

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

CASE NO: 49340/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 24 APRIL 2023

In the matter between:

HUXTABLE: DAVID MARK

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGEMENT

Ally AJ

[1] This matter came before this Court on the basis of a default, Defendant not having filed an intention to defend although the notice of set down was also served on it.

[2] Judgement on the merits of the case was previously granted by my sister Mali J wherein an order to the effect that the Defendant was to pay 100% of the Plaintiff's proven damages was granted on 25 May 2021.

[3] During the hearing of this matter on 10 October 2022, I indicated to Counsel for the Plaintiff that supplementary heads of argument will be required to deal with the following:

- 3.1. the retirement age of the Plaintiff as proposed by the Industrial Psychologist;
- 3.2. past loss of earnings;
- 3.3. past medical expenses in relation to the proof thereof.

[4] The matter was then adjourned on 10 October 2022 for the purpose of filing of the supplementary heads of argument and oral argument to 14 October 2022.

[5] Supplementary Heads of Argument were duly filed and the Court is grateful for same. Oral argument was however, presented by Adv. R. Hawman whereas the heads of argument were drafted by Adv. B.P. Geach SC.

[6] In response to the first issue of the retirement age, it is perhaps necessary to give some context. The Industrial Psychologist proposed in his report that a retirement age of 67.5 years was apposite in the circumstances of this case. Now the Policy of the Company, DRA, that he is presently employed by, has a retirement age of 63 years. The Industrial Psychologist submitted an addendum report wherein the retirement age of 67.5 is confirmed. The author of the report refers to research having been conducted in South wherein it is shown that the age of 65 is no longer regarded as being a retirement age. One of the reasons for this, is that people are unlikely to sustain the same livelihood today if they retired at age 65 and hence the inclination to work as long as possible taking into consideration the specific circumstances of the individual.

[7] The Court has no problem with the reasoning of the Industrial Psychologist but one should be careful, in my view, in circumstances where the postulation is made in claims against the State. One is reminded of the warning sounded by Holmes J in **Pitt v Economic Insurance Co Ltd**:¹

¹ 1957 (3) SA 284 (D)

“The Court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant’s expense.”

[8] It is incumbent on the Court therefore to be mindful of ‘the vicissitudes of life’ and apply contingencies taking same into account. The Industrial Psychologist has remarked that certain risks need to be borne in mind in respect of what is described as ‘impact on earnings vulnerabilities’². The Industrial Psychologist then sets out the risks and when dealing with contingencies, in my view, ventures into the realm of the discretion of the Court to determine appropriate contingencies. It is noted that the Industrial Psychologist does accept the principle of contingencies being left for determination by the Court, but then goes forth and proffers suggestions as to what levels of contingencies should be applied. This exercise, in my view, is an exercise to be conducted by the Court.

[9] The Actuary, Mr Sauer, has taken heed of the Industrial Psychologist’s report and has applied contingencies in respect of pre-morbid and post morbid. The higher contingency inferred from the table suggested by the Industrial Psychologist, is a differential of 20% in respect of future earnings. I have considered same and applying the principles set out above in the **Pitt case** as well as the ‘vicissitudes of life’, I am of the view that in the present circumstances, a 15% differential in respect of future earnings must be applied.

[10] Accordingly the Court has calculated the loss of earnings of the Plaintiff to be the following:

	Pre-morbid	Post-morbid	Loss
Past Earnings	3 413 358	3 269 897	
Contingency (5%/5%)-	170 668	- 163 495	
	<hr/>	<hr/>	<hr/>
	3 242 690	3 106 402	136 288

² Caselines: 0008 – 111 @ para 10.2.5

Future Earnings	5 069 989	4 857 432	
Conting (20%/35%)	1 013 997	1 700 101	
	<hr/>	<hr/>	
	4 055 992	3 157 331	898 661
			<hr/>
			R1 034 949

[11] For clarity, the amount awarded in respect of loss of earnings is the amount of R 1 034 949 – 00 [one million and thirty-four thousand nine hundred and forty-nine rand].

[12] The next issue which was left for determination was the issue relating to past medical expenses. I indicated to Counsel for the Plaintiff at the time that supplementary Heads of Argument were requested and that I was not satisfied on the papers before me that past medical expenses for the Plaintiff had been proven.

[13] At the time an official from the Plaintiff's Medical Aid Fund had not deposed to an affidavit indicating firstly that the amount for past medical aid expenses had been paid by the Medical Aid Fund and secondly that the expenses related to injuries sustained in the motor vehicle collision of relevance to this case. The Court is satisfied that the Plaintiff has now submitted the relevant documentation and that he is accordingly entitled to the amount claimed, namely, R 2 696 – 50 [two thousand six hundred and ninety-six rand].

[14] The Plaintiff has succeeded in his claim and there is no reason why costs should not follow the result.

[15] Accordingly the following Order will issue:

1. The Defendant shall pay the sum of **R1 037 645-50 [one million and thirty-seven thousand six hundred and forty-five rand and fifty cents]** in respect of past medical expenses and loss of earnings;

2. Payment of the capital amount referred to in paragraph (a) is to be paid to Roets & Van Rensburg Attorneys, payable within 180 days from the date of this order by direct payment into their trust account with the following details:

Account Holder : Roets & Van Rensburg

Bank : ABSA

Branch Code : 3[...]

Account number : 4[...]

Reference Number : J[...]

3. The aforementioned amount referred to in paragraph (a) above will not bear interest unless the Defendant fails to effect payment thereof within 180 calendar days of the date of this Order, in which event the capital amount will bear interest at the prescribed rate per annum calculated from the date of this order up to the date of payment thereof;
4. The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs on a High Court Scale, including the cost for 14 October 2022 and all previous appearances including 10 October 2022 and which costs shall further include but not be limited to the following:
 - 4.1. The costs of the experts mentioned herein below including, but not limited to, preparation for trial, qualifying as well as the costs of the RAF 4 serious injury assessment reports, the medico-legal reports, the addendum reports, actuarial/revised actuarial calculations, and joint minutes of all of the Plaintiff's experts (if any), and the costs of securing expert affidavits, which include, but will not be limited to, the following experts:

- Mr Johan Sauer (Actuary).
- Dr Bogatsu (Orthopaedic Surgeon).
- Ms Steyn/Stoltz (Occupational Therapists).
- Dr Pretorius (Industrial Psychologist).
- All other experts' reports served on the Defendant.

- 4.2. Costs of the Plaintiff's counsel, inclusive of the drafting of the heads of arguments, the supplementary heads of argument, advice on evidence, counsels' day fees for 10 October 2022 and 14 October 2022 and the costs for the preparation for trial, consultation with client & the attorney;
- 4.3. The costs in respect of the preparation, drafting and copying of all the bundles of documents and the costs for time spend preparing case lines;
- 4.4. The costs attendant upon the obtaining of payment of the amounts referred to in this order:
- 4.5. The reasonable traveling costs (inclusive of toll gate and e-toll charges), subsistence, accommodation and transportation costs, if any and upon proof thereof, incurred by the Plaintiff in attending medico-legal examination(s) with the experts and in attending the office of the Plaintiff's attorney for purposes of a virtual hearing /trial, if any;
- 4.6. The costs of ATC and/or Boitumelo assessors, including their time spent;

- 4.7. The costs of the Plaintiff's legal representatives/counsel for the preparation and drafting of expert and damages/founding affidavits;
 - 4.8. All interlocutory applications brought by the Plaintiff;
 - 4.9. The above costs will be paid into the aforementioned attorneys trust account;
5. Payment of the above costs by the Defendant is subject to the following conditions:
 - 5.1. The Plaintiff is ordered to serve the Notice of Taxation of the bill of costs on the Defendant by e-mail;
 - 5.2. The Defendant is ordered to pay the Plaintiffs' taxed and/or agreed party and party costs within 180 (fourteen) days from the date upon which the accounts are taxed by the Taxing Master and/or agreed between the parties;
 - 5.3. Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the prescribed mora rate per annum on the taxed or agreed costs from the date of the allocator or agreement to date of final payment.
6. The Defendant must provide the Plaintiff with a section 17(4)(a) undertaking in respect of the Plaintiff's claim for future medical expenses, within 10 court days from the date of this order;
7. **The issue of general damages is postponed *sine die*.**

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA
Electronically submitted therefore unsigned**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representative by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be **24 April 2023**.

Appearances:

Attorneys for the Plaintiff: **Roets & Van Rensburg**
jason@rvrince.co.za

Counsel for the Plaintiff: **Adv. BP Geach SC with Adv R Hawman**

Attorneys for the Respondent: **No appearance**