

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 89805/2019

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

Date: 20 October 2023 E van der Schyff

In the matter between:

M W CHUENE

APPLICANT

and

THE ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT

Van der Schyff J

Introduction and factual background

[1] It must be stated, at the onset, that the only contentious issues raised related to the contingency deduction that had to be applied in quantifying the plaintiff's claim for

loss of earnings and the quantification of general damages. For this reason, this short judgment will deal only with the issues relating to the applicable contingency deduction. The Road Accident Fund (the Fund) conceded liability.

- [2] In the accident, the plaintiff sustained a fractured femur and injuries to both knees. The right femur was initially stabilized using skin traction, but an open reduction internal fixation was later performed. He used two crutches for two months after the accident and, since then, one crutch. The plaintiff was employed as a forklift driver. Although his employer retained him after the accident, he was retrenched in December 2023 because the business suffered financial hardship.

- [3] It is common cause that the plaintiff's lower extremities were a problem pre-accident and that he experienced difficulties climbing onto and off the forklift. There were, however, no complaints about his work performance pre-accident. Since the accident occurred, he struggled even more. His employer trusted him and accommodated him post-accident. The occupational therapist records that the plaintiff may have suffered a degree of physical compromise before the accident, which has been exacerbated by the pain and discomfort he now experiences due to the accident.

- [4] The plaintiff's scarring and disfigurement impacted his confidence and self-esteem.

- [5] I accept that the plaintiff had pre-existing physical challenges, which are exacerbated by the injuries suffered. This is the kind of situation catered for by the *talem qualem* rule. This rule provides that a wrongdoer takes his victim as he finds him.¹ A defendant cannot use the extraordinary vulnerability of the plaintiff as a defence.

- [6] A vulnerable employee was rendered more vulnerable as a result of the accident. After the accident, he had difficulties maintaining his workstation due to residual symptoms of his right hip, and he frequently had to take breaks and rest before continuing to work. Having had regard to the evidence contained in the expert

¹ *Smit v Abrahams* 1994 (4) SA 158 (K).

reports and the collateral information provided, I am of the view that it is reasonable and fair to find that the defendant is liable for the loss of earnings suffered by the plaintiff, and in particular, the extent thereof as allowed for in this judgment.

- [7] Counsel for the defendant submitted that when quantifying the plaintiff's claim for future loss of earnings, the court should allow a 50% to 60% contingency deduction because of the plaintiff's pre-existing vulnerability. This would not be fair and reasonable. Counsel for the plaintiff submitted that while the normal contingency deduction amounts to 12.5%, the proposed 20% is already higher than usual. I agree with the plaintiff's counsel in this regard. As for quantifying the plaintiff's claim for past loss of income, I agree with the plaintiff's calculation.
- [8] As for general damages, I am of the view that the amount of R400 000.00 is fair and reasonable with regard to the *sequelae* of the injuries and comparable awards.

ORDER

In the result, the following order is granted:

- 1. The draft order marked 'X', dated and signed by me is made an order of court.**

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the plaintiff:	Adv. C Spangenberg
Instructed by:	Spruyt Inc.
For the defendant:	Mr. L. Lebogang
Instructed by:	State Attorney
Date of the hearing:	18 October 2023
Date of judgment:	20 October 2023