

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Reportable: NO
Of interest to other Judges: NO
Revised: NO
Date: 01 June 2026 S.S Tebeile AJ
Signature: [REDACTED]

Case No: 2023-108625

In the matter between:

MOTHA NELSON MPHIWA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Link No: 5250847

Heard on : 18 March 2026

Decided on : 01 June 2026

JUDGMENT

TEBEILE AJ:

Introduction

[1] This is an application for default judgment by the plaintiff emanating from an action for damages arising from a motor vehicle accident which occurred on

21 April 2019 on the N3 South, near Modderfontein, Gauteng. The plaintiff, who was a pedestrian at the time, was struck by a motor vehicle with registration letters and numbers [D... GP], driven by one Mr Ncube (“the insured driver”).

- [2] The plaintiff instituted action against the Road Accident Fund (“the defendant”), claiming compensation for past and future medical expenses, past and future loss of earnings, and general damages. The matter comes before this court by way of default judgment proceedings following the defendant’s failure to comply with a court order granted by my Sister, Mali J on 19 November 2025.

Background

- [3] The plaintiff served a combined summons on the defendant on 24 October 2023. The defendant filed a notice of intention to defend and subsequently filed its plea on 25 January 2024. The defendant raised special pleas relating to the serious injury assessment required for general damages claims under the Road Accident Fund Act 56 of 1996 (“the Act”).
- [4] On 8 December 2022, the parties entered into a written agreement settling the merits of the claim on the basis that the defendant would pay 100% of the plaintiff’s proven or agreed damages. This settlement is binding on the defendant.
- [5] The defendant failed to comply with its obligations under Uniform Rule 41A relating to mediation. Despite service of a Rule 41A notice, a Rule 30A(1) notice, and multiple letters from the plaintiff’s attorneys, the defendant did not respond. On 19 November 2025, my Sister, Mali J issued a court order compelling the defendant to attend a pre-trial conference and, separately, to respond to the Rule 41A notice within five days.
- [6] The defendant failed to comply with the court order dated 19 November 2025. Consequently, the defendant’s defence was struck out, and the plaintiff was

granted leave to approach the registrar for a date of hearing on the default judgment roll.

Rule 38(2) application

[7] On the hearing of the application for default judgment, the plaintiff's counsel made an application in terms of Rule 38(2) to lead evidence by way of affidavit. That application was unopposed and is granted.

Accident and injuries

[8] On 21 April 2019 at approximately 13h30, the plaintiff was standing between two vehicles which had been involved in an earlier accident. He had been called to the scene to tow one of the vehicles. While standing there, the driver of the insured vehicle, travelling at high speed on the N3 South, lost control and collided with vehicle "B", which then struck the plaintiff.

[9] The plaintiff sustained the following bodily injuries:

- 9.1. Head injury (with reported loss of consciousness)
- 9.2. Left hip soft tissue injury
- 9.3. Right knee meniscus injury
- 9.4. Left knee contusion
- 9.5. Contusions to both ankles

[10] The plaintiff was transported by ambulance to Sunninghill Hospital and later transferred to Life Fourways Hospital. X-rays report revealed early degenerative

changes in the right ankle (pre-existing) but no fractures. The plaintiff underwent an arthroscopic meniscus repair of the right knee in July 2019.

The plaintiff's personal circumstances

[11] The plaintiff is a male born on 24 May 1974. At the time of the accident, he was 44 years old, and he is currently 51 years old. He completed Grade 12 (formerly Standard 10) in 1993. He is a person living with chronic illness, a fact he disclosed during the medico-legal assessments, and he manages this condition with prescribed medication. He resides with his partner and their children. He holds a Code 8 driver's licence.

Pre-accident employment and earnings

[12] At the time of the accident, the plaintiff was employed as a tow truck driver at First Assist. He had been in the towing industry since approximately 2000. His duties included responding to accident scenes, driving to sites, securing scenes, contacting emergency services and insurers, attaching and securing vehicles to the tow van, and transporting damaged vehicles.

[13] The occupational therapist, Ms Narishca Doorasamy, classified the plaintiff's pre-accident work as light to medium physical demand level, requiring occasional lifting of up to approximately 15kg, frequent sitting (driving), occasional standing, walking, stooping, and crouching.

[14] Based on payslips provided by the plaintiff for the period immediately preceding the accident, the industrial psychologist, Dr A C Strydom, calculated the plaintiff's average weekly earnings as R5 210.14, which translates to approximately R22 560.00 per month and R270 719.00 per annum. These earnings fall above the upper quartile for semi-skilled workers.

Post-accident employment and earnings

[15] The plaintiff returned to work in August 2019. He remains employed by First Assist in the same position. However, he now experiences significant difficulties: he has difficulty attaching vehicles to the tow van and requires assistance; he experiences pain in his right knee when standing or driving for long periods and requires rest breaks; and he reports that he is forgetful with names at work and is slow to respond.

[16] The plaintiff's earnings have substantially decreased. Based on current payslips, his average weekly earnings are R2 973.60, approximately R12 876.00 per month and R154 508.00 per annum.

Expert evidence

[17] The plaintiff filed expert reports from:

17.1. Dr T.S. Ramokgopa (Orthopaedic Surgeon).

17.2. Ms Narishca Doorasamy (Occupational Therapist).

17.3. Dr A.C. Strydom (Industrial Psychologist).

17.4. Mr Daniel Saksenberg (Actuary).

[18] Dr Ramokgopa (orthopaedic surgeon) opined that the right knee remains symptomatic despite the meniscus repair. He noted that the ongoing symptoms suggest a poor outcome and that the plaintiff may be developing degeneration of the cartilage. He recommended a further arthroscopic assessment. The prognosis is guarded.

[19] Ms Narishca Doorasamy (occupational therapist) conducted a functional capacity evaluation and found: restricted range of motion with pain in the right knee; pain in both ankles; slight limitation in sitting, standing, stooping; some limitation in

walking, climbing, kneeling; significant limitation in squatting; inability to maintain a crouching position; cognitive deficits (MOCA score 21/30, indicating neurocognitive fallout); psychological sequelae (flashbacks, depression, anxiety, social isolation). Ms Doorsasamy concluded that the plaintiff is limited to light physical demand work on an occasional basis and is an unfair and vulnerable competitor in the labour market.

[20] Dr Strydom (industrial psychologist) concluded that pre-morbid, the plaintiff would probably have continued working as a tow truck driver until normal retirement age (65), and that, post-morbid, he suffers a loss of employability and earning capacity. He is less competitive and physically vulnerable. His current earnings have decreased from approximately R22 560.00 per month pre-morbid to approximately R12 876.00 per month post-morbid.

Pre-existing health condition

[21] The plaintiff disclosed during the industrial psychologist's interview that he is living with a chronic illness and takes the prescribed medication. He reported no pre-morbid symptoms or functional limitations from this condition. The medical experts did not attribute any of his current physical or cognitive complaints to this condition, and all were causally linked to the accident.

[22] However, in my view, this pre-existing condition is relevant to contingency deductions, as it introduces an additional element of vulnerability in the open labour market.

[23] I am also of the view that the plaintiff's immune status as a result of this condition may affect his long-term health, recovery from any future surgeries (including a potential knee replacement), and most importantly his overall life expectancy and work longevity. This risk must be considered in arriving at a fair compensation to the plaintiff's injuries and contingency deductions.

The actuarial calculation

[24] The actuary calculated the plaintiff's loss of earnings as follows:

	But-for the accident	Having regard to the accident	Net loss
Past loss	R1 721 263.00	R977 996.00	R743 267.00
Future loss	R3 098 998.00	R1 451 776.00	R1 690 494.00
Total	R4 820 261.00	R2 429 772.00	R2 433 761.00

[25] The actuary applied contingencies of 0% on past loss and 15% pre-morbid and 35% post-morbid on future loss.

Contingency deductions and analysis

[26] It is trite that the assessment of damages for loss of earning capacity is not a mechanical exercise, and the court must, based on the evidence and guided by comparable cases, exercise a wide discretion to award what it considers fair and adequate compensation.

[27] It cannot be gainsaid that contingency deductions are applied to account for the fluctuations of life, such as unemployment, illness, early death, and other unforeseeable factors. The court may adjust the recommended contingencies based on the facts of the case.¹

¹ See *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W) at 392H–393A.

[28] The Supreme Court of Appeal in *Road Accident Fund v Kerridge*² opined as follows:

“Any claim for future loss of earning capacity requires a comparison of what a claimant would have earned had the accident not occurred, with what a claimant is likely to earn thereafter. The loss is the difference between the monetary value of the earning capacity immediately prior to the injury and immediately thereafter. This can never be a matter of exact mathematical calculation and is, of its nature, a highly speculative inquiry. All the court can do is make an estimate, which is often a very rough estimate, of the present value of the loss.”³ (Footnote omitted)

[29] In *Southern Insurance Association Ltd v Bailey NO*⁴, the Appellate Division held that contingencies are a practical method of accounting for the unknown future and are in the discretion of the trial court. The Court held:

“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.”

[30] In *Shezi v Road Accident Fund*⁵, the court stated:

“In order to determine a plaintiff’s claim for future loss of income or earning capacity, it becomes necessary to compare what the claimant would have earned ‘but for’ the incident with what he would likely have earned after the incident. The future loss

² 1024/2017 [2018] ZASCA 151 (01 November 2018).

³ Id para 40.

⁴ 1984 (1) SA 98 (A).

⁵ [2023] ZAGPPHC 432; 22540/2017 (25 May 2023).

represents the difference between the pre-morbid and post-morbid figures after the application of the appropriate contingencies.

The Plaintiff's future employability is an important consideration and the associated risks as identified by the experts. The Plaintiff's physical injuries and how those injuries impact her working capacity is also an important consideration. Future treatment required and whether the Plaintiff would be able to recover. The likelihood of the Plaintiff being fired or retrenched. The fact that the plaintiff has an unsatisfactory service record. **The possibility of mistakes having been made in the determination of the life expectancy or earning life expectancy of the Plaintiff. The likelihood of illness.**

These factors must be juxtaposed against the injuries sustained by the plaintiff in the accident and more importantly the causal link between those injuries and the impact that it has on the plaintiff's earning capacity. General contingencies cover a wide range of considerations, which vary from case to case and there are no fixed rules as regards general contingencies"⁶. (Emphasis added)

[31] The plaintiff's counsel submitted that the 15% / 35% differential is fair. However, I am of the view that an adjustment is warranted for the reasons to follow.

[32] There are existing factors justifying higher pre-morbid contingency (30%): the plaintiff's pre-morbid earnings were commission-based and carry potential irregularity because towing fees varied significantly week to week; it cannot be gainsaid that South Africa is experiencing a high unemployment rate; the plaintiff's education level (Grade 12) and semi-skilled status render him vulnerable to periods of unemployment; and plaintiff's chronic condition which he treats with relevant medication and which chronic condition could, over a 20-year working lifespan, lead to health-related interruptions, increased absenteeism, or early retirement. This is a legitimate pre-morbid contingency factor.

⁶ Id at paras 26-28.

[33] There are also factors justifying higher post-morbid contingency (40%): the plaintiff works despite persistent pain and discomfort, affecting productivity; he requires assistance with attaching vehicles and takes rest breaks, and therefore, accommodations not guaranteed in the open labour market; if he loses his current job, securing alternative employment will be extremely difficult given his physical and cognitive limitations; the orthopaedic prognosis is guarded, with potential for right knee degeneration and future knee replacement; the cognitive deficits (memory, concentration) increase his risk of errors and safety hazards as a driver; the psychological sequelae (depression, anxiety, flashbacks) affect his ability to cope with workplace stress and interpersonal demands; and his chronic condition, combined with a guarded orthopaedic prognosis, creates a compounded vulnerability, and any future illness or surgery will be more complicated.

[34] In *Brits v Road Accident Fund*⁷, the court applied a 15% pre-morbid and 35% post-morbid contingency differential. The court per Strijdom J stated:

“It was submitted by the plaintiff that the court must apply a 30% contingency differential 15/45. I am of the view that in the circumstances of this case a 35% contingency will be fair. Such a contingency takes into account that the plaintiff is still employed and may remain in that position and also allows for the possibility that he may be rendered unemployable if he should lose his job. The result would be a 15% pre-morbid contingency and a 35% post-morbid contingency. A differential of 20% contingency.”⁸ (Emphasis added)

[35] The facts of the present case, particularly the plaintiff’s chronic condition and the cognitive sequelae of his head injury, justify a slightly wider differential. In determining a reasonable and fair amount for loss of earning, the court must also consider the global award and ensure it is fair and just having regard to the plaintiff’s age, the nature of his injuries, and the impact on his earning capacity.

⁷ (54415/2018) [2025] ZAGPPHC 417 (11 April 2025).

⁸ Id at para 24.

[36] In my view, the appropriate contingencies are 30% on pre-morbid (but-for the accident) and 40% on post-morbid (having regard to the accident).

Recalculation of loss of earnings

[37] I now consider recalculation of loss of earnings in light of the adjusted contingencies of 30% on pre-morbid and 40% on post-morbid.

Past Loss (Accrued):

But-for: R1 721 263.00

Less 30% contingency (R516 379.00) = **R1 204 884.00**

Having regard: R977 996.00

Less 0% contingency (past loss crystallised) = **R977 996.00**

Past loss after contingencies: R1 204 884.00 – R977 996.00 = R226 888.00

Future Loss (Prospective):

But-for: R3 098 998.00

Less 30% contingency (R929 699.00) = **R2 169 299.00**

Having regard: R1 451 776.00

Less 40% contingency (R580 710.00) = **R871 066.00**

Future loss after contingencies: R2 169 299.00 – R871 066.00 = R1 298 233.00

Total Loss of Earnings: R226 888.00 + R1 298 233.00 = R1 525 121.00

Future medical expenses

[38] Dr Ramokgopa recommends a further arthroscopic assessment (±R80,000) and possible future knee replacement (±R200,000). The occupational therapist recommends occupational therapy, physiotherapy, biokinetics, assistive devices, home care, and handyman services.

[39] The defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Act for 100% of the costs of future medical treatment,

including but not limited to the recommended arthroscopy, potential knee replacement, occupational therapy, physiotherapy, biokinetics, assistive devices, and related travel expenses.

General damages

[40] The plaintiff claims R500 000.00 for general damages. The defendant has not filed a serious injury assessment report and therefore there is no compliance with Regulation 3 of the RAF Regulations.

[41] Before this court there is no decision by the Health Professions Council of South Africa on the issue of seriousness of the injuries. For that reason, the appropriate order is to postpone the claim for general damages *sine die*.

Rule 38(2) application

[42] The plaintiff filed an application in terms of Rule 38(2) to admit the expert reports on affidavit, which was granted by agreement. Given that the defendant failed to defend, it is reasonable and cost effective to admit the evidence as contained in the affidavits. The order in this regard was granted on 18 March 2026 and is confirmed.

Costs and interest

[43] The plaintiff sought costs of suit on party and party scale B. The defendant shall pay the plaintiff's taxed or agreed party and party costs on scale B, including the costs of 17 March 2026 when the matter was stoon down to 18 March 2026 for settlement.


[44] The interest on the capital amount of **R1 525 121.00** shall accrue at 10.5% per annum if the amount is not paid within 180 days, calculated from the expiry of 14 days after the due date to the date of payment. Interest on costs shall accrue at 10.5% per annum from the date of the *allocator* to the date of payment.

Order

[45] Accordingly, I make the following order:

- (1) An application in terms of Rule 38(2) is granted.
- (2) The defendant shall be liable 100% of agreed or proven damages of the plaintiff related to the accident that occurred on 21 April 2019.
- (3) The defendant shall pay to the plaintiff a total amount of R R1 525 121.00 (One million, five hundred twenty-five thousand, one hundred twenty-one rand) in respect of loss of earnings within 180 days from the date of this order.
- (4) In the event the aforesaid amount in paragraph 3 above is not paid timeously, the defendant shall be liable for interest on the amount at the rate of 10.5% per annum calculated from the expiry of 14 days to the date of payment.
- (5) The defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to pay 100% for the costs of the plaintiff's future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him arising out of the injuries sustained by the plaintiff and the sequelae thereof in the motor accident which occurred on 21 April 2019 after such costs have been incurred and upon proof thereof.
- (6) The defendant shall pay the plaintiff's taxed or agreed party and party costs on scale B, including the costs of 17 March 2026, and for the costs referred to in paragraphs below:

- 6.1. The costs of and consequent to the appointment of counsel, as well as the reasonable preparation fees for default judgment trial, drafting of heads of argument and attendance for default judgment trial.
- 6.2. The costs of all medico-legal reports of the following experts:
- 6.2.1. Dr T.S. Ramokgopa (Orthopaedic Surgeon).
 - 6.2.2. Ms Narishca Doorasamy (Occupational Therapist).
 - 6.2.3. Dr A.C. Strydom (Industrial Psychologist).
 - 6.2.4. Mr Daniel Saksenberg (Actuary).
 - 6.2.5. The reasonable taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by the taxing master of the above experts.
 - 6.2.6. The reasonable costs incurred by and on behalf of the plaintiff in attending the medico-legal examinations of both parties' experts which shall include the reasonable accommodation and transportation of the plaintiff when attending such medical assessments, if any.
- (7) The claim for general damages is postponed *sine die*.
- (8) There is no contingency fee agreement.



SHADRACK TEBEILE
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

For the Plaintiff: Adv N Nemukula instructed by Houghton Harper Inc

For the Defendant: Ms N Moyo (RAF)