

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 3887/2013

In the matter between:

**MOEKETSI RODERICK NONE**

**Plaintiff**

and

**ROAD ACCIDENT FUND**

**Defendant**

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**JUDGMENT**

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**LAING J**

[1] This is an action arising from a motor vehicle accident that occurred on 6 February 2009 between the towns of Lady Grey and Barkly East. The plaintiff had been a passenger at the time. His claim comprised general damages, future medical expenses, and future loss of earnings.

**Background**

[2] The defendant conceded the merits and accepted liability for the plaintiff's claim, as proved or agreed upon. Subsequently, the parties achieved settlement regarding general damages in the amount of R 400,000. The defendant, furthermore, agreed to furnish an undertaking to the plaintiff in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 ('RAF Act') for the payment of his future medical and related expenses. The settlement was made an order of court on 29 March 2022 and the determination of future loss of earnings was postponed *sine die*.

[3] The parties later prepared a written statement, setting out a special case for adjudication under the provisions of rule 33 of the Uniform Rules of Court ('URC'). To that effect, the parties agreed that:

- (a) they would not call any expert witnesses but would confine the case to argument in relation to the contingency deductions to be applied to the plaintiff's loss of earning capacity;
- (b) the contents of the report prepared by an industrial psychologist, Dr Gideon de Kock, dated 17 April 2019, were correct;
- (c) the calculations prepared by Munro Forensic Actuaries were correct and that the plaintiff's future loss of earnings amounted to R 2,491,300 prior to the deduction of an amount for general contingencies; and
- (d) the only issues to be decided by the court were the general contingency deduction to be applied to the above sum, and costs.

[4] When the matter came before this court, the parties confirmed that none of the expert reports was in dispute.

### **Issues to be decided**

[5] The court is satisfied that the facts of the matter are not in dispute and can be recorded as set out in the expert reports. It is apparent, furthermore, that there is no need for the hearing of evidence.

[6] Consequently, the court is required to decide the issues contained in the written statement. The special case for adjudication is limited primarily to the general

contingency deduction to be applied to the calculation of the plaintiff's loss of earning capacity.<sup>1</sup> The only remaining issue for determination is that of costs.

[7] The relevant principles are discussed in the paragraphs below.

## **Legal framework**

[8] A general contingency deduction is made so that any possible (and relevant) future event which might otherwise have caused or influenced the extent of the damages sustained by the plaintiff is considered.<sup>2</sup> Broadly speaking, contingencies have been described as 'the vicissitudes of life, such as illness, unemployment, life expectancy, early retirement and other unforeseen factors'.<sup>3</sup> The courts have recognised, however, that the fortunes of life are not always adverse; they may be favourable.<sup>4</sup>

[9] The determination of the general contingency deduction to be made falls squarely within the discretion of the court, which must decide what is fair and reasonable.<sup>5</sup> This is far from an exact science. As Trollip JA observed in *Shield Insurance Co Ltd v Booysen*,<sup>6</sup> the determination of contingencies involves 'a process of subjective impression or estimation rather than objective calculation'. The true nature of the task was possibly best described by Margo J in *Goodall v President Insurance Co Ltd*,<sup>7</sup> who remarked as follows:

'In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the

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<sup>1</sup> The use of the term is preferred to 'future loss of earnings'. See, to that effect, see the remarks of Nicholas JA in *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A), at 111C-D.

<sup>2</sup> *Erdmann v Santam Insurance Co Ltd* [1985] 4 All SA 120 (C); *Ncubu v National Employers General Insurance Co Ltd* [1988] 1 All SA 415 (N); and *Burns v National Employers General Insurance Co Ltd* [1988] 3 All SA 476 (C).

<sup>3</sup> *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA), at paragraph [3].

<sup>4</sup> *Southern Insurance Association v Bailey NO*, n 1, *supra*, at 117B.

<sup>5</sup> *Fulton v Road Accident Fund* 2012 (3) SA 255 (GSJ), at paragraphs [95] to [96]; and *Nationwide Airlines (Pty) Ltd (in liquidation) v SA Airways (Pty) Ltd* [2016] 4 All SA 153 (GJ), at paragraph [147].

<sup>6</sup> 1979 (3) SA 953 (A), at 965G.

<sup>7</sup> 1978 (1) SA 389 (W).

future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a certain type of almanack, is not numbered among the qualifications for judicial office.<sup>8</sup>

[10] The application of a general contingency deduction has the effect that the damages are reduced by anything between 5% and 50%.<sup>9</sup> Precisely where the line should be drawn depends on the facts and unique circumstances of each case.

[11] It is necessary to consider, at this stage, the contents of the expert reports upon which the parties chiefly rely.

### **Expert reports**

*Dr Gideon de Kock*

[12] The report of Dr de Kock indicates that the plaintiff was a 40-year-old single male.<sup>10</sup> His minor son lived with the mother. The plaintiff had attained an educational level of grade 11 and resided with his brother and sister at Khwezi Naledi township in the district of Lady Grey. His siblings had achieved grade 12 levels of education and one of them was employed in a clerical position.

[13] Previously, the plaintiff had been employed as a storeman at a construction site after which he had been engaged in casual labour. At the time of the accident, he had been employed as a road construction worker. He was currently unemployed.

[14] The plaintiff sustained a fracture of the left humerus and soft tissue injuries to the back and left ankle. He complained of pain in the left arm, which is weak and cannot straighten. He also complained of pain in the left shoulder and upper back, especially when he bends. The plaintiff's left ankle becomes painful when he walks long distances.

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<sup>8</sup> At 392H-392A.

<sup>9</sup> *Van der Plaats v SA Mutual Fire & General Insurance Co Ltd* [1980] 2 All SA 129 (A).

<sup>10</sup> This was the plaintiff's age at the date of the report, 17 April 2019.

[15] In the opinion of Dr de Kock, the plaintiff was likely to have continued as a road construction worker, but for the accident, earning approximately R 24,000 per annum. He would probably have been employed at the unskilled to low semi-skilled level, eventually attaining a career ceiling by the age of 45. At this stage, he would have been earning approximately R 130,000 per annum, receiving only inflationary increases thereafter until retirement at the age of 65.

[16] Because of the accident, stated Dr de Kock, the plaintiff has suffered significant psychological and physical sequelae that have reduced his vocational prospects. He sustained a serious injury to his dominant left hand (and arm), thereby hampering his ability to perform the bi-manual tasks that are most common to unskilled employment. He was limited to sedentary and light-duty work, not requiring bi-manual skills or strength. Dr de Kock went on to indicate as follows:

‘Given the high unemployment rate, [the plaintiff’s] advanced age, time out of market, low level of education, low level of intellectual functioning, physical limitations and endurance, chronic pain, and emotional distress, his employment prospects are so significantly narrowed that he is for all practical purposes regarded as unemployable in the open market on a permanent basis.’

[17] Dr de Kock concluded his report by saying that the plaintiff was a candidate for a permanent disability grant and that he should be compensated for loss of past and future income.

[18] It is not clear who prepared the actuarial report on behalf of Munro Forensic Actuaries ('MFA') but the defendant has not placed the contents in issue.<sup>11</sup> The authors thereof state that they were instructed to estimate the capital value of the potential loss of earnings suffered by the plaintiff because of the accident. They stipulate that their report is based on, *inter alia*, the information contained in Dr de Kock's report.

[19] The MFA report indicates that the plaintiff was paid for one month only after the accident, before becoming unemployed. He later managed to secure low-paying work, but only for a period of two months. He has been unemployed since mid-2010 and was not expected to secure any further work in the future.

[20] The capital value of the plaintiff's past loss of earnings was calculated as R 579,400. His future loss of earnings was equated to be R 1,911,900. The total capital value of the plaintiff's loss of earnings, excluding contingencies, amounted to R 2,491,300.

## **Discussion**

[21] The plaintiff's counsel drew attention, in argument, to the report prepared by an orthopaedic surgeon, Dr Piet Olivier. Dealing with the employability of the plaintiff, the following view was expressed:

'The presence of pathology in the left shoulder girdle as well as the left upper arm is responsible for the inability to perform normal as well as strenuous manual activities. The client will therefore not be able to compete against uninjured individuals in the future. It is not foreseen that the current degree of disability would improve with future medical or surgical intervention... As the client would be restricted to a job that entails light duties only, his future competitiveness in the open labour market is significantly jeopardized.'

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<sup>11</sup> The report is signed by a Mr Willem Boshoff and co-signed by a Mr Eddie Theron, both indicating that they are fellows of the Actuarial Society of South Africa.

[22] Similarly, plaintiff's counsel referred to the report prepared by an occupational therapist, Ms Peliwe Mdlokolo. She stated that:

'The plaintiff sustained orthopaedic injuries involving his left dominant upper limb. He is currently best suited for work that would entail prolonged standing whilst handling objects of negligent weights [sic]. In view of his previous academic difficulties and cognitive limitations noted during the assessment, he is not a candidate for training for an alternative sedentary occupation. He will also have difficulties securing work in the open labour market as most jobs that he would qualify for would require good bilateral hand functioning whilst handling objects of significant weights, working at and above shoulder level, repetitive arm movements, etc. Therefore, it is evident that his opportunities for gainful employment have been significantly compromised when compared to his premorbid state.'

[23] With reference to the above reports, as well as that of Dr de Kock, plaintiff's counsel argued for a deduction of 5% for pre-morbid and 15% for post-morbid loss of earning capacity.<sup>12</sup> At the heart of this argument was the contention that the plaintiff was unemployable in the open market, on a permanent basis. This was the conclusion reached by Dr de Kock.

[24] In contrast, defendant's counsel argued for deductions of 30% and 50%, respectively. This was because, in relation to pre-morbid loss of earnings, the plaintiff was relatively young and there was no proof of his earnings at the time of the accident. It was not possible to establish whether he was indeed earning R 2,000 per month. Regarding post-morbid earnings, defendant's counsel argued that the plaintiff was not unemployable and would have had the capacity to continue with employment for

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<sup>12</sup> The plaintiff's counsel used the terms, 'past loss of earnings' and 'future loss of earnings', respectively. The terms used by the defendant's counsel are preferred.

another 40 years. This was supported, so it was asserted, by the findings made in the expert reports. It was possible that the plaintiff could obtain employment that entailed light-duty work.

[25] Defendant's counsel referred to the decision in *Lekanyane v Road Accident Fund*,<sup>13</sup> where the court dealt with a claim brought on behalf of a minor child who had sustained a head injury when struck by a passing motor vehicle. The court accepted the joint minutes of the industrial psychologists, who concluded that the accident had compromised the child's prospects of employment. However, it went on to find that the experts did not rule out that the child might be able to find employment, although not necessarily be able to sustain it. The plaintiff had also not proved that any learning disabilities on the part of the child would have prevented him from having completed his schooling.<sup>14</sup> Accordingly, the court applied deductions of 35% and 30% respectively.

[26] Furthermore, defendant's counsel referred to *M obo M v Road Accident Fund*,<sup>15</sup> involving a claim brought on behalf of an eight-year-old child who had sustained injuries while travelling as a passenger in a motor vehicle. The court applied deductions of 20% and 30%, based on the child's age, ability to work, and prospects of employment.<sup>16</sup>

[27] The immediate problem with the authorities to which defendant's counsel referred is that they pertain to a minor child. The plaintiff in the present matter was 30 years of age at the time of the accident. There are considerably more uncertainties in relation to the application of general contingencies to the loss of earning capacity for a minor child. His or her true abilities and relatively unknown until later in development, whereas those of a mature adult are more predictable, notwithstanding the possible impact of further work experience and training. Consequently, the authorities in question are not helpful.

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<sup>13</sup> (RAF209/15) [2017] ZANWHC 124 (5 October 2017).

<sup>14</sup> At paragraph [14].

<sup>15</sup> (4484/2016) [2018] ZAGPJHC 451 (18 June 2018).

<sup>16</sup> At paragraphs [15] and [16].



[28] Defendant's counsel has also taken issue with the lack of proof in relation to the plaintiff's earnings at the time of the accident, suggesting that this would justify a higher deduction in relation to pre-morbid earnings. To adopt such a stance, however, contradicts the defendant's acceptance of the contents of both Dr de Kock's and the MFA reports, which relied upon monthly earnings of R 2,000 at the time of the accident as the premise upon which to make the findings indicated. The defendant's acceptance thereof is a key component of the special case for adjudication. It is not possible, at this stage, for the defendant to attempt to distance itself from the amount in question without a suitable application having been made.<sup>17</sup>

[29] The remainder of the defendant's argument rests on the assertion that the plaintiff was not unemployable and that he still had capacity to work. This requires closer examination.

[30] Dr de Kock concluded that the plaintiff should, for practical purposes, be regarded as unemployable in the open market on a permanent basis. He should be regarded as a candidate for a permanent disability grant. The findings of Dr Olivier, however, seem not to be quite as extreme. Whereas he confirmed that the plaintiff's competitiveness in the open market had been severely jeopardised, he suggested that the plaintiff was still capable of light-duty work. Similarly, Ms Mdlokolo indicated that the plaintiff was best suited for work that involved standing and the handling of light objects. She did concede, nevertheless, that the plaintiff's opportunities for finding gainful employment had been significantly compromised.

[31] The plaintiff's history of learning difficulties, lack of education, and dependence on manual labour as a source of work, as apparent from the reports, cannot be ignored. It would not be unreasonable to say that a permanent injury to his arm has all but negated his chances of securing meaningful employment of any kind, let alone light-duty work. This is especially so when considering his residence in the rural Eastern Cape, with its notoriously high levels of unemployment. There was no indication at all

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<sup>17</sup> As to whether such an avenue is open to the defendant, in the circumstances, is doubtful. The issue is not for the present court to decide.

that the plaintiff intended to or could indeed search for employment elsewhere, although this cannot be excluded. Ultimately, however, the outlook on his post-morbid earning capacity is bleak.

[32] To place absolute reliance on the views of Dr Olivier and Ms Mdlokolo and contend that the plaintiff was not unemployable, and still had the capacity to work, would be misplaced. The reality is that for the plaintiff to earn any fixed income, he would need to find non-manual labour. He may yet succeed, but it would be overly optimistic to expect this to be entirely feasible in the foreseeable future.

### **Relief and order to be granted**

[33] For purposes of the determination of general contingencies, the *Quantum Yearbook* remains a reliable guideline.<sup>18</sup> The learned authors thereof observe that a sliding scale of 25% for a child, 20% for a youth, and 10% in middle age, can serve as a basis for the deductions to be made. Moreover, the so-called 'normal contingencies' of 5% for pre-morbid and 15% for post-morbid loss of earning capacity still apply.<sup>19</sup>

[34] As complete a picture as possible of the plaintiff's circumstances must influence the assessment of the general contingencies to be applied. To that effect, the court has considered the contents of the expert reports, as agreed by the parties. A deduction of 10% for pre-morbid earnings would appear to be fair and reasonable, mindful of the *Quantum Yearbook* guidelines and the impact of increasingly severe socio-economic difficulties in South Africa. There is no merit in the defendant's argument for a deduction of 50% for post-morbid earnings. The court is satisfied that a deduction of 15%, as contended by the plaintiff, is justified.

[35] The plaintiff's loss of earning capacity must be adjusted as follows:

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<sup>18</sup> Koch, *The Quantum Yearbook* (Van Zyl Rudd & Associates (Pty) Ltd, Port Elizabeth, 2021).

<sup>19</sup> At 118.

### **Loss of earning capacity**

Pre-morbid	R 579,400	
Less 10% general contingencies	(R 57,940)	
Sub-total	R 521,460	R 521,460
Post-morbid	R 1,911,900	
Less 15% general contingencies	(R 286 785)	
Sub-total	R 1,625,115	R 1,625,115
<b>Total</b>		<b>R 2,146,575</b>

[36] In relation to costs, the plaintiff has been substantially successful and there is no reason why he should not be entitled thereto. The only remaining issue is the question of liability for the postponement on 28 November 2022. This was done to allow the defendant to prepare and submit heads of argument. Similarly, there is no reason why the plaintiff should not be entitled to recover the costs thereof.

[37] The following order is made:

- (a) the defendant is directed to pay to the plaintiff the amount of R 2,146,575 as damages for the loss of earning capacity because of the injuries sustained by the plaintiff;
- (b) the defendant is directed to pay the plaintiff's costs of suit on a party and party scale, including:

(i) costs of counsel; and

(ii) the plaintiff's reasonable qualifying and travelling expenses to consult with;

(aa) Dr PA Olivier;

(bb) Ms P Mdlokolo;

(cc) Dr G de Kock; and

(dd) Munro Forensic Actuaries;

(c) the defendant is directed to pay interest on the above amounts, at the prescribed legal rate, calculated from:

(i) 14 calendar days after the date of this order until date of payment, in relation to paragraph (a), above; and

(ii) 14 calendar days after the date of *allocatur* until date of payment, in relation to paragraph (b), above.

**JGA LAING**

**JUDGE OF THE HIGH COURT**

**APPEARANCE**

For the plaintiff: Adv Skoti, instructed by Yokwana Attorneys, Makhanda.

For the defendant: Ms Jeram, Instructed by the Office of the State Attorney, East London.

Date of submission of heads of argument: 07 December 2022.

Date of delivery of judgment: 28 March 2023.