IN THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION

(MIDDELBURG LOCAL SEAT)

CASE NUMBER: A22/2025

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED YES/NO

[redacted]

04 MAY 2026 — DATE

H.F. FOURIE — SIGNATURE

In the application between:

SANDILE BANELE XABA — **APPELLANT**

AND

ROAD ACCIDENT FUND — **RESPONDENT**

JUDGMENT

FOURIE AJ (PHAHLAMOKLAKA J, BHENGU AJ CONCURRING)

INTRODUCTION:

[1] This is an appeal (heard by this Court after the Supreme Court of Appeal granted leave) against the Judgment and paragraphs 3 and 4 of the Order of the Court *a quo* granted on 8 November 2024, in which the Court *a quo* dismissed the Appellant's claim for loss of earnings and general damages with no order as to costs. The appeal is with leave of the Supreme Court of Appeal

[2] The respondent opposes the appeal.

[3] At the heart of this appeal lies the question whether the Court *a quo* correctly found that the discrepancies in the hospital records advanced to the Court *a quo* when the matter was heard in itself, and evaluated together with all the other evidence and facts in the matter were deserving of the Court *a quo* coming to the conclusion that the Appellant had failed to prove his claim and for his claim of loss of earnings and general damages together with costs to ultimately be dismissed.

BACKGROUND:

[4] When the matter was brought before the Court *a quo* the Court was only to adjudicate the quantum of the Appellant's claim as the merits had become settled via offer and acceptance on 17 September 2024 in that the Defendant in the main action, the Respondent before this Court accepted 80% liability in respect of the Appellant's claim, the essence of which is that the Defendant is liable for 80% of the Appellant's proven or agreed damages. Of crucial importance is the Order made by the Court *a quo* in paragraph 1 thereof, where the Court stated that:

> *"1. By agreement between the parties, the Defendant is liable to compensate the Plaintiff for 80% of the proven delictual damages suffered in the motor vehicle collision that occurred on 8 April 2023."*

[5] The Respondent made no counterappeal against the first Order of the Court a quo, and it is thus uncontested that the agreement between the Appellant and the Respondent evolved from an agreement *inter partes* into an Order of Court.

[6] The fact that there are certain discrepancies in the Appellant's hospital records is common cause. The hospital records s, in certain portions thereof, incorrectly recorded the Appellant's surname as Nzimande and Nkosi. The times and dates were also recorded incorrectly. The essence of the finding by the Court *a quo* was that these discrepancies were enough to lead the Court *a quo* to believe that the threshold the Appellant needed to meet to prove his case on the balance of probabilities was not met.

[7]

[8] On this point, I propose that the Court *a quo* was incorrect in the manner in which it decided it.

THE EFFECT OF THE ADMISSION OF LIABILITY AND SETTLEMENT IN FAVOUR OF THE APPELLANT:

[9] Something is to be said about the effect of the Respondent's settlement of the Appellant's claim in respect of the merits and as such liability.

[10] The Appellant's claim is a claim in delict, and as such, the elements thereof are trite, being:

[18.1] Conduct by another person,
[18.2] Wrongfulness,
[18.3] Negligence,
[18.4] Damages; and
[18.5] Causation.

[11] At the exact moment the Respondent concedes liability partially or totally, it necessarily follows that all the elements of the delict are conceded.

[12] It flows from the aforesaid that, once a concession is made of the elements of delict, the Respondent concedes that the Appellant has suffered damages. It remains dependent on the Appellant to quantify the damages and to prove its case in this regard on a balance of probabilities. It can, however, never be the case for a Respondent, having conceded the elements of delict to aver that no damages have been suffered, as it would stand opposite to the concession already made.

[13] In their Heads of Argument and initial address at Court, the Respondents raise the issue of *ex turpi non causa,* which in essence means that, from a dishonourable cause, no effect can flow. This Court has already stated that the settlement agreement has neither been set aside nor is a counterappeal for us to decide on this issue.

[14] The maximum *ex turpi non causa* prohibits the enforcement of immoral or illegal contracts.

[15] Again, this is not an issue this Court is confronted with by way of a cross appeal. Even if the Court was in any event to entertain this issue, it would be without merit as the contract of settlement entered into between the Appellant and the Respondent was entered into freely and voluntarily under circumstances where the Respondent had all the available information and documentation at their disposal and still elected to concede 80% of the merits in favour of the Plaintiff.

[16] The application of the maxim *ex turpi non causa*, as derived from Roman Law, is inspired by a specific moral principle that discourages illegality and immorality and advances public policy **[1]**.

[17] In the current matter, this maxim finds no application.

[18] The case advanced in the Court *a quo* by the Defendant, on which the Court a quo made a finding, was seemingly that no damages were suffered by the Appellant because such was not proven. Having evaluated all the evidence of the matter and in line with a concession made by the Respondent when the matter was heard before this Court, that is a position that was incorrectly held under circumstances where the Appellant had, on the balance of probabilities, proven that certain damages were sustained. What was necessary to be evaluated was whether or not the Court a quo could, on the evidence presented to it, quantify the Appellant's claim and whether such quantification was proven on a balance of probabilities or not.

[19] Having regard to the uncontroverted evidence presented by the Plaintiff, it is evident that the only just outcome in the matter can be for damages to be awarded to the Appellant for the loss suffered in respect of the Plaintiff's earning capacity as well as for general damages. The prevailing evidence led in the Court a quo stands uncontested, and this Court finds no reason not to accept it.

QUANTUM:

[20] EVIDENCE PRESENTED:

[21] In the Court a quo, the Appellant presented the following evidence:

21.1 The hospital records, which contained the complained-of irregularities.

21.2 The expert evidence by way of an affidavit of the following experts:

21.3 An orthopaedic surgeon
21.4 An urologist
21.5 An occupational therapist
21.6 An industrial psychologist.
21.7 An actuary.

[22] All the experts' reports confirmed that the Appellant sustained the following injuries:

22.1Open book pelvis fracture with scrotal injury

22.2 Left distal femur fracture with peroneal nerve palsy

[23] This Court evaluated the possibility of remanding the matter to the Court a quo to address the quantification of the Appellant's claim. However, it is my considered view that remitting the matter back to the Court a quo would, under the circumstances and given the time that has elapsed since the accident forming the underlying cause of the matter occurred, not be in the interest of justice. This Court believes that it is in a position to sufficiently deal with the quantification of the Appellant's claim.

[24] Although the Judgment of the Court *a quo* did not expressly deal with the quantification of the Appellant's claim, both parties thoroughly dealt with the quantification of the Appellant's claim in their papers as well as their arguments presented both to the Court *a quo* and to this Court.

[25] To deal extensively with each and every averment as made in the experts' reports by the Appellant would serve no practical purpose, having been satisfied that a diminishment in the earning capacity of the Appellant indeed exists, and that the other factors to take into regard remain unopposed by the Respondent, this Court is satisfied that it can apply the relevant contingencies to the actuarial calculations in order for a suitable compensation to be ordered in respect of the Appellant's loss of earnings.

[26] Contingencies discount the vicissitudes of life, and it is a method used to arrive at fair and reasonable compensation. The question of contingencies was dealt with in **Southern Insurance Association Ltd v Baily N.O.[2]:**

'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.

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 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.

It is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable. In dealing with the question of contingencies, WINDEYER J said in the Australian case of Bresatz v Przibilla (1962) 36 ALJR 212 (HCA) at 213:

> *"It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned... (The) generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse: All 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative*

employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad.'"

[27] In **Gillbanks v Sigournay [3]** the Court stated that:

'In any estimate of a person's loss of earning capacity allowance must be made for all contingencies including the accidents of life and certain deductions must be made from the estimated gross income to allow for unemployment benefits, insurance and so on. These contingencies would include –

(i) a possibility that plaintiff's working life may have been less than sixty-five years;
(ii) a possibility of his death before he reaches the age of sixty-five years;
(iii) the likelihood of his suffering an illness of long duration;
(iv) unemployment;
(v) inflation and deflation;
(vi) alterations in the cost-of-living allowances; ...."

[28] Contingencies may consist of a wide variety of factors. They include matters such as the possibility of error in the estimation of a person's life expectancy, the likelihood of illness, accident or employment, which is any event that could have occurred and therefore affects a person's earning capacity **[4]**.

[29] At the hearing of the matter in the court a quo and in the Appellant's papers, the Appellant sought contingencies to be applied on 5% for past loss and 15% for future loss of earnings in respect of the Appellant's uninjured scenario. The Court was satisfied that although contingencies were to be applied, the contingencies as proposed by the Appellant were not satisfactory and the parties were requested to indicate whether contingencies of 25% in respect of past loss and 35% in respect

of future loss would not be more appropriate, considering that no proof of earnings was available. Both the counsels appearing on behalf of the Appellant and the Respondent agreed that it would be appropriate.

[30] Being guided by the aforesaid, I propose that the Appellant has suffered a loss of earnings in the amount of R 1 300 000.00 (One Million Three Hundred Thousand Rand).

[31] In determining general damages, the court is called upon to exercise its discretion to award what it considers to be fair and adequate compensation having regard to a broad spectrum of facts and circumstances connected to the plaintiff and the injuries sustained by him, including their nature, permanence, severity and their impact on his lifestyle **[5]**.

[32] This Court should allow general damages that are both fair to the Appellant as well as the Respondent.

[33] Having regard to the comparative matters referenced in the Heads of Argument by the respective parties, most of the judgments referred to in the parties' Heads of Argument were unfortunately either not applicable to the matter at hand, or alternatively, the amounts were outdated and not correctly calculated at the value as at the day of hearing.

[34] Perhaps the matter closest resembling the sequel of the accident of the Plaintiff would be the matter of Ndaba v RAF **[6]**, where the claimant sustained injuries, including a pelvic fracture and fractures of the right femur and tibia, as well as a left knee injury. The Court awarded the Claimant in the matter of Ndaba, *supra*, damages in the amount of R 500 000.00 (Five Hundred Thousand Rand) in 2011. This Court proposes that the general damages as suffered by the Appellant be awarded in the amount of R 1 000 000.00 (One Million Rand).

[35] Having found as aforesaid, the ancillary relief as prayed for by the Appellant becomes irrelevant. This Court, on the information available to it, does not require the matter to be referred back to the Court a quo, nor does it require any order regarding the admission of further evidence. The evidence presented when the matter was heard in the Court *a quo* is sufficient for the Court to make the Order as proposed.

COSTS:

[36] The Appellant prayed for the costs of two counsel. I do not believe that the matter is so complex as to warrant the employment of both senior and junior counsel. Although costs are warranted, they remain a matter of discretion for the Court. In the current circumstances, I do not see why the Appellant should not be awarded costs on a party and party Scale B, such costs to include the costs of the appeal, costs for the application for leave to appeal, costs for the petition to the Supreme Court of Appeal, and the costs in the Court a quo.

ORDER:

[37] As such and for all the reasons above, I propose the following Order be made:

[37.1] The Appeal is upheld.

[37.2]Orders 3 and 4 of the Order of the Court *a quo* set aside and replaced with the following Order:

"3. The Defendant shall pay the total sum of R 1 840 000.00 (One Million Eight Hundred Thousand Rand) to the Plaintiff in respect of the Plaintiff's claim against the Defendant, which amount is calculated as follows:

3.1. Past and future loss of income/earnings	R 1 300 000.00
3.2. General damages	R 1 000 000.00
SUB-TOTAL	R 2 300 000.00
Less 20% Deduction on merits	R 460 000.00
TOTAL	R 1 840 000.00

[37.3]. The Defendant shall pay the Plaintiff's costs, including the costs for the Application for Leave to Appeal, the costs for the petition to the Supreme Court of Appeal, and the costs of appeal on a party and party Scale B."

[redacted]

H F FOURIE

ACTING JUDGE OF HIGH COURT

I agree

[redacted]

JL BHENGU

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered

[redacted]

K F PHAHLAMOHLAKA

JUDGE OF THE HIGH COURT

Judgment reserved on: 06 FEBRUARY 2026
Date of delivery: 04 MAY 2026

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[1] See Jajbhay v Casim 1939 AD 537

[2] Southern Insurance Association Ltd v Baily N.O. 1984 (1) SA 98 (A) at 113 G and 116 G to 117 D

[3] Gillbanks v Sigournay 1959 (2) SA 11 (N)

[4] Road Accident Fund v Reynolds (A5023/04) [2005] ZAGPHC 19 (18 February 2005)

[5] D v Road Accident Fund (15/24390) [2017] ZAGPJHC 61 (3 March 2017) at para 17

[6] Ndaba v RAF 2011 (6) QOD E3-14 (ECB)