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

CASE NO: 088486/24

DELETE WHICHEVER IS NOT APPLICABLE

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

.....
DATE SIGNATURE

In the matter between:

HEINRICH WYNAND VAN WYK

PLAINTIFF

Id NO: 9[...]

and

THE ROAD ACCIDENT FUND

DEFENDANT

CLAIM:

JUDGMENT

CORAM:	ZITHA AJ
Heard on:	10th APRIL 2026
Delivered:	31st AUGUST 2026

INTRODUCTION

[1] This is a delictual claim for damages as a result of a motor vehicle collision which occurred on the 12th of November 2022. At the time of the collision the Plaintiff was a driver of a motor vehicle. The matter appeared before Court by a way of Default Judgment application on the 10th of April 2026.

PARTIES

[2] The Plaintiff is **HEINRICH WYNAND VAN WYK** an adult male, currently unemployed born on the 27th of June 1994 and who is currently thirty-one (31) years of age. At the time of the collision, the Plaintiff was twenty-eight (28) years.

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

ISSUES TO BE DETERMINED

[4] Merits and or Liability;

[5] Future medical expense;

[6] Loss of earnings (Past and Future).

[7] General damages (Defendant has made an election for the seriousness of the RAF 4 form).

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

In this regard the Plaintiff's evidence is unchallenged and uncontested.

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

8.1. The Plaintiff's quantum evidence;

8.2. Any collateral witness evidence; and

8.3. In terms of the Judge President's Practice Directive 1 of 2021 (paragraph 29), evidence may be tendered by affidavit and the Trial Judge may exercise his/her discretion to accept such evidence.

8.4. In the matter of **Abraham v City of Cape Town**¹, the Court held:

“It was common cause before me that where an application for default judgment serves before a Court, it has a clear and unfettered discretion in terms of the relevant Rule of Court to decide whether or not to hear oral evidence on any of the issues which may require to be decided in order to determine whether or not to grant the relief claimed.”

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

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

‘The approach to rule 38(2) may be summarised as follows. A trial Court has a discretion to depart from the position that, in a trial, oral evidence is the norm. When that discretion is exercised, two important factors will inevitably be the saving of costs and the saving of time, especially the time of the Court in this era of congested Court rolls and stretched judicial resources. More importantly, the exercise

¹ 1995 (2) SA 319

² [2022] ZAMPMBHC 23

of the discretion will be conditioned by whether it is appropriate and suitable in the circumstances to allow a deviation from the norm. That requires a consideration of the following factors: the nature of the proceedings, the nature of the evidence, whether the application for evidence to be adduced by way of affidavit is by agreement, and ultimately, whether, in all the circumstances, it is fair to allow evidence on affidavit.

And at paragraph 53:

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

8.6. The Plaintiff served all information and documentation on the Defendant.

8.7. This is a quintessential example of a matter that can be disposed of by way of affidavit to save time and costs.

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

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

- 8.8. The Plaintiff requested that the expert affidavits and the affidavits in respect of the quantum evidence of the Plaintiff be admitted as evidence.
- 8.9. Insofar as any of the experts in their reports rely upon hearsay evidence the Honourable Court was respectfully requested to admit the said hearsay evidence as an exception to the hearsay rule.
- 8.10. The application in terms of Rule 38(2) was granted.

MERITS/LIABILITY

The Plaintiff relied on both the section 19(f) affidavit and the accident report to pursue the liability aspect of the claim. As a result, the Plaintiff was able to discharge the onus placed on it on a balance of probabilities. Therefore, the Defendant is held liable one hundred percent (100%) of the Plaintiff's agreed and or proven damages.

[9] QUANTUM:

- 9.1. The issues to be decided in this matter are what should be the fair, reasonable and appropriate amount for special damages (loss of earnings).
- 9.2. In quantifying its claim, the Plaintiff obtained medico-legal reports from the following experts in support of his claim:
- 9.2.1. Dr Kruger (Neurosurgeon);
 - 9.2.2. Dr. Mare (Orthopaedic Surgeon);
 - 9.2.3. Dr. Smuts (Neurologist);
 - 9.2.4. Mr Roper (Neuropsychologist);

- 9.2.5. Dr Berkowitz (Plastic Surgeon);
- 9.2.6 Dr Botha (Specialist Physician)
- 9.2.7. W Van der Walt (Occupational Therapist);
- 9.2.8. Nicolene Kotze (Industrial Psychologist) and;
- 9.2.9. Prima (Kobus Pretorius) (Actuary).

[10] The Defendant did not appoint any medico-legal experts.

QUANTUM

GENERAL DAMAGES

[11] INJURIES SUSTAINED:

- 11.1 According to the hospital records, the Plaintiff suffered poly trauma as a result of the accident.

ACCORDING TO THE ORTHOPAEDIC SURGEON,

- 11.2 On the Plaintiff's pelvis and right hip, there is a united fracture of the right acetabulum with internal fixation of metal plate and screws in situ. There is narrowing of the right hip compared to the left with periarticular sclerosis and osteophyte formation, in keeping with degeneration. A vascular necrosis of the right femoral head cannot be excluded. On his right forearm, there is a partial united fracture of the middle third of the ulna with internal fixation of a metal plate and screws in situ. On his right ankle, there is a united fracture of the talus with internal fixation of

two metal screws in situ. There is a periarticular sclerosis noted at the subtalar joint in keeping with degeneration. The Plaintiff sustained a right hip fracture-dislocation. There is narrowing of the right hip compared to the left with periarticular sclerosis and osteophyte formation, in keeping with degeneration. The Plaintiff sustained a right ulna fracture, there is a partial union of the middle third of the ulna with internal fixation using a metal plate and screws. The Plaintiff sustained a right ankle talus fracture, there is united fracture of the talus with internal fixation (two screws in situ). Degenerative changes, including periarticular sclerosis, are evident at the subtalar joint.

11.3 **ACCORDING TO THE NEUROSURGEON:**

11.3.1 The Plaintiff sustained a mild traumatic brain injury as evidenced by the fact that the Plaintiff, had a loss of consciousness after the accident, had an initial dense phase of post-traumatic amnesia of less than 1 hour and had a GCS recorded as 15/15 at the scene of the accident and throughout his ordeal. There was no suspicion of focal brain injury. There was no suspicion of any secondary event that took place that could have aggravated the mild traumatic brain injury sustained in the accident. The mild traumatic brain injury was treated conservatively. The Plaintiff sustained multiple abrasions/lacerations on his body. They were cleaned, sutured and bandaged. He sustained multiple orthopaedic injuries, a right sided acetabular fracture, a right sided ulna fracture, a

right sided talus fracture, an internal degloving injury of the right hip area and an open abdominal injury with an injury to the spleen and kidney. After the accident, the Plaintiff had a cardiac dysrhythmias secondary to blunt chest trauma.

11.3.2 As a result the Plaintiff is suffering from severe post traumatic/post surgical scarring. He has symptoms of post-traumatic stress disorder. He has chronic back pain, associated with cervicogenic headaches, aggravated by physical activity and by psychological stress. Chronic orthopaedic pain with pain in the right hip, right knee, right forearm, right ankle and right foot, aggravated by physical activity and by inclement weather. He has an altered ability to take part in sport.

ACCORDING TO THE NEUROLOGIST

11.3.3 The Plaintiff lost consciousness for a short period of time and woke up in the wreck minutes later. The expert opines that there is a possibility that the Plaintiff sustained a mild or possibly more severe such as mild to moderate concussive head injury. He is suffering from a cervicogenic headache. The headache is by definition a secondary headache but the characteristics are that of a tension headache. The neck and back pain are suggestive of whiplash injury. Due to injury the Plaintiff now has pain with picture of myofascial pain syndrome. This type of condition can follow physical and emotional

trauma. As a result of the accident there is chronic pain which has a negative effect on functioning.

ACCORDING TO THE PLASTIC SURGEON

11.3.4 There are multiple scars covering an area of 140 mm x 140 mm on the lateral aspect of the proximal third of the right arm. There is a scar measuring 90 mm x 8 mm lying oblique across the lateral aspect of the distal third of the right arm. There are multiple scars covering an area of 130 mm x 50 mm on the anterior and lateral aspects of the right elbow. There is a post-surgical scar measuring 170 mm x 7 mm running along the ulnar border of the right forearm. There are multiple scars overlying the ulnar border and dorsum of the wrist. There is a post-surgical scar measuring 290 mm x 10 mm overlying the lateral aspect of the proximal two thirds of the right thigh. There are multiple scars covering an area of 70 mm x 50 mm on the lateral aspect of the distal third of the right thigh. There is a curved post-surgical measuring 70 mm x 12 mm overlying the lateral aspect of the right ankle. There is post-surgical scar measuring 30 mm x 3 mm with cross hatching lying longitudinally on the dorsum of the right hindfoot. There are multiple post-abrasions scars and post laceration scars covering an area of 190 mm x 130 mm on the anteromedial aspect of the distal third of the left thigh and anterior aspect of the knee. There are multiple post-abrasions scars covering a

triangular area measuring 110 mm x 110 mm lying medial and inferior to the nipple areolar complex. There is a scar measuring 120 mm x 10 mm lying horizontally on the lateral aspect of the right lower quadrant of the abdomen.

11.3.5 According to the Neuropsychologist, the Plaintiff sustained a mild head injury, that is not usually expected to result in significant long-term neuropsychological difficulties.

11.3.6 The Plaintiff's counsel referred and relied on the following cases:

11.3.7 ***ANTHONY v ROAD ACCIDENT FUND (27454/2013) [2017]***

ZAGPPHC 161. Injuries: a bilateral medial orbital fracture; inferior blow out fracture; multiple facial lacerations and open wounds; bruising to the upper arm; broken and lost teeth; a moderately severe head injury; and severe scarring and disfigurement. Award in 2026 monetary terms R 2 486 599.00

CLAASENS v ROAD ACCIDENT FUND (35716/2017) [2010]

ZAGPPHC 471 (24 July 2019). A 34 year old male was involved in a work vehicle collision. He suffered several injuries including a moderate to severe traumatic brain injury, rib fractures, lung contusion and infection developed in ICU. Claasen's suffers from chronic headaches, traumatic brain injury sequelae chronic chest pain, severe surgical scarring, chronic lumbar backache and altered ability to work in the open labour market. Award according to the author I Dutton, Quantum guidelines R 1 603 503.00 p 230.

FOUCHE v ROAD ACCIDENT FUND (9619-2016) [2017]

ZAGPPHC 1253 (16 AUGUST 2017). The Plaintiff sustained multiple facial injuries, loss of teeth, contusion of the chest, Plaintiff abdominal trauma with lacerations of the spleen and liver, fracture of the mid shaft of the left femur, Fracture of the left tibia, Fracture of the right radius and ulna, Fracture of the right ankle, Fracture of the clavicle and a mild to moderate diffuse concussive brain injury. Taking into consideration the Plaintiff's pain and suffering, permanent disfigurement, permanent disablement and loss of amenities and award of R 2 334 821 was awarded. The award as evident from the south African Medical legal reports, Quantum guidelines, IT Dutton p 232.

Having considered the above the case law, the Court is satisfied that an amount of R 1 600 000 (One Million and Six Hundred Thousand rands) is fair and reasonable compensation for general damages.

11.4 FUTURE MEDICAL EXPENSES

11.4.1 According to the Orthopaedic surgeon, the Plaintiff will require surgical treatment of the total hip replacement surgery that will cost R 250 000.00.

11.4.2 The Plaintiff will require reconstructive of the right ulna, additional surgery may be necessary to achieve complete union and restore function. Same will cost R120 000.00. The

Plaintiff will require an ankle arthrodesis. An arthrodesis (joint fusion) may be necessary if degeneration in the subtalar joint leads to chronic pain and instability. Same will costs R180 000.00.

11.4.3 The Plaintiff will require removal of internal fixatives, and it will cost R40 000.00.

11.4.4 According to the Neurologist, the Plaintiff will require pain treatment and psychological and psychiatric treatment.

11.4.5 According to the Neurosurgeon, the Plaintiff will require conservative treatment of pain and epilepsy and 5% chance of cervical surgery.

11.4.6 After having considered the above, the Court is satisfied that the Plaintiff has discharged the onus placed on it to prove that future medical expenses are warranted in this case. As a result future medical expenses are awarded in terms of section 17 (4) (a) of the road accident fund Act, in terms of an undertaking.

SPECIAL DAMAGES (LOSS OF EARNINGS)

[12] ACCORDING TO THE ORTHOPAEDIC SURGEON:

The Plaintiff holds a BTech in mining engineering and previously worked as a manager at Chromium and platinum mine in Burgersfort. Prior to the accident, he was in full health, with no limitations or impairments, and performed his duties 100% capacity. Since the accident, he has been unable to meet the physical fitness requirements mandated by the mine, resulting in the termination of his employment.

The Plaintiff is permanently unfit for physical roles in mining or similar industries. He remains capable of sedentary work involving limited physical demands, such as administrative roles, though vocational retraining may be necessary. Early retirement of ten years anticipated.

[13]. ACCORDING TO THE NEUROSURGEON:

13.1. Main complaint

13.1.1. At the time of the accident, the Plaintiff worked at NJN Minerals in Lydenburg. The Plaintiff stayed off duty for 03 months after the accident. During his absence from work, the Plaintiff received his full salary.

13.1.2. The Plaintiff currently struggles to do his work. The Plaintiff struggles with walking. The Plaintiff makes use of a walking stick. He struggles to drive long distances. The Plaintiff struggles to work underground.

[14] NEUROSURGEON

The accident has had a severe impact on his physical appearance, his physical ability, his psychological /psychiatric wellbeing, his ability to work in the open labour market and to sustain himself financially.

[15] NEUROPSYCHOLOGIST:

15.1. He is suffering from post-traumatic stress disorder.

- 15.2. He reported increased anxiety about his career due to concerns over his physical prognosis since the accident.
- 15.3. He has been experiencing a depressed mood on most days due to concerns over his physical prognosis and how it may affect his career as well as his physical limitations since the accident.
- 15.4. The Plaintiff reported incidences of insomnia.
- 15.5. He has been experiencing decreased energy levels due to his physical limitations since the accident.
- 15.6. He reported dizziness when exerting himself since the accident.
- 15.7. He reported visuo-double tracking and sustained attention difficulties. He has difficulty keeping track of more than one piece of visual information at the same time.
- 15.8. Upon returning to work, the Plaintiff had still experienced pain in his ankle, hip, arm and right knee, and had still mobilised with two crutches. He had been placed on light duty and had remained in office all day. Since the accident he has been suffering from distressing memories and flashbacks of the accident and nightmares.
- 15.9. His variable performances on the digit span and mental control tests suggested fluctuating overall attention and concentration abilities. The expert concludes that it would be reasonable to conclude that his psychological symptoms could have impacted negatively on his

performance during testing, and therefore, contributed towards his found cognitive deficits.

15.10. His reported cognitive and behavioural changes are thought to be the result of physical and psychological factors. He further reported that there are a couple of factors that have contributed to reduction of self-esteem. The accident has impacted negatively on his interpersonal functioning. Occupational functioning and career progression has been affected by the accident.

15.11. His self-esteem difficulties are expected to reduce his ability to market himself for promotions or alternative, or more lucrative positions. His depressed mood and reduced levels of energy and motivation are expected to adversely affect his productivity and drive.

[16] OCCUPATIONAL THERAPIST

From an Occupational Therapist's point of view, it appears that the Plaintiff shows potential for safe participation in light load handling with limited walking, standing and low bending. Though he could exert to the level of tasks with medium and heavy demands, he cannot safely participate because of his right hip and right ankle injuries. His physical injuries will leave him with limitations for medium and heavy work as well as frequent standing and walking. He would not be able to climb and negotiate uneven terrain. He ought to do work with light strength demands on the condition that he has limited standing and walking duties. The light work should include regular sitting and minimal walking and standing. The expert does not foresee that he would manage to do light work until retirement age because of his mobility restrictions that remain

from his right lower limb injury. He would also struggle with regular load handling and the use of hand tools, if these are demanded of him, because of his right forearm symptoms. Dr Mare foresees on the basis of his orthopaedic injuries an early retirement of ten (10) years. The expert concur and note that he could cope better with sedentary work until three (03) years before retirement age.

Dr Kruger, neurosurgeon identified a risk of 02% risk of posttraumatic epilepsy on the basis of the mild traumatic brain injury that the Plaintiff suffered in the accident. In the event of epilepsy, the Plaintiff would be exempted from physical work for safety reasons. He would not perform occupational driving, work near or machinery with moving parts, and work on heights and in harsh conditions regarding lightning, temperature and noxious odours. Sedentary office work would be recommended in the event.

The Plaintiff reported that he was retrenched from work in January 2024 for medical reasons. He reportedly could not meet the physical fitness requirements for the position.

When the expert considered the physical demands of a site manager at an open cast mine, the Plaintiff would reasonably not cope with the mobility requirements of extensive standing and walking because of his right lower limb limitations.

[17] INDUSTRIAL PSYCHOLOGIST

17.1. Pre-accident scenario

1. Uninjured it is accepted that he would have remained employed in the mining industry to earn a living all his life.
2. At the time of the accident under review, the Plaintiff was still employed in the afore capacity, earning a total cost to company salary of R92 000 per month or then R 1 104 000 per annum. This salary compares favourably with the median annual guaranteed package associated with Paterson level D2.
3. Collateral information obtained from Mr van Heerden, General Manager at MJM Minerals, indicated that the Plaintiff was earmarked for promotion to the post of subordinate manager at MJM minerals and would have been appointed in this position in January 2023, entering on a total cost to company salary of about R 140 000 to R 150 000 per month or then R 1 680 000-R 1 800 000 per annum. He is suitably qualified for the job and does not need the mine manager's competency certificate for this position. For the position of mine manager the mine manager's certificate is however a pre-requisite.
4. As such it is accepted that but for the accident the Plaintiff would have been promoted to the position of subordinate manager at MJM minerals in January 2023, entering an average total cost to company salary of R 145 000 per month or then R 1 740 000 per annum. This salary compares favourably with the median annual guaranteed package of Paterson D5.
5. Note is taken that the Plaintiff attempted the mine manager's competency certificate 5 times already, failing the part C examination on all five occasions. He indicated that in October 2024, 320 candidates enrolled for

the part C examination, and only 5 passed. This is a pass rate of 0.02%. As the Plaintiff failed prior to the accident already, the expert is of the opinion that his failure cannot be attributed to accident-related sequelae but rather to the difficulty level of the examination, hence the extremely low pass rate.

6. Without the mine manager's competency certificate from DMRE, the Plaintiff would not have qualified for a position as mine manager at MJM minerals or any other mining company, but would have been limited to positions such as operational manager, subordinate manager, etc. This would then also have limited his earning potential. One however cannot disregard the fact that he could possibly pass the mine manager's certificate of competency. In this regard Prof Webber Youngman estimated that, although it is difficult to postulate about mine manager's salaries, at the bigger mining houses, it can be in the region of R200 000 to R300 000 per month.
7. Regarding salaries for mine managers Za.talent.com indicates that the average mine manager salary in south Africa is R 1 380 000 per year of R708 per hour.
8. As a mine manager he could then very well have progressed to a salary of between R 2 500 000 and R2 800 000 per annum.
9. Considering the available information , the expert proposes that but for the accident , also taking into account the risk that he would not have obtained the mine manager's competency certificate , the Plaintiff would reasonably have been able to progress in a straight line from the salary of R145 000 per month or then R 1 740 000 per annum in 2023, over a period of about 8

to 10 years to the upper notch of the annual guaranteed package salaries associated with Paterson D5, a current salary of R 2 077 600 per annum, as per the April 2024 survey by Deloitte Touche Tohmatsu Limited. This can be regarded as his likely uninjured earnings and only annual inflationary increases would thereafter have applied.

10. The Plaintiff would have been able to continue working until age 65 or alternatively until the indicated retirement age of his employer at the time.

17.2. POST ACCIDENT EARNINGS / HAVING REGARD TO THE ACCIDENT

1. Post accident the Plaintiff did not work for a period of 5 months, earning his normal salary during this period of time.
2. On his return to work, he was unable to engage in his pre-morbid duties and was accommodated in office job that is sedentary in nature until he was retrenched on 23/01/2024. He remained unemployed until 15/01/2025 when he secured a contract as mine planner/ Designer with dragon light mine. He advised that this was a 3 (three) months contract. He invoiced an amount of R35 000 per month.
3. Ms Van der Walt (Occupational Therapist) advised that his job as a site manager is light strength demand classification. She opines that considering the physical demands of a site manager at an open cast mine, the Plaintiff would reasonably not cope with the mobility requirements of extensive standing and walking because of his right lower limb limitations., his retrenchment and subsequent unemployment to date certainly seems justified.

4. Ms Van der Walt, based on her assessment, indicated limited mobility for balance, walking, stair use and squatting with lifting and carrying meeting medium strength demand, but unable to walk with loads. She advised that his work rate for physical tasks is not meeting open labour market. She concluded that the Plaintiff presents with mobility restrictions and cannot walk with loads and he needs to stop with load handling at any point when pain and muscle weakness interfere.
5. Mr Roper advised that the Plaintiff's involvement in the accident under discussion has led to a decrease in all areas of his functioning, particularly his psychological functioning, the afore likely related to his emotional reaction to the trauma of the accident under discussion and his reported ongoing experience of pain in his lower back, hip, right ankle, left knee and right arm as well as his headaches.
6. Dr Mare advised that the Plaintiff is permanently unfit for physical roles in mining or similar industries but remains capable of sedentary work. He ought to do work with light strength demands on the condition that he has limited standing and walking duties. Dr Mare foresees, on the basis of his orthopaedic injuries, early retirement of ten (10) years and concurs and note that he could cope better with sedentary work until three (03) years before retirement age.
7. The Plaintiff would reasonably not cope with the mobility requirements of extensive standing and walking because of his right lower limb limitations.

8. His post-traumatic stress symptoms may contribute to increased stress and therefore, fatigue at work and would likely render him less likely to accept alternative employment that exacerbates his anxiety.
9. Having regard to the expert opinions at hand, it is evident that the Plaintiff has been severely compromised by the injuries sustained in the accident under review.
10. Accident related sequelae have evidently rendered the Plaintiff a very vulnerable and compromised individual compared to his uninjured presentation. Noting the Plaintiff's accident related limitations, the expert accepts that his chances to secure a suitable job in the mining industry can be regarded as severely limited.
11. The expert opines that it is highly unlikely that the Plaintiff would be able to earn on par with the salaries indicated Glassdore (ie R832 286 per year for a mine planner). The writer proposes that, given his limitations and significantly restricted job choices, the Plaintiff would probably be able to earn an income of about R420 000 per annum in a fulltime capacity as mine planner, progressing at best to a salary of about R600 000 per annum over a period of 5-8 years. The latter is on par with the annual guaranteed salaries associated with Paterson C3.
12. Dr Mare anticipated 10 years early retirement. The Plaintiff will suffer a total loss of income from date of such earlier retirement.

17.3. Loss of earnings

With regards to future loss of earnings, Plaintiff's future loss of earnings equates to the difference between his pre-and post-accident earnings.

[18]. **LAW**

Loss of Earnings

18.1. It is accepted that earning capacity may constitute an asset in a person's patrimonial estate. If loss of earnings is proven the loss may be compensated if it is quantifiable as a diminution in the value of the estate. It must be noted, a physical disability which impacts on the capacity to an income does not, on its own, reduce the patrimony of an injured person. It is incumbent on the Plaintiff to prove that the reduction of the income earning capacity will result in actual loss of income.

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

18.3. The learned author Dr R.J. Koch in *The Quantum of Damages Year Book* states at page 118 that the usual contingencies which the Road

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

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

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

- 18.5. The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%, depending upon the facts of the case.
- 18.6. The importance of applying actuarial calculations and its advantages was discussed in the case of ***Southern Insurance Association v Bailey NO***, the Court referred with approval to the case of *Hersman v Shapiro and Company* at 379 per Stratford J where the following was said:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.'

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

It has open to it two possible approaches.

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

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

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

- 18.7. Ultimately, the award for future loss of earnings or earning capacity must be based on good medical evidence and corroborating facts.

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

[19]. APPLICATION OF LAW TO FACTS

- 19.1. The Plaintiff's future loss of earnings or capacity to earn has been actuarially calculated and the basis of such calculations, which is discussed below are consistent with the pleadings and the actuarial calculations, facts and probabilities in the matter.
- 19.2. The Plaintiff's case remains undisputed and remains unchallenged. The Defendant has not appointed a single expert to challenged and or contradict the Plaintiff's expert witnesses. There is also no evidence before me that prior to the collision the Plaintiff had any neurocognitive and orthopaedic problems.
- 19.3. In so far as the injuries are concerned, it has not been disputed that the Plaintiff sustained **mild traumatic brain injury** which was consequent to the motor collision. It remains undisputed that the Plaintiff's neuropsychological, neurocognitive and neurobehavioral arising from the accident has been impaired. Mr Roper (Neuropsychologist) also indicated increased irritability, a depressed mood on most days due to concerns over his physical prognosis, decreased energy levels due to

his physical pain and decreased levels of motivation due to his physical limitations since the accident.

19.4. The **Clinical psychologist opines** that the Plaintiff's employment will be adversely affected.

19.4.1. As a result of the accident, the Plaintiff has been suffering from symptoms of post-traumatic stress disorder.

19.4.2. He has been suffering from major depressive disorder related to the accident under discussion and its aftermath.

19.4.3. He reported increased anxiety about his career due to concerns over his physical prognosis since the accident.

19.5. The **Occupational therapist opines** that when the physical demands are of a site manager at an open cast, he would reasonably not cope with the mobility requirements of extensive standing and walking because of his right lower limb limitations.

19.5.1. He was retrenched from work in January 2024 for medical reasons. He reportedly could not cope meet the physical requirements for the position.

19.5.2. He would be exempted from physical work for safety reasons due to the epilepsy.

19.6. The **Industrial Psychologist's uncontested postulations** regarding the pre and post morbid future loss of earnings prior to and but for the accident is the only evidence that is before me which I must accepted.

19.7. **I accept that the Plaintiff on the basis of his orthopaedic injuries will undergo an early retirement of ten (10) years.**

19.7.1. His working environment would also need to be less cognitively demanding as he would struggle to perform with the pressures of work.

19.7.2. I have also considered that he is no longer performing at his pre-accident potential as a result of the accident.

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

19.8. I am mindful that the **Plaintiff will be an unequal competitor** at the open labour market compared with his healthier peers and that he will not be able to perform functions efficiently and effectively as compared to his counterparts.

19.8.1. The injuries sustained from the accident will hinder his career and future employability. The Plaintiff has suffered a medically justifiable loss of earnings or work capacity as a direct result of the accident.

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

[20] According to the actuarial calculations by, there are contingencies applied.

[21] **Plaintiff's counsel submitted that contingencies** are to be applied as usual since *the Road Accident Fund Amendment Act 19 of 2005* cap does have an impact on this case. In this regard counsel argues the contingency deductions on past uninjured earnings five percent (5%) percent and five (5%) on past injured earnings should be applied. For future uninjured earnings thirteen (20%) percent and twenty (20%) percent on future injured earnings.

I hold a similar view:

The Court is of the view that a five (05%) percent contingency deductions for past loss of earnings (uninjured and injured) should be applied in this matter.

The Court is also satisfied with proposed contingencies for future loss, more especially taking into account that there is an early retirement of ten (10) years.

The table below is for illustrative purposes.

	Uninjured	Injured	Loss
Past earnings	R 3 862 394	1 251 392	
Less 10% contingency 5%		5%	
Total	R 3 669 274	1 188 822	2 480 452
Less Raf Cap			1 372 949
Past loss of earnings capacity after RAF Cap			1
107 502			

Future earnings	R30 773 920	8 069 123	
Less 20% contingency	R6 154 784	6 455 298	18 163 838
Less RAF Cap			6 997 823
Future loss of earnings capacity after RAF cap			11 166 015
Total capitalised value of loss of earnings after RAF Cap			12 273 518
<u>TOTAL LOSS OF EARNINGS</u>			<u>R12 273 518</u>

[22] The calculations were on the basis that the Plaintiff is not expected to reach the suggested pre-accident career potential and that he might suffer losses that are directly quantifiable and should be address via contingencies.

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

[24] When considering the contingency deductions to be applied on actuarial calculations of loss of earnings, allowance for contingencies involves, by its very nature, a process of subjective impressions or estimations rather than objective calculations. The so-called normal contingencies referred to takes into account that a Plaintiff might ordinarily sustain some loss in his future income

by virtue of: falling sick from time to time; the prospect of unemployment and an inability to secure alternate employment in the future; the prospect of being injured in circumstances where the Plaintiff would receive no compensation from any source; the saved costs of unemployment. I applied my mind to the Plaintiff's circumstances. I have considered the Plaintiff's background and family history. I am satisfied that the Plaintiff would have obtained the projected pre-morbid postulations in respect of past loss of earnings.

[25] The calculations are submitted to be fair and reasonable in the circumstances, and the Court is satisfied to grant the loss of earnings in the amount of Twelve Million Two Hundred Seventy Three Thousand Five Hundred Eighteen Rand (R12 273 518) as set out in the applied contingency deductions.

[26] The Plaintiff is currently unemployed.

[27] His career progression is therefore significantly compromised as a result of the accident.

[28] He suffers from significant cognitive fallouts.

[29] He is unlikely to reach her pre-MVA occupational potential. His occupational functioning has been negatively impacted by the sequelae of the injuries sustained in the MVA and resulted in a loss of productivity and efficiency.

[30] He has been compromised from a physical, neurocognitive and psychological perspective by his MVA-related injuries and their sequelae.

[31] In general, it is acknowledged that employees with impairments would be disadvantaged, to a greater extent or lesser extent, in respect of their

competitiveness in the open labour market, especially in comparison with uninjured peers.

[32] Costs:

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

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

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

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

[34] Pursuant to the recent amendment of Rule 69 and 70 (effective 12 April 2024) in terms of which Rule 67A was also introduced, it is incumbent upon a Court

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

⁶ 1993 (2) SA 776 (EJ at 779 D-F)

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

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

to make a ruling on the applicability of the new scales introduced for the employment of counsel. The scales listed in the amended Rule are Scales A, B and C. These scales govern the recoverability by the Plaintiff of counsels' costs on taxation.

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

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

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

36.1. Value of the claims:

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

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

36.2. Importance of the relief sought

The relief sought is for damages aimed at the compensation of the unfortunate Plaintiff who was involved in a motor vehicle accident. The Plaintiff suffered severe bodily and psychological injuries. The Plaintiff will suffer physical and psychological for the rest of her life; who has a permanent loss of his earning capacity; who has therefore lost the ability to properly earn a living. The matter has obvious importance to the Plaintiff in that her entire remaining working lifespan has been blighted.

As trenchantly observed by His Lordship Baqwa J in ***Adv AJ Du Toit N.O. obo Cee-Jay Lee Johnson v The Road Accident Fund***¹⁰ the Plaintiff has only one shot at obtaining due compensation from the Defendant and the Plaintiff's whole life depends on obtaining a proper award.

36.3. Complexity of the matter

This case involves the input by various experts of different disciplines. It involves an Orthopaedic surgeon to assess the functional *sequelae*; Psychologist in respect of neurological sequelae; an Occupational psychologist regarding the impact on her occupation; an Industrial psychologist regarding employment prospects; and the Actuary regarding the calculation of the loss of earnings/earning capacity.

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

The reporting of all the experts is not in plain layman's language, but in more complex and specific language and terms used in the respective expert disciplines. A proper understanding of the reporting requires special and specific knowledge by the legal practitioners.

- the matter involves preparation in regard to several different expert disciplines and expert witness reports; the drafting of heads of argument on the issue of the loss of earning capacity; and the research of the case law regarding awards of general damages.

36.4. It is therefore held by the Court that the value of the total claim is not substantial, though the relief sought is of great importance to the Plaintiff; and that the matter involves issues of a less degree of complexity.

36.5. The specific circumstances and the various factors attendant in this matter, rendered it unwise and unreasonable for the Plaintiff to have briefed a more senior counsel.¹¹ There can be no justification for any contention that it was necessary, or that it was wrong to employ a senior counsel; or that it is unfair to the Defendant that it should be required to bear the costs incurred in the employment of a senior counsel. The Defendant could have

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

settled this claim a long time ago had it complied with its statutory duties timeously.

*"In an unreported judgment of this Court, Road Accident Fund v Roman Klisiewicz, case No 192/2001, handed down on 29 May 2002, Howie JA set out the extent of the respondent's responsibilities, saying in para [42]: 'The [Road Accident Fund] exists to administer, in the interests of road accident victims, the funds it collects from the public. It has the duty to effect that administration with integrity and efficiency. This entails the thorough investigation of claims and, where litigation is responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence. These are not exacting requirements. They must be observed'."*¹²

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

36.7. It should be borne in mind that by awarding counsels' costs on scales A or B the Honourable Court will effectively be penalizing the Plaintiff. Counsel are entitled to mark and recover reasonable fees for their work done (**Algemene Balieraad van Suid-Afrika v Burger en 'n Ander**¹³LPC Code of Conduct 15.1 and 23.1). That is not affected by the particular scale under Rule 67 A. Rule 67 A merely restricts the ability of the Plaintiff to

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

¹³ 1993 (4) SA 510 (T);

recover more than the specified amounts on scales A, B or C, respectively, from the unsuccessful Defendant. The balance of counsels' fees unfortunately have to be paid by the successful Plaintiff out of the capital awarded. This impinges on the trite principle set out in paragraph 3 above.

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

36.9. Since the advent of the Covid pandemic and the consequential change that it had on the normal Court and trial procedures, the Court has placed more and more emphasis on comprehensive heads of argument to be filed by the representatives of litigants to assist the Court. Presiding judges rely more and more upon the written submissions of counsel to assist them rather than entertaining hours of oral argument.

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

“ii) In President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another^[41] Kriegler J drew a distinction between the practice in the Constitutional Court and

the SCA in respect of the heads of argument and the associated appearance of counsel at the hearing. He pointed out that 'in the SCA the emphasis is on the oral presentation of argument by counsel in open Court with heads of argument serving largely as a preliminary guide to the Court, while in the Constitutional Court, the emphasis is on written submissions, which are not regarded as succinct heads of argument forming the basis of the argument to be presented, but the argument itself together with all the supporting material.'

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

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

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

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

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

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

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

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

[39] There is no reason why the costs are not to follow the outcome.

[40] **CONCLUSION:**

In the premises I make the following order:-

1. The Defendant is liable hundred percent (100%) in respect of the Plaintiff’s agreed and or proven damages;
2. Future hospital and medical expenses: Section 17(4)(a) Undertaking;

3. Past medical expenses Postponed sine die

4. General damages R 1 600 000

5. Past loss of earnings R 1 107 502

6. Future loss of earnings R 11 166 015

7. Costs of counsel on scale C

Total **R 13 873 518 (thirteen million eight hundred and seventy three thousand five hundred and eighteen rands)**

J. ZITHA AJ

Acting Judge of the High

Court

Gauteng Division, Pretoria

Appearances:

On behalf of the Plaintiff:

Adv. R J De Beer SC

Instructed by:

Surita Marais Attorneys

On behalf of the Defendant:

No appearance

