IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 3892/2020P

In the matter of:

RAVESH MAHARAJ **PLAINTIFF**

and

THE ROAD ACCIDENT FUND **DEFENDANT**

ORDER

The following order is granted:

1. Judgment is granted in favour of the plaintiff against the defendant for his claim for loss of earnings in the sum of R8 908 500.

2. The plaintiff has a valid claim for future medical expenses and costs in terms of s 17(4)*(a)* of the Road Accident Fund Act 56 of 1996 and is, therefore, entitled to an undertaking in terms of s 17(4)*(a)*, pursuant to the defendant's 'blanket election' to furnish an undertaking in such instance, recorded in *Knoetze obo Malinga and Another v Road Accident Fund (Pretoria Attorneys Association and Others as amici curiae)* [2023] 1 All SA 708 (GP).

3. The defendant is directed to pay the plaintiff's costs of suit, such costs to include the costs of trial for a period of three days and the costs of counsel on scale B.

JUDGMENT

Pietersen AJ:

[1] The only issues remaining in this matter are the plaintiff's claim for loss of earnings and earning capacity as well as future medical expenses and costs. The parties reached an agreement at the pre-trial stage that the defendant is liable for 100% of the plaintiff's proven or agreed damages.

[2] The plaintiff's claim arises from a motor vehicle collision, which occurred on 25 October 2019 when the defendant's insured vehicle drove into the back of the plaintiff's vehicle. At the time of the collision, the plaintiff was a branch manager at Fidelity Security. The plaintiff a 37 year old male, born on 16 May 1988.

[3] The parties agreed that the following documentary evidence, in the form of reports, can be accepted as evidence:

(a) Orthopaedic surgeon's report compiled by Dr Vic Oelofse;

(b) Neurosurgeon's report compiled by Dr Nad Govender;

(c) Clinical psychologist's report compiled by Ms Angela Cotterell;

(d) Industrial psychologist's report compiled by Mr Piet Vorster;

(e) Occupational therapist's report compiled by Ms Paroshni Pillay; and

(f) Actuarial calculations.

[4] The plaintiff called four witnesses, while the defendant, who was represented at the hearing, elected not to present any evidence.

[5] It is first necessary to consider the plaintiff's injuries and resulting *sequelae*, as contained in Dr Oelofse's report. Dr Oelofse indicated that the plaintiff sustained a cervical spine and thoracic spine injury during the collision and the hospital recorded a whiplash injury and T-11 wedge fracture. The plaintiff complained of neck pain, stiffness of the neck, and headaches, and mentioned that cold weather exacerbates his symptoms.

[6] Dr Oelofse indicated that the injury to the cervical spine is as a result of the acceleration-deceleration injury and future medical expenses are foreseen with a possible anterior fusion. In respect of the T-11 wedge fracture, Dr Oelofse noted that the patient underwent rhizotomies three months after the collision and at the time, he took Myprodol and Stilpane three times per week. The plaintiff also presented with a probable iatrogenic injury to his spinal cord, which will also involve future medical expenses, including a possible fusion. Dr Oelofse recorded that the plaintiff was working as a manager at the time of the collision. Dr Oelofse concluded that the plaintiff finds it difficult to sit for long periods of time and travelling long distances will be problematic, which will render the plaintiff office-bound in the future to protect his back.

[7] The plaintiff proceeded to testify that he has been employed by Fidelity Security for a period exceeding 15 years and has secured three promotions prior to the collision. He has not been promoted after the accident in 2019. He further testified that he wanted to join the South African Police Service but ultimately joined the security industry. He explained that he suffered injuries during the collision, particularly a back injury, as recorded by the expert reports. Regarding his responsibilities, he indicated that he is responsible for a large area, which involves frequent long distance travelling and that he now finds it difficult to do so due to the back pain which he experiences when driving. The plaintiff further indicated that he finds it difficult to visit various clients and to conduct site inspections, as he can no longer walk for long distances. He indicated that seniority in the security industry does not translate to more sedentary work, but that one is required to remain physically able and mobile.

[8] The plaintiff further testified that he uses medication often, during which times he also cannot drive. The plaintiff mentioned one specific instance where he visited a site, after which he had to stay over as a result of high levels of pain.

[9] During cross-examination, the plaintiff was asked about his qualifications for his positions and it was suggested that he did not suffer any loss of earnings, as he is still being employed. The plaintiff's post-morbid position and the difficulties he experiences were not challenged in cross-examination.

[10] The second witness on behalf of the plaintiff was Mr Kriben Moodley. Mr Moodley testified that he was a general manager at Fidelity Security and he knew the plaintiff prior to the collision. He mentioned that the plaintiff was an exceptional employee with good leadership qualities. According to Mr Moodley, the plaintiff was considered as part of the succession plan within the company. Mr Moodley testified that the plaintiff was deserving of further promotions prior to the collision and would in all probability have been promoted to general manager and a regional executive. However, Mr Moodley indicated that, currently, the plaintiff would not be considered at all for these positions due to his injuries. He testified that the highest position the plaintiff can now obtain is his current position and that he has therefore reached his career ceiling. During cross-examination, Mr Moodley was questioned about the number of promotional positions available, to which he responded that the company is based nationwide and has approximately 60 000 employees. The company requires senior managers to be hands on and the company therefore simply cannot take the risk of promoting the plaintiff.

[11] The cross-examination of Mr Moodley also centred on the plaintiff having asthma, to which Mr Moodley responded that it would not have been an impediment to the plaintiff's career progress.

[12] The plaintiff's third witness was Ms Paroshni Pillay. Ms Pillay is an occupational therapist and confirmed the contents of her report. Ms Pillay testified that

she assessed the plaintiff and found that he experienced the following symptoms as a result of the collision:

(a) Constant headaches;

(b) Cannot stand for longer than 15 minutes due to back pain;

(c) He cannot sit or walk for more than ten minutes due to back pain;

(d) He cannot run or ascend stairs and complains of pain in his head, neck, lower back and both legs;

(e) He is easily fatigued;

(f) He presents with surgical scars and his memory and concentration are poor;

(g) His behaviour, personality and mood have changed and he is now moody, irritable, sad, fearful and forgetful and can only sleep with medication;

(h) He experiences swelling of his lower back and has difficulty carrying or lifting weighted objects;

(i) He experiences numbness of both legs in the mornings as well as pins and needles in his legs and feet; and

(j) He also reported a fear of driving.

[13] Ms Pillay referred to the plaintiff's educational history and his position at Fidelity Security. In this regard, she mentioned that during 2006, the plaintiff attended a Big Brother training course and obtained grades E, D, C and B certificates. He also attended firearm training and successfully completed a course in terms of the Firearms Control Act 60 of 2000. He holds a competency certificate from the South African Police Service from 2012 and during 2013, he obtained a Certificate of Excellence from Fidelity Security.

[14] Ms Pillay further indicated in her report that the plaintiff was promoted during 2009 to the position of a supervisor and again in 2013 to that of an operations manager. His last promotion came early in 2019, when he was promoted to a branch manager. She testified that the position of branch manager required prolonged standing, walking, driving, climbing as well as lifting of heavy objects.

[15] After the collision, so Ms Pillay testified, the plaintiff was redeployed to lighter duties and only attended to reports, emails and finances. He experienced difficulties with prolonged sitting due to back pain, headaches and neck pain and he continues to suffer these difficulties.

[16] Ms Pillay confirmed that the plaintiff's difficulties correlated with her own clinical assessment. She indicated that his post-morbid earning potential has been reduced and he is unlikely to attain the levels of vocational success that may have been possible in his uninjured condition. She testified that she found him to be an unequal competitor in the open market as a result of his chronic physical and psychological deficits and he is no longer suited to any medium, heavy or very heavy work, as he experiences difficulty with light and sedentary work.

[17] During cross-examination, Ms Pillay was challenged about the plaintiff being asthmatic and having injured his left knee as a child. She indicated that these matters do not change her view and mentioned that the plaintiff may need to retire early, should he even maintain employment in his current position.

[18] The plaintiff's last witness was Dr Peet Vorster, an industrial psychologist. Dr Vorster testified that he assessed the plaintiff and delivered two reports. He confirmed the contents of these reports. Dr Vorster testified that he took into account collateral information from the plaintiff's employer, salary advices and tax records and, in his view, this information confirmed that the plaintiff was regarded as an excellent performer prior to the collision. Various promotional opportunities were available to the plaintiff based on his work performance and qualifications. He testified that the plaintiff would probably have been promoted to general manager at Fidelity Security, at which time his income would have amounted to approximately R70 000 per month in 2022 monetary terms. He could also have been promoted further to a regional executive, earning approximately R150 000 per month in 2022 monetary terms. If he were promoted to general manager, the plaintiff could have earned R100 000 per month and, as a regional executive, R160 000 per month in 2025 monetary terms. These promotions would have occurred between the ages of 48 to 50.

[19] Dr Vorster expressed an opinion that the plaintiff would have been promoted to regional manager, general manager and regional executive at Fidelity Security and would have reached his career ceiling by the ages of 48 to 50, earning R160 000 per month. Thereafter, he would have received inflationary increases.

[20] Dr Vorster testified that post-morbidly, the plaintiff is struggling to perform his duties as branch manager at Fidelity Security and Dr Vorster is not confident in the plaintiff being promoted to a higher position. He mentioned that the plaintiff is now regarded as a below-average performer due to his accident-related *sequelae* and his post-morbid work performance means that he can, at best, only stay on in his current position. During cross-examination, Dr Vorster was challenged on what a normal and higher than normal post-morbid contingency should be, to which he simply indicated that a higher contingency should be applied when the injuries are serious, as in this case.

[21] The plaintiff thereupon closed his case and the defendant indicated that it would not be calling any witnesses and also closed its case.

[22] The plaintiff's calculations to quantify his postulated pre- and post-morbid positions were not disputed. The calculations were premised on four scenarios in respect of pre- and post-morbid positions:

SCENARIO A	**Uninjured Earnings**	**Injured Earnings**	**Loss of Earnings**
PAST Less contingencies	R2 747 700 -	R1 817 100 -	
	R2 747 700	**R1 817 100**	**R930 600**
FUTURE Less contingencies	R20 365 600 15%	R6 268 600 25%	
	R17 310 760	**R4 701 450**	**R12 609 310**
TOTAL LOSS OF EARNINGS			**R13 539 910**

The application of the Road Accident Fund Amendment Act 19 of 2005 (RAF Amendment Act) cap in this loss scenario does have an impact on the claim.	

SCENARIO B	Uninjured Earnings	Injured Earnings	Loss of Earnings
PAST Less contingencies	R2 747 700 -	R1 817 100 -	
	R2 747 700	**R1 817 100**	**R930 600**
FUTURE Less contingencies	R20 365 600 15%	R6 268 600 30%	
	R17 310 760	**R4 388 020**	**R12 922 740**
TOTAL LOSS OF EARNINGS			**R13 853 340**
The application of the RAF Amendment Act cap in this loss scenario does have an impact on the claim			

SCENARIO C	Uninjured Earnings	Injured Earnings	Loss of Earnings
PAST Less contingencies	R2 747 700 -	R1 817 100 -	
	R2 747 700	**R1 817 100**	**R930 600**
FUTURE Less contingencies	R20 365 600 15%	R6 268 600 35%	
	R17 310 760	**R4 074 590**	**R13 236 170**
TOTAL LOSS OF EARNINGS			**R14 166 770**
The application of the RAF Amendment Act cap in this loss scenario does have an impact on the claim			

SCENARIO D	Uninjured Earnings	Injured Earnings	Loss of Earnings
PAST Less contingencies	R2 747 700 -	R1 817 100 -	
	R2 747 700	**R1 817 100**	**R930 600**
FUTURE Less contingencies	R20 365 600 15%	R6 268 600 40%	
	R17 310 760	**R3 761 160**	**R13 549 600**
TOTAL LOSS OF EARNINGS			**R14 480 200**
The application of the RAF Amendment Act cap in this loss scenario does have an impact on the claim			

The RAF Amendment Act cap applies as follows to the above calculations:

	A	B	C	D
Past	R905 500	R905 500	R905 500	R905 500
Future	R7 997 500	R8 003 000	R8 008 400	R8 011 500
Total	**R8 903 000**	**R8 908 500**	**R8 913 900**	**R8 917 000**
Cap reduction	34.25%	35.69%	37.08%	38.42%
The RAF Amendment Act cap has reduced the claim in each scenario as illustrated above. Contingencies are not be applied to the totals above, since they are deducted before the cap*.*				

[23] The general principle when assessing damages or loss of earning capacity is that the plaintiff must prove that the reduction in earning capacity gives rise to pecuniary loss.[1] It has further been held that:[2]

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[1] *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) para 11.
[2] *Prinsloo v Road Accident Fund* 2009 (5) SA 406 (SE).

'[5] A person's all-round capacity to earn money consists, inter alia, of an individual's talents, skill, including his/her present position and plans for the future, and, of course, external factors over which a person has no control, for instance, *in casu*, considerations of equity. A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on which he/she sustained the injury. In *casu*, the court must calculate, on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss….
[6] At the same time the evidence may establish that an injury may in fact have no appreciable effect on earning capacity, in which event the damage under this head would be nil.'

[24] It follows that a factual basis for the loss should be established, where possible, on proved incomes and collateral information. In *Southern Insurance Association Ltd v Bailey NO*,[3] the Appellate Division held that:

'In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis….'

The court further held that:[4]

'Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right" (*per* HOLMES JA in *Legal Assurance Co Ltd v Botes* 1963 (1) SA 608 (A) at 614F). One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114 - 5. The rate of the discount

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[3] *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 114C-D.
[4] Ibid at 116G-117A.

cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case.'

[25] The facts of this matter present a young male person injured in a motor vehicle collision. The defendant's liability for 100% of the plaintiff's proven or agreed damages has been conceded and the plaintiff recorded that he is not pursuing a claim for general damages. Therefore, the only issue remaining is that of the plaintiff's future medical expenses and his loss of earnings.

[26] The defendant, in written closing argument, denied that the plaintiff will suffer future medical expenses and thus refused to provide an undertaking in terms of s 17(4) of the Road Accident Fund Act 56 of 1996. This position adopted by the defendant is hard to understand, considering that the defendant failed to take issue with the contents of Dr Oelofse's report. In his report, Dr Oelofse set out in great detail the need for future surgery and treatment and also provided estimates of the costs associated with such surgery and treatment, ranging between R100 000 and R1 000 000. I am, therefore, satisfied that the plaintiff is entitled to an undertaking in terms of s 17(4) pursuant to the defendant's 'blanket election' to furnish an undertaking, as recorded in *Knoetze obo Malinga and Another v Road Accident Fund (Pretoria Attorneys Association and Others as amici curiae)*.[5]

[27] Regarding the plaintiff's claim for future loss of earnings, it is uncontested before me that the plaintiff was a professional member of staff at his place of employment and that he appeared to be highly sought after and viewed favourably. The evidence indicates that he was on track for future promotions and would probably have reached the position of a regional executive, as Mr Moodley testified. Furthermore, if one considers the plaintiff's work history, it also indicates rapid and continuous progress.

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[5] *Knoetze obo Malinga and Another v Road Accident Fund (Pretoria Attorneys Association and Others as amici curiae)* [2023] 1 All SA 708 (GP).

[28] The defendant's cross-examination about the plaintiff's asthma failed to elicit any relevant evidence. The plaintiff's evidence was clear that his asthma has not been an impediment to his career progress. Furthermore, no expert evidence was presented by the defendant to support any inference that the asthma could have been a concern.

[29] The evidence seems clear that the plaintiff would have obtained three more promotions, resulting in an income of R160 000 per month at the age of 49. The defendant failed to present any other version.

[30] Post-morbidly, the plaintiff's career progress has effectively come to an end and he is likely to be demoted, if retained at all, at his present employment. It was undisputed that the plaintiff's difficulties with his lower back, his difficulties with climbing stairs, his difficulties with sitting for long periods of time and driving over extended distances would be problematic in executing his duties. The plaintiff's claim is properly substantiated by the experts' reports and supported by the evidence presented before me. From the facts set out above, there is a stark contrast between the plaintiff's pre- and post-morbid scenarios. The plaintiff's claim is therefore only limited by the application of the statutory cap and, in the circumstances, I am satisfied that scenario B is the most reasonable, which entails a 15% and 30% contingency reduction.

[31] The plaintiff is therefore entitled to judgment for the amount of R8 908 500, together with an undertaking in terms of s 17(4).

[32] I accordingly make the following order:

1. Judgment is granted in favour of the plaintiff against the defendant for his claim for loss of earnings in the sum of R8 908 500.

2. The plaintiff has a valid claim for future medical expenses and costs in terms of s 17(4)*(a)* of the Road Accident Fund Act 56 of 1996 and is, therefore, entitled to an undertaking in terms of s 17(4)*(a)*, pursuant to the defendant's 'blanket election' to furnish an undertaking in such instance, recorded in *Knoetze obo Malinga and Another*

v Road Accident Fund (Pretoria Attorneys Association and Others as amici curiae) [2023] 1 All SA 708 (GP).

3. The defendant is directed to pay the plaintiff's costs of suit, such costs to include the costs of trial for a period of three days and the costs of counsel on scale B.

PIETERSEN AJ