

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: 4828/2014

In the matter between:

FREDERICK PETRUS JACOBS HERMANUS STEMMETT

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

[LINK NO. 3541295]

[CLAIM NO. 503/12189826/1002/0]

Neutral citation: *Stemmett v Road Accident Fund* (4828/2014) [2026] ZAFSHC 425 (7 September 2026)

Coram: VAN ZYL J

Heard: 27 August 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 14h00 on 7 September 2026.

Summary: Payment of damages – motor vehicle accident – loss of earnings suffered – appropriate contingency deductions.

ORDER

1 The defendant is liable for payment to the plaintiff in the amount to be determined as stipulated below in respect of the plaintiff's loss of earnings.

2 The plaintiff is to request Munro Forensic Actuaries to calculate the plaintiff's loss of earnings in the uninjured and in the injured scenarios based on the actuarial report dated 20 August 2025, but applying the following contingency deductions:

2.1 Uninjured: 8%.

2.2 Injured: 45%.

3 The parties are granted leave, upon receipt of the aforesaid actuarial calculation, to approach Van Zyl J in chambers to make the outcome of the actuarial calculation of the plaintiff's claim an order of court.

4 The defendant shall pay the plaintiff's taxed or agreed party and party costs until date of this order, including but not limited to the costs set out hereunder:

4.1 The reasonable qualifying and reservation fees and expenses (if any) of the following experts:

4.1.1. Dr JJ Schutte (General Practitioner);

4.1.2 Dr LF Oelofse and Dr NB Deacon (Orthopaedic Surgeons);

4.1.3 Dr N Bellew, van Dyk & Partners and Sandton Radiology (Radiologists);

4.1.4 Mr FA Kleynhans (Orthotist and Prothetist);

4.1.5 Ms C Smit (Occupational Therapist);

4.1.6 Mr C Cornellisen (Livestock Agent and Auctioneer);

4.1.7 Mr N du Plessis (Chartered Accountant);

4.1.8 Dr EJ Jacobs (Industrial Psychologist);

4.1.9 Munro Forensic Actuaries.

4.2 The costs of senior counsel on scale C.

5 Payment of the capital amounts shall be made without set-off or deduction within 180 (one hundred and eighty) calendar days from date of the granting of this order, directly into the trust account of the plaintiff's attorneys of record by means of electronic transfer, the details of which are the following:

Honey Attorneys Trust Account

Bank: Nedbank, Maitland Street, Bloemfontein

Branch code: 110 234 00

Account Number: 1[...]

Reference: HL Buchner/vch/J02935

(Please quote the reference at all times)

6 Payment of the taxed or agreed costs shall be made within 180 (one hundred and eighty) days of taxation and is likewise to be paid into the trust account of the plaintiff's attorney.

7 Interest shall accrue at the statutory rate per annum, compounded, in respect of:

7.1 The capital amount of the claim, calculated from 14 (fourteen) days from date of this order.

7.2 The taxed or agreed costs, calculated from 14 (fourteen) days from date of taxation, alternatively date of settlement of such costs.

JUDGMENT

Van Zyl J

[1] The plaintiff issued summons against the defendant for payment of damages which he suffered as a result of a motor vehicle accident that occurred on 21 November 2011 on the N5 road between Bethlehem and Paul Roux, Free State Province.

[2] The defendant conceded the merits of the claim and accepted 100% liability for the damages proven by the plaintiff. The parties have further settled the claim for general damages and the defendant furnished the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996, with regard to future medical costs. The remaining issue to be decided is the loss of earnings suffered by the plaintiff. With regard thereto, I am also called upon to determine the appropriate contingency deductions in respect of the plaintiff's loss of earnings.

[3] Mr Zietsman appeared on behalf of the plaintiff and Ms Bornman on behalf of the defendant.

Agreements between the parties

[4] The plaintiff was born on 1[...] M[...] 1979 and was therefore 46 years old at the time of the hearing of this action.

[5] Both the plaintiff and the defendant served various expert summaries and addendum reports thereto. Joint minutes of the orthopaedic surgeons (Dr Oelofse and Dr Bogatso), the occupational therapists (Ms Smith and Ms Moage) and the industrial psychologists (Dr Jacobs and Ms Kheswa) were also filed. It is evident from the joint minute of the industrial psychologists that Dr Jacobs and Ms Kheswa agreed, *inter alia*, as follows:

- (a) There are no major points of disagreement regarding the plaintiff's scholastic qualifications or background that will have an impact on their recommendations.
- (b) A forensic audit report of Mr Du Plessis (CA) was made available to them.
- (c) As industrial psychologists they do not have the expertise to make an interpretation of complex accounting and audit reports.
- (d) Calculations are to be based on the recommendations of Mr Du Plessis as appearing at section 5 of his report.
- (e) The accident had rendered the plaintiff an unequal competitor in the labour market.
- (f) The injured scenario of the plaintiff should also be guided by the forensic audit report of Mr Du Plessis.
- (g) Contingencies are the prerogative of the court or can be determined by agreement between the parties.

[6] The plaintiff and the defendant agree on the methodology and factual basis of the actuarial calculation of Munro Forensic Actuaries, except for the contingencies to be applied.

[7] Following on from the joint minute of the industrial psychologists, Munro Actuaries calculated the capital value of the plaintiff's loss of earnings, before applying the RAF cap at R7 188 035, applying 15% contingency in the uninjured scenario and 55% contingency in the injured scenario. After having applied the RAF cap, the capital value of the plaintiff's loss of earnings was reduced by 43.24% to R4 079 600.

[8] The actuarial calculation was based on a retirement age of 67 and a half years in the uninjured scenario and 55 years in the injured scenario.

[9] The retirement age of the uninjured scenario is by agreement between the parties and that of the injured scenario is based on the report of Dr Jacobs, read with the expert reports of Dr Oelofse.

Background of the plaintiff

[10] In the forensic audit report of Mr Du Plessis, the following relevant background information is contained:

(a) Mr Stemmett grew up on a farm and has been a farmer himself for fundamentally his whole working life to date. He started working for his father on the farm after finishing school and around 2007 he starting farming for his own account as well.

(b) The plaintiff never had formal training in farming or farming practices, but has more than 20 years practical experience as a farmer himself, combined with what he learned from his father whilst growing up on a farm.

(c) His income came from doing the work on his father's farmland, keeping a core herd of cattle and selling the offspring and lastly from speculation with cattle (short-term and feeding in a feedlot). He plants maize to use as feed for the cattle.

(d) Before the accident the plaintiff fundamentally did all the work on his and his father's farmland himself. This included the feeding of a couple hundred cattle, as well as working with the cattle. He worked from as early as 05h00 to about 18h00 or 19h00 on most days. Since the accident the plaintiff had been forced to employ labourers as he was not physically able to do the work on the farms himself anymore.

(e) The plaintiff used to receive a salary from his late father and, after his father passed away, from his late mother. These payments were stopped in the 2002 financial year and has not been replaced. It is unlikely that the plaintiff will be able to find similar employment with his injuries due to the physical nature of his work and his doctors' instruction not to drive. From the joint minutes of Dr Oelofse and Dr Bogatsu, the orthopaedic surgeons, it is evident that they agree that the plaintiff is an unfair competitor in the open labour market.

(f) In terms of the report of Dr Oelofse the plaintiff will need sick leave of approximately six months due to required operations which any other unrelated employer will be reluctant to give.

(g) According to the report of Dr Oelofse the plaintiff should not do any physical labour. He will require assistance with day-to-day tasks and will have to stop working anything from ten to fifteen years earlier than would normally have been the case. This is also evident from the joint minute of Dr Oelofse and Dr Bogatsu, as well as the addendum report of Dr Jacobs.

(h) The following view of Mr Du Plessis, I will directly quote from his forensic report:

'3.1.13 Mr Stemmett's farming business model is different from the typical livestock farmer. His business involves a lot more buying and selling of cattle than what one would typically see. He uses his skills of being able to scout for profitable animals for short-term speculation that ranges from buying from other farmers and selling almost instantly for profit to making deals with other farmers on a "sharecrop" basis... His business includes feedlot components and also traditional livestock farming which entails keeping of a core herd and selling the offspring. ...the way that he actively buys and sells looking for profitable opportunities gives him a model that generates farming profits more often than most, which sets his operation apart from other livestock farmers in general. Unfortunately, it is this speculation twist on livestock farming, in my opinion the competitive edge, which is most at risk to be lost when one has regard to the expert opinion of Mr Cornellisen as summarized in the expert witness summary.'

(i) The report of Mr Du Plessis serves as supporting evidence to assist the court in determining the quantum of the loss of income suffered by the plaintiff since the date of the accident on the assumption that the accident never happened.

(j) With the information at Mr Du Plessis' disposal, it was not possible to determine the quantum of any historic loss of earnings suffered by the plaintiff as a result of the accident.

Legal principles relating to contingencies

[11] 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 Bailey* NO¹:

'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,

¹ *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 A at 113 G and 116G - 117D.

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."

[12] In *Goodall v President Insurance CC Ltd*² Margo J stated as follows regarding contingencies:

'In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art of science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office.'

² *Goodall v President Insurance CC Ltd* 1978 (1) SA 389 (W) at 392H – 393A.

[13] In *Gwaxula v Road Accident Fund*³ Moshidi J, stated the following:

‘It is by now accepted that in the assessment of these kinds of damages, which cannot be assessed with any amount of mathematical accuracy, the court has a wide discretion. See for example *AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A). . . . Each case must be assessed on its own circumstances.’

[14] In *Road Accident Fund v Reynolds*⁴ the full court also held as follows:

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

[15] In *Van der Plaats v South African Mutual Fire and General Insurance Company Limited*⁵ the court held that it has a discretion in allowing contingencies. The discretion must be based upon the circumstances of the particular case.

[16] In *Dlamini v Road Accident Fund*⁶ the court dealt with and applied some guidelines referred to by Koch in *The Quantum Yearbook*:

‘[30] Koch refers to the following as some of the guidelines as regards contingencies:

“Normal contingencies” as deductions of 5% for past loss and 15% for future loss.

Sliding scale: ½ % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age and relies on *Goodall v President Insurance* 1978 (1) SA 389.

Differential contingencies are commonly applied, that is to say one percentage applied to earnings but for the accident, and a different percentage to earnings having regard to the accident.

[31] When a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. In the absence of contrary evidence, the court can assume that the reasonable person in the position of the plaintiff would have succeeded to minimize the adverse hazards of life rather to accept them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are

³ *Gwaxula v Road Accident Fund* [2013] ZAGPJHC 240 paras 17 – 28.

⁴ *Road Accident Fund v Reynolds* (A5023/04) [2005] ZAGPHC 19 (18 February 2005) para 6.

⁵ *Van der Plaats v South African Mutual Fire and General Insurance Company Limited* 1980 (3) SA 105 A (A) at 115C – D.

⁶ *Dlamini v Road Accident Fund* (59188/13) [2015] ZAGPPHC 646 (3 September 2015) paras 30 – 31.

not always adverse *the court should in exercising its discretion lean in favour of the plaintiff as he would not have been in placed in the position where his income would have been the subject of speculation if the accident had not occurred.*' (My emphasis.)

[17] Differential contingencies were dealt with in *SL v The Road Accident Fund*⁷:

'[41] Mr Pretorius also opines that "appropriate (probably substantial) higher post-accident contingencies" should be applied given the various impairments listed by the various experts. In determining the percentage differential to be applied in this regard, Mr. Pretorius refers to the research of the actuary Mr. Gregory Whittaker, which indicates that a "higher" contingency deduction generally implies a 20% differential and "substantially higher" a 35% differential.

[93] In this regard he referred me to the judgment in the matter of *Lighthelm v RAF* [2014] ZAGPPHC 149 par [35] where a similar expert opinion was expressed that a "substantially higher" post-accident contingency ought to be applied. Having heard evidence from the Industrial Psychologist in that matter that "substantially higher" would imply a differential "over 30%" the court ultimately applied a 40% contingency differential (i.e., 15% pre and 55% post).'

[18] In *Road Accident Fund v Guedes*⁸ the following principle was stated:

'The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that in order to assist in such a calculation an actuarial computation is a useful basis for establishing the quantum of damages. *Even then, the trial court has a wide discretion to award what it believes is just.*' (My emphasis.)

Uninjured scenario

[19] Mr Zietsman submitted that it is important to emphasise the basis of the calculation, because (a) it will inform the approach to the contingencies to be applied and (b) this is an unusual case because the industrial psychologists are in agreement that the court is to be guided by the forensic auditor's report in both the uninjured and the injured scenario.

⁷ *SL v The Road Accident Fund* 2021 JDR 2010 (GP) paras 41 and 93.

⁸ *Road Accident Fund v Guedes* [2006] ZASCA 19; 2006 (5) SA 583 (SCA) para 8.

[20] Mr Zietsman further submitted that the present matter calls for a contingency deduction lower than what has been described in the above caselaw as 'normal contingency' of 15% in the uninjured scenario.

[21] In this regard Mr Zietsman accentuated the fact that due to the only financial information available, the plaintiff's future income potential in the uninjured scenario has been modelled on his actual income streams over various income periods in his injured state.

[22] This, in itself, is a conservative approach. Mr Du Plessis remarks in this regard at para 4.4.17 of his report the following:

'When considering contingencies, it should be noted that the above income is already post-morbid and thus in my opinion includes an element of loss related to the accident. This is in the form of wages incurred, and losses due to some of the physical tasks likely not performed at the same optimal level that Mr Stemmett would have been able to do in an uninjured state.'

[23] I agree with the aforesaid contentions. Because the uninjured scenario is modelled on actual income in the plaintiff's injured state, which already has an inherent element of accident-related reduced capacity and accident-related additional costs, a more conservative contingency than the so-called 'normal contingency' of 15% in the uninjured scenario is to be applied.

[24] In her heads of argument Ms Bornman referred to the following extracts from the report of Mr Du Plessis:

'4.4.2. . . various factors influence the financial performance of a farm on a year-to-year basis. These include factors like:

Annual rainfall;

Timing of rainfall;

Droughts;

Floods;

Hail;

Heat waves;

Frost;

Livestock diseases;

Crop diseases;

Commodity prices;

Livestock prices;

Credit terms of financiers and creditors.

4.4.3 Some of these risks can be managed by the farmer but for most of them the farmer is at the mercy of the elements.

5.2 Farming is notorious for producing fluctuating income from year-to-year, making it extremely difficult to forecast income from farming activities in future periods.

5.3 Despite these risks, the farming operation of Mr FPJH Stemmett was profitable on average during the 14 years under review yielding an average income of R316 968 per year before tax with the latter years being more profitable than the early years of the business.'

[25] Ms Bornman submitted that the risk factors of a farming business would always be present, regardless of the plaintiff's injured state, which business has seen growth and was profitable more so in the latter years than the early years. She submitted that there is no evidence before the court that the plaintiff would have been more profitable in the business he undertook post-accident, had it not been for the accident, but merely assumptions by a chartered accountant. The plaintiff only started with the specific business model which is now very profitable, post-accident, and there is unfortunately no comparison to be made in the uninjured state. Ms Bornman consequently submitted that a normal contingency deduction of 15% is more than fair and reasonable in the circumstances.

[26] In reply Mr Zietsman pointed out that the defendant acknowledges that the basis of the actuarial calculation of the plaintiff's uninjured income is premised on the plaintiff's financial information in his injured state. Since the plaintiff's financial results from his farming enterprises for the period 2009 to 2024 were reviewed by using an average approach, the external factors which could, and as a fact did, affect the plaintiff's financial results over the review period have already been incorporated into the uninjured actuarial income potential calculation. Mr Zietsman submitted that to increase the contingency deduction as a result of the external factors would be equivalent to double penalisation.

[27] With regard to the contention by Ms Bornman that there is no evidence before the court that the plaintiff would have been more profitable in the business he undertook post-accident, had it not been for the accident, is, according to the

submission of Mr Zietsman, factually not correct. I agree with the submission of Mr Zietsman. It is evident from the medical evidence that the plaintiff finds most of his daily farming duties and tasks painful and very difficult to perform. With the progression of degeneration in his ankles, subtalar and mid-foot joints of both feet, his productivity will decrease. In their joint minute, the occupational therapists agreed that the plaintiff's whole-body impairment was assessed at 31% and that he is best suited for sedentary work settings within reasonable accommodation. However, his pre-accident occupation as a farmer falls within medium to heavy work category and requires optimal functioning and strength of both upper and lower limbs.

[28] I have already quoted paragraph 3.1.9 of the report of Mr Du Plessis from which it is evident that since the accident the plaintiff had been forced to employ labourers as he was not physically able to do work on the farm himself anymore.

[29] In my view, it is consequently clear that the plaintiff's injuries had a negative impact on the income potential of the farming enterprise; so did the necessity of additional labour and reduced productivity. Therefore Mr Zietsman submitted that since a 10% contingency deduction is normally applied to middle aged persons, like the plaintiff, a further 2% would be sufficient to account for the fact that the uninjured income scenario was based on post-accident income.

[30] I consequently agree with the contention on behalf of the plaintiff that an 8% contingency deduction in the uninjured scenario is fair and reasonable to both parties.

Injured scenario

[31] Before I deal with the impact that the loss of the speculation component of the farming business of the plaintiff will have according to Mr Du Plessis, I will first quote from his report with regard to his explanation as to why this component will likely be terminated in the future. In this regard he stated as follows at para 5.4 and further of his report:

'5.4 As previously indicated in paragraph 3.1.13, I am of the opinion that a big portion of Mr Stemmett's business success stems from the business model he is using for his

farming enterprise. He has been applying his skills as a livestock speculator in order to identify profitable animals to buy, use and sell in his farming operation.

5.5 This entails a fair amount of direct contact with clients and animals as highlighted in the expert witness summary of Mr Cornellisen that was provided to me. In his opinion, it would be very difficult for someone with injuries similar to that of Mr Stemmett to continue working as a livestock speculator. His absence due to medical reasons or the fact that he might be unable to do the physical aspects of livestock business in the future as a result of his injuries, would cause irreparable harm to the business model that Mr Stemmett is presently using and will no doubt have a negative effect on his profitability. He will testify that it could be outright dangerous for a person with lower limb injuries similar to that of Mr Stemmett to work with large livestock as a person needs agility to avoid serious injury in certain instances.

5.6 Mr Cornellisen will further testify that skills required to be a proficient livestock speculator is not easily taught to another person and is in fact not readily acquirable in the market. A person with the required skillset, will likely rather be working for his account than be employed by someone else. . . .’

[32] The basis of the future injured scenario is set out by Mr Du Plessis in his report as follows:

‘5.12 I am of the opinion that Mr Stemmett will incur business costs as a direct result of the injuries sustained in the accident.

5.13 This will likely be in the form of initially two general farm workers to cope with the up to 90 hours work weeks that Mr Stemmett maintains... This equates to an annual cost of at least R135 979.68 in 2005 terms. There are always further indirect costs incurred with the employment of workers that range from staff refreshments, workmen’s compensation, transport, staff loans, uniforms, and the like. If we assume that the tax effect and the indirect costs, cancel each out, the direct and indirect costs of these workers will reduce the uninjured earnings by at least 20.57% ($135979.68/661\ 108 \times 100$).

5.14 ...the speculation component of the business is likely to reduce over time, until only a “normal” livestock farming operation remains where calves are produced for sale. *This effect could in my opinion easily reduce the net profits by 50% on average.* The reduction of R460 502 in pre-tax earnings will result in a reduction in the tax bill of R171 861 based on the 2024 tax tables and the resultant decrease of R288 634 in after-tax earnings/uninjured earnings of 43.66% ($288\ 634/661\ 108 \times 100$) (See annexure “B” for 50% reduction in net income.) This will be caused by a combination of not being able to source profitable animals and not being able to gear with “share cropping” in order to have access to extra land. There are also in most instances a component of revenue loss

to be attributed to the fact that workers have to do work with animals, which Mr Stemmett would have normally done himself to ensure that it is 100%. (My emphasis.)

5.15 *The combination of the above, means as much as 64,23% of uninjured income could be lost related to injuries.* Applying 40% contingencies to the 64,23% leaves 38.54% that could still be lost. For purposes of this report I propose to round this percentage to 40%.' (My emphasis.)

[33] Therefore, to cater for accident-related relevant future events which might cause damage Mr Du Plessis suggests a contingency deduction spread of 40%.

[34] In addition to the future events mentioned by Mr Du Plessis, the nature of the injuries suffered by the plaintiff should also be considered. In this regard one must be mindful of the fact that the plaintiff is currently 46 years old and therefore has another nine years until the expected retirement age.

[35] From paragraph 7.1 of the report of Dr Oelofse it is evident that the plaintiff suffered a left upper arm, right ankle and foot and left lower leg and ankle injury in the accident under consideration.

[36] With regard to his left upper arm, the plaintiff experiences pain in his shoulder and upper arm with most physical activities. He is unable to carry the same weight in his arm than he could prior to the accident. Activities such as carrying/lifting heavy weight, working above shoulder height or with his arm in extension for prolonged periods aggravate the pain.

[37] With regard to his right ankle and foot, he experiences daily pain in his ankle and foot, with or without activity. Bearing full weight on his leg is very painful and difficult. His ankle tends to give away. Movement of his ankle and foot is very painful and difficult – his ankle and foot feel stiff and he struggles to mobilise. Certain duties and tasks, as required from a farmer, remain very painful and difficult to perform, such as standing/walking for prolonged periods, stooping/squatting, carrying/lifting heavy objects, climbing up/down equipment, driving a tractor etc.

[38] With regard to his left lower leg and ankle, pain in his ankle is present daily and aggravated by physical activity. Most physical activities remain painful and difficult to perform.

[39] On the prognosis and future treatment of the plaintiff Dr. Oelofse opines as follows in paragraph 12.5.1 of his report:

'12.5.1.2 Both ankles have developed post-traumatic osteoarthritis, and especially the right ankle has advanced since my previous consultation in 2018.

12.5.1.3 On the right side he has definite pain and stiffness of the subtalar joint.

12.5.1.4 He has a **PROBABILITY** to develop subtalar and/or midfoot osteoarthritis of both feet.

12.5.1.5 The osteoarthritis of both ankles will progress and will most probably be due for his first replacement surgery of the right ankle within the next 10 (ten) – 15 (fifteen) years.'

[40] The long-term outcome and complications of ankle arthrodesis are discussed in paragraph 12.8 of Dr. Oelofse's report. From a reading thereof it is very evident that it is not positive.

[41] Dr. Oelofse expresses the opinion in paragraph 16.1.2 of his report that the plaintiff must be placed in a permanent light-duty/sedentary working environment within his current or any future career as determined by an occupational therapist.

[42] However, the fact of this matter is that such a position is simply not possible. The plaintiff is a farmer and earns his living as such.

[43] In paragraph 16.1.3.1 of Dr. Oelofse's report he discusses the various frequencies of sick leave which the plaintiff will require.

[44] The impact which his injuries will have on the plaintiff's productivity, is discussed in paragraph 16.2 of the report, which is the following:

'16.2.2 I believe that the patient's injuries had a profound impact on his amenities of life, productivity and working ability and will continue to do so in future.

16.2.3 According to the patient, he is still a farmer but is experiencing problems at work.

16.2.6 With the progression of degeneration in his ankle, subtalar and midfoot joints of both feet, his productivity will decrease again.

16.2.7 His bilateral leg injuries will continue to have a profound impact on all aspects of his life.

16.2.8 Permanent deficits will remain.

16.2.10 Even though the patient is currently employed, he must not be allowed to do physical labour again and must be accommodated in a strict permanent light-duty/sedentary working position.

16.2.11 Also, an occupational therapist should give clear guidelines regarding possible future reduced working hours as his affliction progresses’.

[45] In the joint minute of the occupational therapists they agreed as follows:

‘The Orthopaedic Surgeons’ “diagnoses and recommendations concur with our recommendation of the plaintiff to only be allowed to participate in sedentary work with reasonable accommodation. Ms Smit further states that it is further indicated by Dr. LF Oelofse that p. 24: “With successful treatment, it is likely that his productivity will increase but as the degeneration in both ankles progresses, his productivity will begin to decrease again.”’

[46] In paragraphs 9.6 and 9.7 of the aforesaid minute the following is recorded:

‘9.6 We note that upon return to his pre-accident work roughly after 9/10 months of incapacity leave he had to employ extra assistance. Considering the plaintiff’s limitations and already visible degeneration and, as noted by Ms Smit, 50% possibility of end-stage osteoarthritis to occur in his ankles; additional farm labour is justified. ... During times of surgical intervention or over time as he ages, and his functioning will decrease, and he will need to hire even more farm labour support which will further negatively affect the profit margin. ...

9.7 We agree that the plaintiff will remain compromised in terms of his productivity and competence compared to his pre-morbid occupational capacity. Exposure to his pre-accident occupational tasks will place strain on the affected joints, which will speed up the degeneration. The plaintiff is therefore an unequal competitor in the open labour market.’

[47] In the heads of argument filed on behalf of the defendant, Ms Bornman stated as follows in paragraph 13 thereof:

‘13. The “relevant period of risk” which might lead to reduced earnings, is only a period of 9 years (46 to 55). When applying the scale of $\frac{1}{2}\%$ for year to retirement, the appropriate contingency deduction would be 4.5% ($9 \times \frac{1}{2}\%$). There is subsequent no legal basis for the submission of the high contingency deduction as argued for and on behalf of

the Plaintiff, considering the 9 years left until retirement and the fact that the business has been generating a profit for the last 14 years post accident.'

[48] However, as correctly stated⁰ by Mr Zietsman in his replying heads of argument, the sliding scale approach is applicable to the so-called 'normal' contingencies in the uninjured state. In the injured scenario the court should have regard to facts which, in addition to the general contingencies, might cause damage or a part thereof or which may otherwise influence the extent of the plaintiff's damage.

[49] In the defendants' heads of argument reference was made to *Mogorosi v Road Accident Fund (Mogorosi)*⁹ where the court held as follows:

'I am mindful that the prognosis of the Plaintiff's orthopaedic injuries are not good, and that she will have to undergo replacement surgery within ten to fifteen years of both her elbow and knee joints but I also recognize that the injured scenario provides for seven and a half years early retirement and that the calculation is based on the premises that the Plaintiff will be employed in a sedentary environment. To apply a contingency deduction as high as 35% to the prospective future injured scenario, where early retirement is already foreseen, would not be reasonable and fair to the RAF. I am of the view that the contingency deduction of 20% should be applied to the future injured scenario.'

[50] As correctly addressed in the replying heads of argument filed on behalf of the plaintiff, in *Mogorosi* the relevant expert conceded that the plaintiff's residual work capacity is to the extent that she would be able to work as a medical receptionist earning income in her injured state which is higher than that postulated by him. The evidence in the *Mogorosi* matter was therefore that she would be gainfully employed, in a sedentary environment until early retirement age. *In casu* the plaintiff's ability to earn an income until early retirement is not only severely compromised, but also significantly in danger.

[51] Ms Zietsman also submitted that if regard is had to the 8% contingency deduction suggested on behalf of the plaintiff in the uninjured scenario, then the 45% contingency deduction suggested in the injured scenario represents a real

⁹ *Mogorosi v Road Accident Fund* (185/2018) [2024] ZAFSHC 113 (25 April 2024) para 34.

contingency (or a contingency differential) of 37%. This is less than the 50% profit margin which Mr Du Plessis suggested will be lost through the loss of the plaintiff's livestock speculation activities.

[52] The defendant also relied on the judgment in *BEE v Road Accident Fund*¹⁰ where the court determined as follows:

'116. . . . Since the appellant's future loss of earnings only spanned 11 years, the 15% contingency deduction might, *absent special circumstances*, have been at a high end.' (My emphasis.)

[53] However, after the court considered the particular facts of the case it held that 25% contingency deduction in the injured scenario was fair and reasonable.

[54] In the defendant's heads of argument the following submission was made:

'18. The Defendant submits that a contingency deduction of no higher than 15 – 20%, would account for any further risk in a short period of 9 years which remain until the date of retirement of the Plaintiff. The Plaintiff's business has shown growth and profit in his injured stated, and the contingency deduction will address any remaining concerns of the short period of risk which remains.'

[55] I cannot agree with the aforesaid contention on behalf of the defendant. It is evident from the expert evidence that the plaintiff runs a real risk to become physically incapacitated to continue working as a farmer even before the age of his early retirement.

[56] Therefore, when the particular facts of the matter *in casu* are considered, I agree with the submission on behalf of the plaintiff that a contingency of 45% in the injured scenario is fair and reasonable to both parties.

Re-calculation

[57] The calculation which currently serves before court by the actuary makes provision for different contingencies than those I am finding are the fair and reasonable contingencies.

¹⁰ *Bee v Road Accident Fund* [2018] ZASCA 52; 2018 (4) SA 366 (SCA) para 116.

[58] Although the basis upon which the actuarial calculations was made, should remain the same, the matter has to be referred back to the actuary in order to apply the contingencies as determined in this judgment.

Costs

[59] There is no reason why costs in the present matter should not follow the outcome.

Order

[60] The following order is consequently made:

1 The defendant is liable for payment to the plaintiff in the amount to be determined as stipulated below in respect of the plaintiff's loss of earnings.

2 The plaintiff is to request Munro Forensic Actuaries to calculate the plaintiff's loss of earnings in the uninjured and in the injured scenarios based on the actuarial report dated 20 August 2025, but applying the following contingency deductions:

2.1 Uninjured: 8%.

2.2 Injured: 45%.

3 The parties are granted leave, upon receipt of the aforesaid actuarial calculation, to approach Van Zyl J in chambers to make the outcome of the actuarial calculation of the plaintiff's claim an order of court.

4 The defendant shall pay the plaintiff's taxed or agreed party and party costs until date of this order, including but not limited to the costs set out hereunder:

4.1 The reasonable qualifying and reservation fees and expenses (if any) of the following experts:

4.1.1. Dr JJ Schutte (General Practitioner);

4.1.2 Dr LF Oelofse and Dr NB Deacon (Orthopaedic Surgeons);

4.1.3 Dr N Bellew, van Dyk & Partners and Sandton Radiology (Radiologists);

4.1.4 Mr FA Kleynhans (Orthotist and Prothetist);

4.1.5 Ms C Smit (Occupational Therapist);

4.1.6 Mr C Cornellisen (Livestock Agent and Auctioneer);

4.1.7 Mr N du Plessis (Chartered Accountant);

4.1.8 Dr EJ Jacobs (Industrial Psychologist);

4.1.9 Munro Forensic Actuaries.

4.2 The costs of senior counsel on scale C.

5 Payment of the capital amounts shall be made without set-off or deduction within 180 (one hundred and eighty) calendar days from date of the granting of this order, directly into the trust account of the plaintiff's attorneys of record by means of electronic transfer, the details of which are the following:

Honey Attorneys Trust Account
 Bank: Nedbank, Maitland Street, Bloemfontein
 Branch code: 110 234 00
 Account Number: 1[...]
 Reference: HL Buchner/vch/J02935

(Please quote the reference at all times)

6 Payment of the taxed or agreed costs shall be made within 180 (one hundred and eighty) days of taxation and is likewise to be paid into the trust account of the plaintiff's attorney.

7 Interest shall accrue at the statutory rate per annum, compounded, in respect of:

7.1 The capital amount of the claim, calculated from 14 (fourteen) days from date of this order.

7.2 The taxed or agreed costs, calculated from 14 (fourteen) days from date of taxation, alternatively date of settlement of such costs.

C VAN ZYL
JUDGE OF THE HIGH COURT

Appearances:

On behalf of the plaintiff: PJJ Zietsman SC
 Instructed by: Honey Attorneys, Bloemfontein

On behalf of the defendant: C Bornman
 Instructed by: Office of the State Attorney, Bloemfontein