REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, PRETORIA

CASE NO.: 82302/2016

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

19 June 2020

DATE

.....

SIGNATURE

In the matter between:

ADV C CAWOOD NO o.b.o W ABRAHAMS Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGMENT

MOGALE, AJ:

INTRODUCTION

[1] On 30 April 2014, the Plaintiff who was a pedestrian was injured in a collision and wherein the plaintiff sustained head injuries. The plaintiff was born on the 01 January 1987 and 27 years old at the time of the accident.

[2] Both the plaintiff and the defendant councils confirmed to the court that, the merits were previously settled with the defendant admitting liability 50% in favour of the plaintiff. The defendant shall provide an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996 ("the undertaking"), to compensate the Plaintiff/ Willem Abrahams for 50% (Fifty percent) of the costs relating to the future accommodation of the Plaintiff/ Willem Abrahams in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the Plaintiff after the costs have been incurred and on proof thereof and arising from the collision which incurred on 30 April 2014. The defendant shall further pay the Plaintiff's Past Medical Expenses Voucher of R1 148, 00 and that General Damages in an amount of R1 200 000, 00 to be paid. The plaintiff also stated that a Trust has been established on behalf of the plaintiff; where in Advocate C Cawood has been appointed as curator ad litem. All this information was supported by the relevant documents filed of record. No oral evidence was presented; parties submitted heads of arguments and requested that the matter be settled on paper.

ISSUES FOR DETERMINATION

[3] This matter comes before me for the determination of the plaintiff's loss of earnings and the appropriate contingency deduction that should be applied, more particularly, the pre-morbid scenario after having regard to expert reports filed by both the plaintiff and defendant respectively, including joint minutes filed by both parties. This court should also make a ruling in respect of the costs aspect in respect of loss of earning portion.

COMMON CAUSE FACTS

[4] A perusal of the Joint Minutes of different experts revealed the point of agreement or common course issues which are as follows.

4.1. **Joint Minutes of the Industrial Psychologists**.

PRE-ACCIDENT- The plaintiff was cognitively since early childhood but managed to obtain a Grade 4 level of education. Prior to the collision, he was never formally employed; however, he was sympathetically employed in various forms, eg, as an assistance driver on a casual basis, as a general worker on a piece meal basis (2 or 3 days per week). Prior to the collision he received a SASSA disability grant which he would have continued supplementing by low level unskilled sympathetic employment. He could probably have earned remuneration associated with the earnings set out in the Quantum Yearbook at a level equal to

the average between the Lower Quartile and Median of earing for unskilled workers, increasing to the Upper Quartile of earning by ± 35 years.

POST-ACCIDENT- The plaintiff will not be able to supplement his SASSA disability grant by means of earning an income since the accident. His job options and associated likely earning have been nullified by the sequelae of the injuries sustained in the accident, a total loss of earning had occurred and the pre-accident likely earnings should be used as a basis to qualify the claim

4.2. **Report compiled by the Neurosurgeon-** indicates that the plaintiff was involved in a motor vehicle as a pedestrian and was later picked up by someone who took him to hospital. The plaintiff sustained severe diffuse brain injury, right sided hemiplegia and right intubated GCS-3/15. He has poor co-ordination as a result, provisions for both Physiotheraphy and Occupational must be made. Prior the accident, the plaintiff had neurocognitive deficits but the brain injury worsened an existing cognitive deficits. He is suffering from post-traumatic continues headache with the risk of epilepsy. It is agreed that the plaintiff was never employed even prior the accident.

4.3. The report compiled by **Messrs Munro Consulting Actuary** submits the following contingencies: Uninjured of 5% and 15% on past and future earnings respectively.

APPLICATION OF THE LAW

[5] In order to determine loss of earnings and the appropriate contingencies to be applied, the court need to consider the undisputed fact that the plaintiff has been rendered unemployable as a result of the impact of the traumatic head injury he sustained during the accident. This, I will do with reference to the Joint Minutes and the medico legal reports filed of record which is supported by the fact that a curator ad litem have already been appointed for the plaintiff. I am also equally conscious of the fact that the degree of pain and inconvenience caused to the plaintiff can never be measured in monetary terms. However, in making awards, it is important not to lose sight that the purpose of awarding damages is to compensate the plaintiff with a just and equitable amount.

[6] Having said that, I am mindful of the caution in ***De Jongh v Du Pisanie 2005 (5) SA 457 (SCA) at para 60*** wherein the Supreme Court of Appeal stated that:

"The principle remained that the award should be fair to both sides – it must give a just compensation to the plaintiff, but 'not pour out largesse from the horn of plenty at the defendant's expense."

[7] The legal principles applicable to the assessment of loss of earnings and loss of earning capacity has in the past, been set out in various case law. Each case must be assessed on its own circumstances and it is equally important to note that the use of comparable cases is not a hard and fast rule that should be strictly applied because two cases can never be the same. It is accepted that in assessment of these heads of damages which cannot be assessed with any amount of mathematical accuracy, the

court has a wide discretion- See ***A A Mutual Insurance Association Ltd v Magula 1978 (1) SA 805 (A).***

FACTS IN DISPUTE

[8] Both parties have placed in dispute, the plaintiff's income and the contingency deductions to be applied. Advocate Matladi on behalf of the plaintiff submitted that, since the plaintiff is sympathetically employed, the amount he was earning is not to be taken into account when assessing his loss of earning, taking into account that he was unemployed prior the accident and further that, he would not have been employed should the accident not have occur. That the plaintiff was paid purely on compassionate ground at a time and he could contribute nothing to the business such salary should not be taken into account when dealing with the plaintiff's claim for loss of earnings. That even before the collision the plaintiff was still not employable in the open labour market. Relying on the case of ***Prinsloo v Road Accident fund (3579/06) 2008 ZAECHC 193, 2009 (5) SA 406 (SE),*** Advocate Matladi argued that the court in this case said that, the evidence may establish that an injury may in fact have no bearing effect on earning capacity, in which event the damage under this head would be nil. Therefore the plaintiff has failed to prove the *nexus* between the collision or injury and the loss of earning capacity and 80% contingencies be applied.

[9] In the matter of ***Gouveia v Road Accident Fund (2010/19802) [2013] ZAGP JHC 293*** it was found that where the plaintiff is sympathetically employed the amount

that he is earning is not to be taken into account when assessing his loss of earnings, also taking into account that he is unemployable in the open labour market.

[10] Advocate Matladi also relied in the case of ***Santam Versekeringsmaaktskapy Bpk v Byleveldt 1973 (2) SA 146 (A)*** were it was held that were an employee was paid purely on compassionate ground at a time when he could contribute nothing to the business such salary is not taken into account when dealing with the plaintiff's claim for loss of earnings.

[11] Advocate Laubscher on behalf of the plaintiff argued that this court should be bound and apply the joint agreement of the experts. He relied on the case of ***Thomas v BD Sarens (PTY) Ltd {2012} ZAGPJHC 161*** where Sutherland J said that where certain facts are agreed between the parties in civil litigation, the court is bound by such agreement, even if is skeptical about those facts. That where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement, unless it does so clearly and, at the very latest, at the outset of the trial. Advocate Laubcsher further argued that effective case management would be undermined if there were an unconstrained liberty to depart from an agreement reached during the course of pre-trial procedures, including those reached by litigant's respective experts. There would be no incentive for parties and experts to agree matters, because despite such agreement, a litigant would have to prepare as if all matters were in issue. The plaintiff agrees with the defendant that parties to legal proceedings cannot, by their agreement, compel the court to decide the case on an incorrect legal basis. Further that the joint minute does not record any agreement on matter of law. The plaintiff argues that, the defendant has not repudiated

the joint agreement and cannot do so as he is bound by the contents thereof. Advocate Laubcsher further submitted that this court is also bond by the joint agreement which is based on facts, expert agreements and the law. With reference to whether the plaintiff is entitle to loss, the plaintiff relied and agree with the joint minutes complied by the Industrial Psychologists further that, the plaintiff likely earnings have been nullified by the sequelae of the injuries sustained in the accident. They argue that the loss of earning should be based on the joint expert minutes, as calculated by Munro Actuaries. With reference to the issue of contingencies, it was submitted that, the normal contingencies of 5% on past and 15% on future uninjured earnings is fair and appropriate. The plaintiff argues that the defendant submission that a future uninjured contingency of 80% is unfair and has not been substantiated by either the undisputable evidence or case law.

[12] Advocate Laubcsher relied also in the case of ***BEE v RAF 2018 (4) SA 366*** that where certain facts are agreed between the parties in civil litigation, this court is bond by such agreement even if it is skeptical about those facts.

[13] In my view this argument by Advocate Laubcsher is misplaced because the issues pertaining to the contingency deductions are the prerogative of the court. In ***Shield Insurance Co Ltd v Hall 1976 (4) SA 431 (A) 444***, it was held that, the provisions for contingencies falls squarely within the subjective discretion of the court as to what is reasonable and fair. ***In Michael v Linksfield Park Clinic Ibid at 175H,*** the following was said:

"What is required of the trial Judge was to determine to what extend the opinions advanced by the expert were founded on logical reasoning and how the competing sets of evidence stood in relation to one another, viewed in the light of the probabilities."

[14] In ***Road Accident Fund v SM (1270/18) {2019} ZASCA 103***, this is a case which demonstrates the perils parties face when they rely exclusively on the opinion of expert without laying any factual basis for such opinion. In the trial proceeding, it was held that:

".... it is fundamental that the opinion of an expert must be based on facts that are established by the evidence and the court assesses the opinion of the expert on the basis of "whether and to what extend their opinions advanced are founded on logical reasoning". It is for the court and not the witness to determine whether the judicial standard of proof has been met."

[15] It is common cause that contingencies of whatever nature generally serve as a control mechanism to adjust the loss to the circumstances of the individual case in order to archive justice and fairness to the parties. As we held in the matter of ***Hall v RAF 2013 (6J2) QOD 126 (SGJ),*** the question of the contingencies deductions to be applied, as is the calculation of the quantum of a future amount involving, *in casu*, loss of earning capacity, is often difficult. The court has a wide discretion based on a consideration of all the relevant facts and circumstances.

[16] In ***Road Accident Fund v Guedes 2006 (5) SA 583 (SCA) at 587 A-B*** the Supreme Court of Appeal addressing the assessment of compensation and a trial Judge's discretion stated:

"The court necessarily exercises a wide discretion when it assesses the quantum of the damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that to assist in such a calculation, an actuarial computation exercises 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."

[17] In ***RAF v Kerridge (1024/2017) {2018} ZASCA 151 (01 November 018) at para 25***, the court stated that:

"Indeed, a physical disability which impacts on the capacity to an income does not, on its own, reduce the patrimony of an injured person. There must be proof that the reduction in the income earning capacity will result in actual loss of income. However, where loss of income has been established but proof of the quantum thereof cannot be produced in the usual manner, the courts have shunned the non-suiting of a claimant and have preferred to make the best of the evidence tendered to give effect to the finding of proved reduction in loss of income earning capacity....."

[18] Robert J. Kroch in his book The Quantum Year Book 2019 at page 115 stated 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 allowances has been made on the actual calculation. The deduction is the prerogative of the courts*.....It is generally accepted, and the norm to apply, is a 5% contingency deduction. Contingencies are not to be viewed as always operating adversely to the plaintiff. The so-called normal contingencies takes into account that a plaintiff might

ordinarily sustain some loss in her future income by virtue of: falling sick from time to time; the prospect of unemployment and an inability to secure alternate employment immediately; the prospect of being injured in circumstances where the plaintiff would receive no compensation from any source" etc. **(See also The Law of Third-Party Compensation, HB Klopper, 3rd edition, pages 183-184).**

[19] In considering the experts' views regarding the plaintiff's career prospects, from the Neurosurgical perspective, the injuries sustained by the claimant from the accident will not influence life expectancy; he was not employed even prior to the accident. The Joint minutes of the Industrial Psychologists postulated that the plaintiff could have earned on the average between the lower and medium quartile for unskilled workers (as per the Quantum Yearbook). He probably could have reached the upper quartile of earning by ±35years and further that this would probably have been followed by earnings adjustments until retirement age 65. They also agreed that the pre-accident earnings should be used as a basis to quantify the claim.

ANALYSIS

[20] According to the Industrial Psychologists, the plaintiff was diagnosed with TB Meningitis at the age of 2 years and as a result suffered brain damage. He has been receiving Government disability grant in order to support himself financially.

[21] According to Social Assistance Act 2004, Chapter 2 of the Act, in Section 9, "disability grant" is defined as "a grant made in terms of section 9". The section reads:

"A person is, subject to section 5 eligible for a disability grant, if he or she-

a) Has attained the prescribed age, and
b) Is, owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance

[22] After considering the provisions of Section 9 of the Act and the Joint Minutes of the Industrial Psychologists, relating to the historical background of the Plaintiff, the following questions comes into my mind:

a) Whether the plaintiff income deriving from the sympathetic employment was lawful or not by virtue of the fact that he was declared unfit to obtain employment or profession?
b) If the disability grant was provided on the virtue that, the plaintiff was mentally or physically disabled and unfit to obtain employment, can the plaintiff now claim such an income which was unlawfully obtained?

[23] The plaintiffs argued that I am bound by the experts Joint minutes, that I have to comply with the contingency calculations indicated by the experts and the defendant's submissions that the plaintiff was a peace job worker on an intermittent basis, that he never worked before, that the position was still going to be the same after the accident and further request that 80% contingency be applied.

[24] It is my view that, the applicant was not supposed to work in the first place as he was declared unfit to obtain any employment or profession. He was found to be unable

to enter into an open labour market or to support himself in light of skills and ability to work

[25] I am inclined to agree with the submission by Advocate Laubscher on behalf of plaintiff that I am bound and have to comply with the contingency calculations indicated by the experts.

[26] I agree with the submission made by Advocate Matladi on behalf of the defendant that the plaintiff was and still is unable to enter into an open labour market before and after the accident.

[27] Taking into account the totality of the facts *in casu*, I am of the view that 70% reduction is fair and reasonable. The reason for this view is that this contingency reduction will be fair and equitable and will also serve to balance the interest of both parties.

[28] In the result, the plaintiff is entitled to the following amounts in respect of his loss or earning:

Past earnings	**R291 080, 00**
Less contingency deductions 70%	**-R87 324, 00**
Total loss of past earnings	**R203 756, 00**
Future earnings	**R1 497 700, 00**
Less contingency deductions 70%	**-R449 310, 00**
Total loss of future earnings	**R1 048, 390, 00**

Total loss of earnings **R1 252, 146, 00**

[29] **In the result I grant the following order:**

1. The Merits are settled on the basis that the defendant shall pay 50% of the plaintiff's proven or agreed damages.

2. The defendant shall pay provide an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 ("the undertaking"), to compensate the Plaintiff/ Willem Abrahams for 50% (Fifty percent) of the costs relating to the future accommodation of the Plaintiff/ Willem Abrahams in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the Plaintiff/ Willem Abrahams after the costs have been incurred and on proof thereof and arising from the collision which occurred on 30 April 2014.

3. The defendant shall pay the plaintiff the sum of **R600 000, 00 (Six Hundred thousand Rand Only)** which is 50% less of the agreed R1 200 000 in respect of General damages

4. The defendant shall pay the plaintiff the sum of **R574, 00 (Five hundred and Seventy Four Rand Only)** which is less 50% in respect of Past Medical Expenses.

5. The defendant shall pay the plaintiff the sum of **R626 073, 00 (Six Hundred and Twenty Six Thousand and seventy three Rand only)** in respect of Loss of Earnings.

COSTS

6. The Defendant shall pay the Plaintiff's taxed or agreed High Court Scale party and party costs, inclusive of the costs related to any motions and applications and including for the sake of clarity, but not limited, to the costs of the Plaintiff's instructing attorneys, Adendorff Incorporated in Cape Town and the correspondent attorneys in Pretoria, Savage Jooste and Adams Inc, as well as the other costs set out hereunder.

The Plaintiff shall, in the event that the costs are not agreed, serve the Notice of Taxation on the Defendant or the Defendant's attorney of record.

The Plaintiff shall allow the Defendant 30 (thirty) calendar days to make payment of the taxed or agreed costs.

GENERAL COSTS

7. Any taxed or agreed costs incurred after the date of this order in obtaining payment of any of the amounts referred to herein.
8. The Defendant will not be liable for interest on the outstanding amount.

EXPERT WITNESSES

9. Regarding the expert witnesses listed hereinbelow ("the experts"), the taxed or agreed qualifying expenses, if any, the taxed or agreed attendance, travelling, waiting time and reservation fees, if any, the costs attached to the procurement of the medico legal and other reports, inclusive of those referred to, as well as joint expert minutes of the experts, including x-rays, MRI scans, Pathology

reports, interpreter's services, addendum reports and all consultations with counsel, Plaintiff attorneys, as well as time spent traveling and conducting home and work visits.

10. The experts are:

a. Dr Keir le Fevre (Psychiatrist) (RAF4 & Expert report).
b. Ms Rita Van Biljon (Occupational Therapist).
c. Ms Renee de Wit (Neuropsychologist).
d. Forensic Investigation Specialists (Merits Investigators)
e. Ms Karen Kotze (Industrial Psychologist).
f. Messrs Munro Consulting (Actuary).

RELATED COSTS

11. The Defendant shall be liable to pay the reasonable costs of the Plaintiff's legal representatives, the taxed or agreed travelling, waiting time, accommodation and related costs incurred by Plaintiff, Plaintiff's legal representatives and counsel in respect of settlement discussions with Defendant or Defendant's attorneys, and in respect of consultations with experts for trial preparation, costs for preparing for, formulation of and attending to Pre-Trial Conferences, Pre-Trial Conference Minutes, Pre-Trial Agendas, Rule 37(4)&(6) Further Particulars, Judicial Certification Meetings, Judicial Management Meetings, Rule 35(9) & Rule 36(10) notices, Rule 38(2) affidavits, trial preparation, advice on evidence, joint

memorandums on settlement, heads of argument, the preparation of trial bundles as per the Practice directives and the cost of this Order.

12. The Defendant shall be liable to pay the taxed or agreed travelling, waiting time, accommodation and related costs, incurred as follows:

a) In respect of the Plaintiff / Willem Abrahams, attending medico legal examinations with expert witnesses in Cape Town & Gauteng.

b) In respect of the Plaintiff and the Plaintiff's legal representatives conducting home visits, investigations and consultations at the Patient's home & workplaces in Ashton.

c) In respect of the Plaintiff's legal representatives conducting the Pre – Trial Meetings & Judicial Case & Management Meetings.

d) In respect of Plaintiff and Plaintiff's legal representatives conducting the Trial.

e) In respect of Mr & Ms Sasch, the Patient's adoptive parents / carers and the Patient / Willem Abrahams attending medico legal examinations with expert witnesses in Cape Town & Gauteng as well as the *Curatrix ad Litem and Curator Bonis*

COUNSEL'S FEES

13. The fees of the Plaintiff's senior junior counsel, in conducting the trial, which costs are inclusive of day fees, preparation, consultations with expert witnesses, lay witnesses, drafting of submissions, heads of argument, joint memorandums on settlement and advice on evidence, as well as preparation for and appearance at Judicial Case Management Meetings and Judicial Management Meetings.

COSTS OF THE CURATOR *AD LITEM*

14. The Defendant shall pay the costs of the application to appoint the Curator *ad Litem* on the High Court scale, as between party and party, including the costs of the medical reports filed as part of the said application, as taxed or agreed, plus VAT.

15. The Defendant shall pay the costs of the Curator *ad Litem* on the High Court scale, as between party and party, as taxed or agreed, plus VAT, inclusive of day fees in respect of the hearing on 6 May 2020.

COSTS OF CURATOR BONIS

16. In the event of the Western Cape High Court, or another competent Court having jurisdiction, appointing a *Curator Bonis* to the Patient, the Defendant shall pay the costs of the *Curator Bonis*, as taxed or agreed, such costs including for the sake of clarity, but not limited to:

17. The costs of the application to the appoint the *Curator Bonis* on the High Court scale as between party and party, as taxed or agreed, plus VAT ("the application costs");

a) The costs, if any, incurred by the *Curator Bonis* in furnishing security to the Master;

b) The fees and costs of the *Curator Bonis* in respect of administering the capital and the undertaking.

c) The fees of the *Curator Bonis* shall be paid from the Undertaking.

PAYMENT PROVISIONS

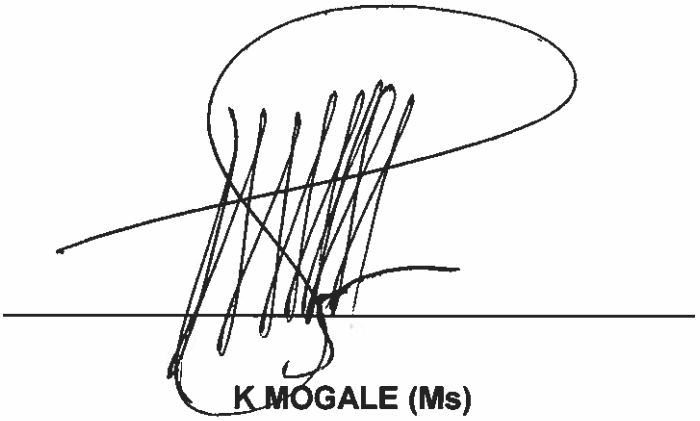
18. Payment of the capital amount as reflected above shall be effected on or before 28 August 2020 ("the capital due date") by way of electronic transfer into the Plaintiff's attorneys trust banking account, details of which are listed herein below.

19. Payment of the taxed or agreed costs reflected above shall be effected within 30 (thirty) calendar days of agreement or taxation ("the costs due date") and shall likewise be effected by way of electronic transfer into the Plaintiff's attorneys trust banking account, details of which are listed herein below.

20. Upon receipt of the capital amount in Plaintiff's attorneys trust banking account, same will be invested in an interest-bearing trust account pending payment to the Plaintiff.

CONTINGENCY FEE AGREEMENT

21. It is recorded that the Plaintiff entered into a contingency fee agreement and that same complies with the Act.



K MOGALE (Ms)

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, PRETORIA

Date of hearing	:	18 May 2020
Date of judgment	:	19 June 2020

APPEARANCES

Plaintiff's counsel: Adv Anton Laubscher

Instructed by Adendorff Attorneys

Defendant's counsel: Adv Jan Matladi

Instructed by Road Accident Fund