaintiff made an application in terms of Rule 38(2), in order to lead evidence by a way of an affidavit. Such application was properly served and accompanied by the expert affidavits. The application was granted. For future medical expenses the Plaintiff is awarded an undertaking in terms of section 17 of the Road Accident Fund Act.

In this regard the Plaintiff's evidence is unchallenged and uncontested as the Defendant's plea was struck off by the Court.

The Plaintiff applied that his quantum evidence be admitted by way of affidavit.

This included:

- 9.1. The Plaintiff's quantum evidence;
- 9.2. Any collateral witness evidence; and
- 9.3. In terms of the Judge President's Practice Directive 1 of 2021 (paragraph 29), evidence may be tendered by affidavit and the Trial Judge may exercise his/her discretion to accept such evidence.
- 9.4. In the matter of ***Abraham v City of Cape Town***¹, the Court held:

"It was common cause before me that where an application for default judgment serves before a Court, it has a clear and unfettered discretion in terms of the

¹ 1995 (2) SA 319

relevant Rule of Court to decide whether or not to hear oral evidence on any of the issues which may require to be decided in order to determine whether or not to grant the relief claimed.”

9.5. In *Mnisi v The Road Accident Fund and Seven Similar Matters*², the court held and quoted the following at paragraph 52:

“The subrule provides a mechanism whereby the court may on application and if sufficient reason is shown, allow that evidence be given on affidavit. Firstly, there must be an application to adduce evidence by affidavit. Secondly, there must be sufficient reason for doing so and thirdly, the court may lay down the terms and conditions for the evidence to be adduced. In Madibeng Local Municipality v Public Investment Corporation Ltd 2018 (6) SA 55 (SCA) at 25, the Supreme Court of Appeal expressed itself over subrule 38(2):

‘The approach to rule 38(2) may be summarised as follows. A trial court has a discretion to depart from the position that, in a trial, oral evidence is the norm. When that discretion is exercised, two important factors will inevitably be the saving of costs and the saving of time, especially the time of the court in this era of congested court rolls and stretched judicial resources. More importantly, the exercise of the discretion will be conditioned by whether it is appropriate and suitable in the circumstances to allow a deviation from the norm. That requires a consideration of the following factors: the nature of the proceedings, the nature of the evidence, whether the application for evidence to be adduced by way of affidavit is by agreement, and ultimately, whether, in all the circumstances, it is fair to allow evidence on affidavit.

And at paragraph 53:

² [2022] ZAMPMBHC 23

“Plaintiffs in RAF matters often request the court to accept evidence upon affidavit. Especially now where in most RAF matters there is no appearance by the RAF or where the RAF has not participated in the pre-trial proceedings or where the RAF has not defended the action and/or failed to deliver and file a plea. Of course, where the RAF does not appear at the trial, there will be no request for cross-examination as provided for in the subrule. Therefore, subject to what I set out in paragraphs 61³ and 62⁴ below, I see no reason why Rule 38(2) may not actually be used to contribute to the speedy and cost-effective delivery of justice in RAF matters.

- 9.6.** The Plaintiff served all information and documentation on the Defendant.
- 9.7.** This is a quintessential example of a matter that can be disposed of by way of affidavit to save time and costs.
- 9.8.** The Plaintiff requested that the expert affidavits and the affidavits in respect of the quantum evidence of the Plaintiff be admitted as evidence.
- 9.9.** Insofar as any of the experts in their reports rely upon hearsay evidence the Honourable Court was respectfully requested to admit the said hearsay evidence as an exception to the hearsay rule.
- 9.10.** Application in terms of Rule 38(2) was granted.

[10] THE MERITS:

10.1. The issue of liability is resolved as follows:

³ Paragraph 61 of the judgment: “In my view, the approach in RAF matters in circumstances set out above where there is no participation by the RAF at all or only limited participation or there is no appearance when the trial is called for hearing, the approach to be adopted should be on basis of what is set out by *Froneman J Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC)”

⁴ Paragraph 61 of the judgment: “In my view, the approach of Froneman J applies to RAF actions where the circumstances set out in this judgment apply. The court should be extremely astute and consider all the information before it which includes the pleadings, documents that were discovered, all reports by the experts and all affidavits (if filed) before the trial commences to determine the way to approach the trial. The pleadings, the facts that appear from what is in the court file and the expert reports, (especially whether the findings therein) tally with the rest of the information ...”

The plaintiff's version was based on the section 19(f) affidavit and the accident report. Accordingly, the Defendant is held liable for hundred percent (100%) of the Plaintiff's proven or agreed damages. The Plaintiff was at all material times a passenger. The Plaintiff's version is contained in the section 19 (f) affidavit. The names of the Plaintiff appear in the accident report.

[11] QUANTUM:

11.1. The issues to be decided in this matter are what should be the fair, reasonable and appropriate amount for special damages (loss of earnings), the contingencies to be applied to the calculations and future medical expenses.

11.2. In quantifying it's claim, the Plaintiff obtained medico-legal reports from the following experts in support of her claim:

11.2.1 Dr V M Close (Orthopaedic Surgeon);

11.2.2 Dr D Campbell (Nephrologist);

11.2.3 Ms M Petschel (Occupational Therapist);

11.2.4 Ms M Grove (Industrial Psychologist); and

11.2.5 Mr M J Minnaar (Actuary).

[12] The Defendant did not appoint any medico-legal reports.

[13] The expert opinions.

a) Dr CLOSE (Orthopaedic Surgeon)

13.1. THE INJURIES SUSTAINED BY THE PLAINTIFF:

According to the expert, the Plaintiff sustained a Left femur fracture with mild angulation and non-union and shortening.

The Plaintiff had an injury to the cervical and thoracic regions.

He had a post-accident renal failure.

13.2. COMMENTS ON HOSPITAL RECORDS:

13.2.1. His date of admission was documented as 29 October 2021 at 06h08.

13.2.2. On 1 November 2022 the possibility of a head injury was mentioned with headaches, dizziness, and vomiting.

13.2.3 On 29 October 2022, i.e., on admission, the haemoglobin was 14.3 and the haematocrit was just within normal range at 0,41.

13.2.4. The hemoglobin and hematocrit subsequently dropped to 10 and 0.3 respectively by 31 October 2022, and this indicate acute blood loss rather than any anaemia due to chronic renal disease.

13.2.5. A left femur fracture was identified, and he was tender over the cervical thoracic region, as well as injured over the left flank and left leg.

13.3. TREATMENT RECEIVED – HIGHLIGHTS:

13.3.1. The surgeon records a femoral corticotomy, as well as a capsulotomy, in order to introduce an intramedullary nail to the femur.

13.3.2. Surgery to the left femur was performed on 30 October 2022. Post operation he was referred to physiotherapy but was noted to be dizzy and sweating.

13.3.3. According to the operative notes he had to repeat surgery on 03rd of November 2022, stated to be a left femur middle fracture fragment, open reduction, and cerclage x 3, 'decompression' and open reduction.

13.3.4. A psychological consultation was requested due to the loss of his sister-in-law in the accident.

13.3.5. He attended approximately three physiotherapy sessions during which he commenced walking with crutches. The Orthopaedic Surgeon later advised that therapy be discontinued due to complications with one screw.

13.3.6. At the beginning of 2023 Dr Hadebe identified the need for a second surgical procedure and he underwent surgery in

February 2023; according to the patient one of the screws was removed and replaced with a longer screw.

13.3.7. Post surgery he attended physiotherapy and mobilised with bilateral elbow crutches until July 2023.

13.4. RENAL FAILURE:

13.4.1. The patient reported no pre-accident diseases, illnesses, use of medication or orthopaedic complaints.

13.4.2. In approximately July 2023 i.e. 09 months post-accident he was diagnosed with renal failure and now receives dialysis three times weekly. His treating Physician, 'Dr Do Vale' indicated that renal failure could be associated with the trauma of the accident.

13.5. PRESENT COMPLAINTS:

13.5.1. He reports experiencing lower back pain which was worse prior to him being put on dialysis treatment.

13.5.2. The headaches that he experienced over both temples also improved since he started receiving dialysis.

13.5.3. Currently he only experiences low back pain intermittently and headaches occur approximately twice weekly.

13.5.4. He experiences pain over his left thigh. The pain is usually worse when he sits or lies in one position for extended periods

of time. Walking helps pain to dissipate. However, walking extensively, elicits pain. He needs to rest if he walks for longer than 1 km.

13.5.5. He also reports experiencing 'a click' in his left hip and this is associated with pain. The click usually occurs when he transfers from sitting to standing.

13.6. OPINION AND DIAGNOSIS:

13.6.1. He walks without an assistive device but with an obvious limp.

13.6.2. He has a catheter inserted into the right side of the chest for his dialysis treatment.

13.6.3. With the patient undressed and standing, there is shortening of the left leg in comparison to the right and he prefers the right leg for weight bearing.

13.6.4. With the patient supine, there is residual left thigh muscle wasting and, shortening of the left leg arising from above the level of the knee.

13.6.5. From proximal on the left thigh, there is a 5 cm scar for the insertion of the femoral nail. Then there is a 4 cm scar, and then a 24 cm scar in keeping with an open reduction. Distally, there is a 2 cm scar and a 1 cm scar for the insertion of distal locking screws.

13.6.6. In the lower legs there are two scars identified - on the proximal right shin there is a 2 cm x 1 cm atrophic scar, and on the lateral aspect of the left lower leg, a healed abrasion of approximately 2 cm in length.

13.6.7. The patellofemoral grind test is positive.

13.6.8. X-rays of 3 October 2023 were reported on by Dr Mafole stated that in the lumbar spine there is a loss of the normal lumbar lordosis, possibly due to muscle spasm.

13.6.9. In the left femur there is an intramedullary nail and interlocking screws in the femur shaft with evidence of a previous comminute mid femur shaft fracture with non-union. Fracture lines still visible.

13.6.10. There is an atrophic non-union of both fracture sites - i.e., proximally and distally, with no attempt at callus formation detected.

13.7. WORK CAPACITY:

In his current condition Mr Matetoa cannot be expected to return to employment. The femur fracture is ununited and he requires dialysis three times per week. The requirement for dialysis is permanent unless Mr Matetoa is fortunate enough to receive a kidney transplant, but this is entirely for the renal physician to discuss.

Currently the expert considers him unemployable.

b) Dr CAMPBELL (Nephrologist):

13.8. PRE-MORBID CONSIDERATION:

13.8.1. Prior to the accident, the patient reported no medical issues. He had not seen doctors except for minor ailments. No hypertension had ever been noted.

13.8.2. He has been diagnosed with end-stage kidney failure and is on dialysis 3 (three) times per week. There is no evidence of excessive anti-inflammatory drugs. His blood tests for kidney function were normal on initial presentation and when he returned for a second surgery on the left leg. His kidney failure was diagnosed 06 (six) months later.

13.9. DISCUSSION:

The possibility of an undiagnosed vascular injury causing chronic ischemia and subsequent kidney failure has not been completely excluded.

By making use of the *sine qua non* principle, the only explanation for the renal failure is the injuries sustained in the accident with the associated blood loss and subsequent drop in the hemoglobin and hematocrit levels as described by Dr Close.

c) Megan Petschel (Occupational Therapist):

13.10. PRE- AND POST ACCIDENT VOCATIONAL CAPACITY:

Pre-accident:

13.10.1. At the time of the accident, Mr. Matetoa worked as a key accounts manager. He reported no limitations in his ability to perform his work duties with efficiency prior to the accident.

13.10.2. This work can be classified as sedentary physical work with constant (more than 66% of the day) dynamic postural tolerances, occasional (up to 33% of the day) mobility, upper limb involvement/dexterity and occasional (up to 33% of the day) sedentary load handling demands.

13.10.3 He had the potential to work until retirement age of sixty five (65) years to perform his own or similar employment

Post-accident:

13.10.4. As a result of his injuries sustained in the accident, the plaintiff was unable to return to work for nine months. He was on sick leave for the entire nine months and was reportedly remunerated during this period of time.

13.10.4. He was retrenched a month after his return to work.

13.11. RESIDUAL VOCATIONAL CAPACITY:

13.11.1. He is unable to sustain frequent mobility or dynamic postural tolerances.

13.11.2. It is noted that he is able to meet the requirements of his pre-accident job as a key accounts manager or similar employment. However, this is now done in the presence of pain relating to the accident in question and he will benefit from adjusted measures and assistive devices to reduce pain experienced and improve his productivity and job satisfaction. This will therefore be found to influence his rate of work/productivity. Significant pain will affect his ability to continue comfortably for the duration of a full workday and will therefore not be sustainable in occupations which requires sympathetic accommodation.

13.11.3. The plaintiff currently undergoes dialysis three times a week due to renal failure. This would have a significant impact on his ability to work in the open labour market.

13.11.4. His scores on the Contextual Memory Test indicated that there may be difficulties with contextual memory retrieval and could suggest underlying cognitive impairment.

13.11.5. While his work is sedentary in nature, his greatest pain stems from remaining in one position for extended periods of time such as sitting. Cognitively, he may be vulnerable to error making due to poor immediate and long-term memory.

13.11.6. The Plaintiff will have difficulty even meeting the demands of sedentary physical work with his current need for dialysis three times a week. The effects of dialysis which include

hypotension, headaches, muscle cramps, nausea and vomiting as well as fatigue and weakness would hinder his ability to engage in any type of work in the open labour market.

13.11.7. As noted by Dr. VM Close, with his current condition relating both to his femur fracture and dialysis three times a week, he is considered unemployable.

13.12. TREATMENT ENVISAGED IN THE FUTURE:

13.12.1. The Neurosurgeon recommends an allowance of analgesia, which costs R 10 000.00 (ten thousand rand). An allowance of R350 000.00 (three hundred and fifty thousand rand) should be made available for the investigation and treatment of late post-traumatic seizures.

13.12.2. The Plaintiff will require future treatment for the management of pain.

13.12.3. The Plaintiff is incapable of independent living; provision will need to be made for home-based care should family members no longer be able to cater for him.

13.12.4. The Plaintiff will require psychiatry assessment and treatment for the depressive, post-traumatic stress disorder related and psychotic symptoms.

As a result, the Plaintiff is awarded future medical expenses in terms of Section 17 of the Road Accident Fund Act. In the matter of

Knoetze obo Malinga and Another v Road Accident Fund (77573/2018; 54997/2020 [2022 ZAGPPHC 819; [2023] 1 All SA 708 (GP), the CEO of the Defendant offered a blank undertaking for all proven future medical hospital and related expenses in all cases before the Court where such are proven and therefore it is held that the Plaintiff is entitled to such an undertaking.

Future treatment and assistive devices have been indicated. This should be covered from an undertaking to be awarded to the Plaintiff.

d) M GROVE (Industrial Psychologist):

13.13. PRE-ACCIDENT EMPLOYMENT:

13.13.1. He was employed as an account manager/technical sales specialist for a chemical manufacturing company at the time of the accident. He stated that his job required extensive travel to maintain relationships and secure new business. His travel destinations included Kenya, Nigeria, Ghana, Zimbabwe, Botswana, East Africa, and Mozambique. He worked five days a week, from 08:00 to 17:00.

13.14. POST-ACCIDENT EMPLOYMENT:

13.14.1. Upon returning to work, he noted difficulties with back pain and headaches. As an accommodation, he was removed from traveling and allowed to work from home.

13.14.2. A month or two after his return, he received a notice of retrenchment, effective 30 June 2023. He believes his absence from work contributed to his retrenchment. He feels that if he had been present when critical decisions were being made, he would have remained employed.

13.14.3. He has been unemployed since his retrenchment in June 2023.

13.15. PRE-MORBID EARNING POTENTIAL:

13.15.1. His vocational history indicates that he has experience working as a projects coordinator, technical sales specialist and accounts manager, with the latter being the job he occupied for the last 10 (ten) years and at the time of the accident.

13.15.2. He would have been suited for positions falling within the semi-skilled to skilled spectrum of employment in the broader job market.

13.15.3. The Plaintiff's actual earnings at the time of the accident, as per the available salary advice, should be taken as the basis for future earning potential calculations. Related inflationary increases until retirement is recommended.

13.15.4. His recommended career progression and earnings postulation is stated in the industrial psychologist report. Retirement at 65 is recommended.

13.16. **POST-MORBID EARNING POTENTIAL:**

13.16.1. It is evident from the expert opinions to hand that the Plaintiff remains with orthopaedic, physical and functional sequelae, following the injuries he sustained in the accident under review.

13.16.2. The ununited femur fracture impairs his ability to perform even sedentary work without significant interruptions and pain and the same would affect his ability to maintain performing work task of his former position for the duration of a full workday.

13.17. **Scenario 1 - Likely future earnings (kidney failure not attributable to the accident):**

13.17.1. It is advisable to use the salary figures provided in the 'overall' group for the purpose of quantification by the industrial psychologist. The 'overall' group figures provide a general benchmark that can be applied across different sectors, allowing for a more realistic estimation of potential earnings.

13.17.2. The postulated post-morbid career progress and earnings, are summarised in the actuarial report with contingency

considerations, to account for his elevated post-accident employment vulnerability.

13.17.3. The claimant also presents with post-accident employment vulnerability, which are factors that have the potential to influence his anticipated post-accident career trajectory. A higher post-morbid contingency deduction should therefore be applied.

13.18. Scenario 2 - Likely future earnings (kidney failure attributable to the accident):

13.18.1. The Plaintiff, with the kidney failure attributable to the accident, is considered unemployable due to his need for permanent dialysis. Even if he were fortunate enough to receive a kidney transplant, his residual work capacity would likely remain significantly restricted, rendering him unemployable for all practical purposes.

e) Mr IJ Minnaar (Actuary):

13.19. INCOME IF THE ACCIDENT HAD NOT OCCURRED:

13.19.1. At the time of the accident the Plaintiff was employed and at 1 July 2023 he would have earned an income of R 1,443,794 (one million four hundred and forty three thousand seven hundred and ninety four rand) per annum (Basic R 68,864.42 (sixty eight thousand eight hundred and sixty four rand and forty two cents) plus cash allowances of R 13,200 (thirteen thousand two hundred rand) per month plus benefits of R 25,144.69 (twenty

five thousand one hundred and forty four rand and sixty nine cents) per month as well as a bonus of R 157,284.26 (one hundred and fifty seven thousand two hundred and eight four rand and twenty six cents) per annum [per payslip for April 2023] and it is assumed that his income would have increased at the average rate of inflation as measured by CPI to R 1,561,811 (one million five hundred and sixty one thousand eight hundred and eleven rand) per annum at the present time, then remaining constant apart from inflationary increases to his retirement at age 65 (sixty five).

13.19.2. It is likely that the Plaintiff's income would have increased in the future to allow for inflation and it is assumed that his income would have further increased at the rate of 5% per annum from the present time to his retirement.

13.20. INCOME NOW THAT THE ACCIDENT HAS OCCURRED:

13.20.1. The Plaintiff has been unemployed since 1 July 2023.

13.20.2. The industrial psychologist postulates two scenarios, namely:

13.21. Scenario 1:

13.21.1. Having a residual earnings capacity of R 266,215 (effective at 1 January 2024 and adjusted for inflation as measured by CPI to R 279,088 per annum at the present time) from mid – 2025 (present time) and it is assumed that his income will remain

constant apart from inflationary increases to his retirement at age 65.

13.21.2. As a result of his injuries he will be more prone to extended periods of unemployment/ unemployability and this aspect will be dealt with below (higher post-morbid contingency deduction to be applied).

13.22. Scenario 2:

Remaining unemployed/ unemployable.

13.23. CONTINGENCIES:

13.23.1. In assessing the value of the income allowance may be made for the various contingencies of life that occur such as sickness and unemployment. For the reason stated above, the industrial psychologist recommends a higher than normal post-accident contingency adjustment.

13.23.2. For illustrative purposes he deducted 5% from the accrued value had the accident not occurred, 12% from the prospective value had the accident not occurred and 42% from the prospective value now that the accident has occurred.

13.23.3. It is the Court's view that under the circumstances of this particular case, a 30% spread between pre- and post-morbid contingencies on future earnings is reasonable.

14. THE CALCULATION:

(a) **Limitation of Compensation (CAP):**

14.1. The expert confirms that the CAP is applicable on these calculations. Thus the loss of income does exceed the Statutory Limit during every year and the appropriate adjustment is set out in Table A of his report. For convenience the Plaintiff's counsel attached a copy of Table A to the next page below.

(b) **SUMMARY OF LOSS:**

14.2. **Loss of income** **Maximum Compensation**

Scenario 1: R 13,484,519 R 7,523,461

Scenario 2: R 15,591,261 R 7,523,461

As can be seen from the above, it does not make a difference whether the loss is calculated on scenario 1 or 2 as the limited amount will remain the same.

[15] **LAW**

15.1. LOSS OF EARNINGS

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. It must be noted, a physical disability which impacts on the capacity to an income does not, on its own, reduce the patrimony of an injured person. It is incumbent on the Plaintiff to prove that the reduction of the income earning capacity will result in actual loss of income.

15.2. In quantifying such a claim an Actuary is often used to make actuarial calculations based on proven facts and realistic assumptions regarding the future. The role of the Actuary is to guide the court in the calculations to be made. Relying on its wide judicial discretion the court will have the final say regarding the correctness of the assumptions on which these calculations are based. The court should give detailed reasons if any assumptions or parts of the calculations made by the actuary are rejected. It must be borne in mind that the actuary depends on the report of the Industrial Psychologists, who in turn are dependent on the information provided by the claimant.

15.3. The learned author Dr R.J. Koch in *The Quantum of Damages Year Book* states at page 118 that the usual contingencies which the Road Accident Fund accepts is 5 % on the past income and 15 % on the future income. The aforesaid is only a guideline, but it indicates the general approach adopted by the defendant in similar matters. The learned author continues on page 118 to suggest (based upon the authorities of ***Goodall v President Insurance and Southern Insurance Association v Bailey N.O.*** that as a general rule of thumb, a sliding scale can be applied, i.e. “1/2% per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in middle age.”

15.4. The Court, in the case of ***Road Accident Fund v Guedes*** at paragraph [9] referred with approval to *The Quantum Yearbook*, by the learned author Dr R.J. Koch, under the heading '*General Contingencies*', where it states that:

“...[when] assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court...”

15.5. 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

15.6. The importance of applying actuarial calculations and its advantages was discussed in the case of *Southern Insurance Association v Bailey NO*, the court referred with approval to the case of *Hersman v Shapiro and Company* at 379 per Stratford J where the following was said:

‘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 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.’

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

It has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award."

15.7. Ultimately, the award for future loss of earnings or earning capacity must be based on good medical evidence and corroborating facts. There must be some reasonable basis for arriving at a particular figure. In the event of a mathematical approach, one has to first work out what the third party's earnings would have been but-for the accident (that is, if the accident had not occurred), and secondly, one has to calculate what the Plaintiff's earnings are now that the collision has occurred (having regard to the accident) and the difference between these two amounts will then represent the loss.

[16] APPLICATION OF LAW TO FACTS

16.1. The Plaintiff's future loss of earnings or capacity to earn has been actuarially calculated and the basis of such calculations, which is

discussed below are consistent with the facts and probabilities in the matter.

- 16.2.** The Plaintiff's case remains undisputed and remains unchallenged. The Defendant has not appointed a single expert to challenge and or contradict the Plaintiff's expert witnesses. There is also no evidence before me that prior to the collision the Plaintiff had any renal and orthopaedic problems.
- 16.3.** In so far as the injuries are concerned, it has not been disputed that the Plaintiff sustained a left femur fracture and renal failure and or injury which was consequent to the motor collision. It remains undisputed that the Plaintiff's kidney problems arising from the accident has severely affected his well-being.
- 16.4.** The occupational therapist opines that the Plaintiff's employment has been adversely affected and as result curtailed. His injuries make him an unfair competitor in the open labour market.
- 16.5** The occupational therapist opines that the Plaintiff's productivity and career prospects may be limited due to his physical and psychological impairments.
- 16.6** The occupational therapist opines that the orthopaedic and renal failure deficits would have a negative impact on his work abilities and future employment. His competitiveness in the open labour market has been compromised, especially for roles exceeding medium physical demands. He is unemployable in the open labour market. His career options are significantly reduced as a result of the injuries sustained.

16.7 The industrial psychologist's uncontested postulations regarding the pre and post morbid future loss of earnings prior to and but for the accident is the only evidence that is before me which I must accept.

16.8 I accept that the Plaintiff would require an understanding employer who will be willing to accommodate his cognitive limitation should he secure work in future. His working environment would also need to be less cognitively demanding as he would struggle to perform with the pressures of work, as an accounts manager/technical sales specialist. I have also considered that he is no longer performing at his pre-accident potential as a result of the accident.

The Plaintiff is therefore likely to suffer a future loss of earnings to be calculated as the difference between his pre-accident earning potential and his post-accident earning potential.

16.9 I am mindful that the Plaintiff will be an unequal competitor at the open labour market compared with his healthier peers and that he will not be able to perform functions efficiently and effectively as compared to his counterparts. The injuries sustained from the accident will hinder his career and future employability. The Plaintiff has suffered a medically justifiable loss of earnings or work capacity as a direct result of the accident.

16.10 I find that the Plaintiff's expert witnesses remain the only evidence before me. The submissions made by industrial psychologist are clear, reasonable and persuasive. I therefore find that the evidence before me is credible and I accept it as reliable and plausible.

[17] According to the actuarial calculations by Minnaar.

17.1 Pre-Morbid (retirement age 65)

According to the report of the industrial psychologist, dated 11th November 2025, Plaintiff earned an income of R1 443 794 per annum, as an accounts manager/technical sales. He worked for five days per week. He would probably have continued working as such with straight line increases and earnings inflation to 65 years. It is postulated that he would have earned R1 561 811 per annum at the present time. It is postulated that he would have reached a career ceiling at 45 years, he would probably earned in the upper quartile for skilled workers and for 2025, this is expressed as R 1 561 811 per annum.

17.2 Post-Morbid (retirement age 65)

According to the report of the Industrial Psychologist, it is postulated that the Plaintiff will remain unemployed for the remainder of his working life and a total loss of earnings has occurred.

A total loss of earnings had occurred from the date of the termination of his/retrenchment on 30TH JUNE 2023. At that stage he was forty two (42). He had a future working life span of twenty three (23), that was interrupted and affected by the injuries sustained in the accident.

[18] Plaintiff's counsel submitted that contingencies are to be applied as the actuarial calculations since *the Road Accident Fund Amendment Act 19 of 2005* cap does have an impact on this case. In this regard counsel argues the contingency deductions for past loss earnings of 5% on uninjured earnings and 5% on injured future earnings should be applied. I agree with the contingencies applied in the past loss of earnings.

I hold a same view with respect to the contingencies as applied by the actuary and submitted by the Plaintiff's counsel:

A 5% deductions on past pre-morbid income is acceptable.

A 5% deductions on past post-morbid income is acceptable.

A 12% deductions for future pre-morbid income is acceptable.

A 42% deductions for future post-morbid is acceptable.

A future contingency deductions of 30% spread is acceptable.

THE ILLUSTRATIVE ACTUARIAL CALCULATIONS:

TABLE A	Scenario 1	Scenario 2
	R	R
<u>Accrued Value from 1 July 2023</u>		
Had the accident not occurred	2007570	2007570
Less : Contingencies	(5%) 100379	(5%) 100379
[A]	1907191	1907191
Now that the accident has occurred	0	0
Less : Contingencies	(0%) 0	(0%) 0
[B]	0	0
Accrued Loss [A]-[B]	1907191	1907191
<u>Prospective Value</u>		
Had the accident not occurred	15550080	15550080
Less : Contingencies	(12%) 1866010	(12%) 1866010
[C]	13684070	13684070
Now that the accident has occurred	3632314	0
Less : Contingencies	(42%) 1525572	(0%) 0
[D]	2106742	0
Prospective Loss [C]-[D]	11577328	13684070
Total Loss ((A)-[B])+([C]-[D])	13484519	15591261
Less : Statutory adjustment	4053867	6160609
Maximum Compensation	7523461	7523461

[19] The loss of earnings after the above-stated contingency deductions amount to R 7 523 461 (Seven Million Five hundred and Twenty Three thousand Four hundred and Sixty One Rand). The calculations were on the basis that the Plaintiff is not expected to reach the suggested pre-accident career potential and that he might suffer losses that are directly quantifiable and should be address via contingencies. The retirement age is at 65 years.

[20] It is trite that in considering what damages to award in damages claims, the court exercises discretion. In doing so, the court has to ensure that the award for damages made is fair and reasonable. This is usually achieved through judicial precedent. The actuaries recommend the so called normal contingencies apply as discussed above.

[21] When considering the contingency deductions to be applied on actuarial calculations of loss of earnings, allowance for contingencies involves, by its very nature, a process of subjective impressions or estimations rather than objective calculations. The so-called normal contingencies referred to takes into account that a Plaintiff might ordinarily sustain some loss in his future income by virtue of: falling sick from time to time; the prospect of unemployment and an inability to secure alternate employment immediately; the prospect of being injured in circumstances where the Plaintiff would receive no compensation from any source; the saved costs of unemployment.

I applied my mind to the Plaintiff's circumstances. I have considered the Plaintiff's background and family history.

[22] **ACTUARIAL CALCULATIONS IN RESPECT OF LOSS OF EARNINGS:**

22.1 The calculations are submitted to be fair and reasonable in the circumstances, and the Court is satisfied to grant the total nett loss of income in the amount of **Seven Million Five Hundred and Thirty Two Thousand Four Hundred and Sixty One**

Rands (R 7 532 461) as set out in the 30% contingency spread scenario above.

For this reason, I am satisfied that the Plaintiff suffered a loss of earnings in the amount of R 7,523,461.

Having regard to the aforementioned cases, it is the Court's view that special damages in the amount of **Seven Million Five Hundred and Thirty Two Thousand Four Hundred and Sixty One Rand (R7 532 461)** is fair and reasonable under the circumstances.

COSTS:

[23] In *Bauer v Bauer & Another*⁵ it was re-affirmed that the principle in awarding costs to a successful litigant is to strive to indemnify insofar as possible that litigant for the expenses he has incurred to initiate or defend litigation. These principles were also confirmed in *Zeelie v General Accident Insurance Co Ltd*,⁶. This purpose of an award for costs has been acknowledged for a very long time, authoritatively ever since *Texas Co (SA) Ltd v Cape Town Municipality*⁷.

[24] In *Society of Advocates of KwaZulu - Natal v Levin*⁸ the Court also stated as follows in respect of Counsel fees:

⁵ (361104) [2008] ZAECHC 2008 (17 April 2008)

⁶ 1993 (2) SA 776 (EJ at 779 D-F)

⁷ 1926 AD 467 at 488. (See Cilliers, Costs, par 1.03 at 1-4/5)

⁸ 4564/13) [2015] ZAKZPHC 35; 2015 (6) SA 50 (KZP); [2015] 4 All SA 213 (KZP) (6 July 2015)

“ [19] A useful guide, which would find application in most cases where the reasonableness or otherwise of counsel’s fee had to be determined on the taxation, was formulated in *City of Cape Town v Arun Property Development (Pty) Ltd and Another*:

‘(a) Consideration should have been given to the importance of the matter, its financial value to the parties and the complexity of the issues raised and/or required to be canvassed”.

[25] Pursuant to the recent amendment of Rule 69 and 70 (effective 12 April 2024) in terms of which Rule 67A was also introduced, it is incumbent upon a Court to make a ruling on the applicability of the new scales introduced for the employment of counsel. The scales listed in the amended Rule are Scales A, B and C. These scales govern the recoverability by the Plaintiff of counsels' costs on taxation.

[26] In ***Buhle Waste (Pty) Ltd v MEC for Health Gauteng & Others***⁹ Cajee AJ held as follows regarding the abovementioned Rule amendment.

"28. While I am cognizant of the fact that the new taxable costs regime no longer considers seniority of counsel, but rather complexity of the matter and value of the claim or importance of the relief sought to be the deciding factors, in my view a court should be wary not to grant or approve costs on a scale which counsel of a certain seniority would not ordinarily charge his or her own attorney and client. This would run counter to the intention of the new regime..."

[27] With regard to this present matter it is held by the court that employment of a senior counsel was warranted and that counsels' fees on Scale C are appropriate for ***inter alia***, the following reasons:

⁹ (Gauteng Division Johannesburg, Case Number 2023-102560)

27.1. Value of the claims:

The value of the claim should be evaluated in the eye of the Plaintiff who was injured. It is apparent that the Plaintiff needs to rely on his compensation to sustain himself especially in the later years of his life. From his point of view the amount concerned is considerable.

27.2. Importance of the relief sought

- The relief sought is for damages aimed at the compensation of the unfortunate Plaintiff and his family who was involved in a motor vehicle accident. The Plaintiff suffered severe bodily and psychological injuries. The Plaintiff will suffer physical and psychological for the rest of his life; who has a permanent loss of his earning capacity; who has therefore lost the ability to properly earn a living. The matter has obvious importance to the Plaintiff in that his entire remaining working lifespan has been blighted.
- As trenchantly observed by His Lordship Baqwa J in *Adv AJ Du Toit N.O. obo Cee-Jay Lee Johnson v The Road Accident Fund* ¹⁰ the Plaintiff has only one shot at obtaining due compensation from the Defendant and the Plaintiff's whole life depends on obtaining a proper award.

27.3. Complexity of the matter

- This case involves the input by various experts of different disciplines. It involves an **Orthopaedic surgeon** to assess the functional *sequelae*; **Psychologist** in respect of neurological *sequelae*; an **Occupational psychologist** regarding the impact on his occupation;. an **Industrial**

¹⁰ 20147/2021) Gauteng Division, Pretoria (23 April 2024)

psychologist regarding employment prospects; and the **Actuary** regarding the calculation of the loss of earnings/earning capacity.

- The reporting of all the experts is not in plain layman's language, but in more complex and specific language and terms used in the respective expert disciplines. A proper understanding of the reporting requires special and specific knowledge by the legal practitioners.
- the matter involves preparation in regard to several different expert disciplines and expert witness reports; the drafting of heads of argument on the issue of the loss of earning capacity; and the research of the case law regarding awards of general damages.

27.4. It is therefore submitted that the value of the total claim is substantial, that the relief sought is of great importance to the Plaintiff; and that the matter involves issues of a high degree of complexity.

27.5. The specific circumstances and the various factors attendant in this matter, rendered it wise and reasonable for the Plaintiff to have briefed a more senior counsel.¹¹ There can be no justification for any contention that it was not necessary, or that it was wrong to employ a senior counsel; or that it is unfair to Defendant that it should be required to bear the costs incurred in the employment of a senior counsel. The Defendant could have settled this claim a long time ago had it complied with its statutory duties timeously.

"In an unreported judgment of this Court, Road Accident Fund v Roman Klisiewicz, case No 192/2001, handed down on 29 May 2002, Howie JA set out the extent of the respondent's responsibilities, saying in para [42]: 'The [Road Accident Fund]

¹¹ it was certainly a wise and reasonable precaution to employ the services of two counsel (compare *Newman v Prinsloo and Another* 1974 (4) SA 408 (W) at 411A; *Zweni v Minister of Law and Order* (1) 1991 (4) SA 166 (W) at 170A). The disputes involved potentially wide-ranging issue of both fact and law. It is not by any means a minor matter. The case was sufficiently difficult to justify the engagement of two counsel. (compare *DE NMMLOZE VENNOOTSCHAP ALINTEX v VON GERLACH* 1958 (1) SA 13 (T) at 16-7).

*exists to administer, in the interests of road accident victims, the funds it collects from the public. It has the duty to effect that administration with integrity and efficiency. This entails the thorough investigation of claims and, where litigation is responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence. These are not exacting requirements. They must be observed'."*¹²

27.6. It was the Defendant that obliged the Plaintiff to approach this Honourable Court for relief.

27.7. It should be borne in mind that by awarding counsels' costs on scales A or B the Honourable Court will effectively be penalizing the Plaintiff. Counsel are entitled to mark and recover reasonable fees for their work done (**Algemene Balieraad van Suid-Afrika v Burger en 'n Ander**¹³LPC Code of Conduct 15.1 and 23.1). That is not affected by the particular scale under Rule 67 A. Rule 67 A merely restricts the ability of the Plaintiff to recover more than the specified amounts on scales A, B or C, respectively, from the unsuccessful Defendant. The balance of counsels' fees unfortunately have to be paid by the successful Plaintiff out of the capital awarded. This impinges on the trite principle set out in paragraph 3 above.

27.8. In the premises, it is held by the court that Plaintiff is entitled to an order that the fees consequent upon the employment of a senior counsel are allowed; and for a direction that such fees are granted on scale C.

27.9. Since the advent of the Covid pandemic and the consequential change that it had on the normal Court and trial procedures, the Court has placed more and more emphasis on comprehensive heads of argument to be filed by the representatives of litigants to assist the Court.

¹² (*Madzunye and Another v Road Accident Fund 2007 (1) SA 165 (SCA) par [17] at 171*).

¹³ 1993 (4) SA 510 (T);

Presiding judges rely more and more upon the written submissions of counsel to assist them rather than entertaining hours of oral argument.

27.10. In this sense the normal practise for presenting argument in the High Court has become more similar with the practice in the Constitutional Court. The court in ***Society of Advocates of KwaZulu - Natal v Lev*** matter ***supra*** held as follows:

“ii) In President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another^[41] Kriegler J drew a distinction between the practice in the Constitutional Court and the SCA in respect of the heads of argument and the associated appearance of counsel at the hearing. He pointed out that ‘in the SCA the emphasis is on the oral presentation of argument by counsel in open court with heads of argument serving largely as a preliminary guide to the Court, while in the Constitutional Court, the emphasis is on written submissions, which are not regarded as succinct heads of argument forming the basis of the argument to be presented, but the argument itself together with all the supporting material.’

And further that ‘In an appropriate case, therefore, it may be reasonable to make some special allowance for counsel’s fees for preparing written argument for this court. This is expressly contemplated by sub rule (2) of the CC Rule 21.’

iii) There is no reason why a similar consideration should not apply to the assessment of counsel’s fees in this matter.

iv) I have perused the relevant heads of argument and having considered the submissions of Ms Annandale on the general and specific purpose and content of heads of argument, I am of the view that the taxing mistress misdirected herself in assessing the fee at R600 per page, as such an assessment even on a per page basis, is disproportionate to the effort involved in drafting the heads and fails to take into account the issues dealt with therein.

v) I have already commented on the need for a uniform practice in accordance with the generally accepted computation of fees on a time spent basis, which will provide fair and reasonable remuneration for the service rendered."

27.11 It has further become an acceptable practice that Counsel be allowed to ask for the drafting of his Heads of Argument premised upon the actual time (although must be reasonable) spent.

27.12 In the ***Society of Advocates of KwaZulu - Natal v Lev*** matter *supra* the Court stated as follows:

[17] Counsel's fees in the bill of costs under review were charged on a time spent basis. I share the view expressed by Sholto-Douglas AJ in City of Cape Town v Arun Property Development (Pty) Ltd and Another:

'The modern trend- if I may call it that- of charging a fee based on time actually expended is both acceptable and in the interest of transparency'."

27.13 In the premises it is held by the court that any order as to costs should include Counsel's time spent for drafting Heads of Argument as well.

[28] CONCLUSION:

In the premises I make the following order:

1. The Defendant is liable hundred percent (100%) in respect of the Plaintiff's agreed and or proven damages;
2. Future hospital and medical expenses: Section 17(4)(a) Undertaking;
3. General damages Post pone sine die
4. Loss of earnings R 7 532 461;
5. Costs of counsel on scale C

Total

R 7 532 461

J. ZITHA AJ
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 09TH December 2025

Judgment delivered: 21st April 2026

APPEARANCES:

For the Plaintiff: Mr Theron

Attorney for the Plaintiff: HW THERON INC

For the Defendant: None

Attorney for the Defendant: None