

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

CASE NO:78371/2017

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 21 February 2024

E van der Schyff

In the matter between:

JS NDHLELA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Van der Schyff J

[1] The plaintiff, Mr. Ndhlela, an adult male nurse, was injured in a motor vehicle accident. The merits and general damages were previously settled. This court is thus tasked with quantifying the plaintiff's claim for loss of income. There was no appearance on behalf of the defendant.

[2] The evidence before the court indicates that Mr. Ndhlela suffered serious injuries. He sustained a severe diffuse axonal brain injury that was complicated by a focal brain injury. Initially, he was unable to resume work for almost two years. He needed full-time assistance. He is currently functioning independently. He has an increased risk of developing epilepsy and suffers from behavioral disturbances. His injuries impacted his communication skills and contributed to poor thought processes, and he suffers memory loss.

- [3] Mr. Ndhlela is a qualified Occupational Health Nurse. He holds a B Tech degree in Occupational Health Nursing, a Diploma in Nursing and Midwifery, and various certificates in the medical field.
- [4] He commenced his nursing career in 2011 at Lydenburg Hospital as a registered nurse. In June 2012, he secured a better opportunity at Life Occupational Health at Witbank. He was permanently employed as an occupational health nurse. His manager, at the time, indicated that he was an exceptional employee who would have been able to secure a promotion to the level of Occupational Health Unit Manager. The Industrial Psychologist opined that, was it not for the accident, Mr. Ndhlela would have qualified for a promotion by January 2017.
- [5] The reality of Mr. Ndhlela's employment history is that after the accident occurred, he was demoted due to his inability to perform on his pre-accident level. He opted to resign in January 2016. In March 2016, he started working at ESKOM as an occupational nurse on a contract basis for three months with an income similar to his previous employment. He was unemployed for one month thereafter and then secured permanent employment at Life Occupational Health in Mpumalanga. Since May 2019, he has been employed at Life Occupational Health in Pretoria North. His reported monthly income is higher than when he was employed in Mpumalanga. Mr. Ndhlela's counsel submitted that he is currently employed by a new employer but that he does not want the Industrial Psychologist to contact his new employer. According to Mr. Ndhlela, he left his previous employment due to a bad relationship with the manager. This was not confirmed by collateral information.
- [6] Based on the expert evidence, I accept that Mr. Ndhlela does not qualify to be promoted in future and that he will not be able to fulfill managerial functions due to the *sequelae* of the injuries suffered. The occupational therapist opined that he meets the physical demands of his current employment. If, however, he has epilepsy, he will become unemployable.

- [7] The reality is that, even though the neurocognitive test results indicate ‘significant fine motor, attention, expressive language and comprehension difficulties, perceptual and visuo-spatial difficulties and severely impaired memory and verbal learning,’ Mr. Ndhlela functioned as an occupational health nurse and after his initial demotion, succeeded in again obtaining employment in his field. His salary improved with each move to a new employer. The Industrial Psychologists’s opinion that Mr. Ndhlela resigned ‘from numerous jobs due to difficulty maintaining satisfactory levels of performance and relational issues with his superiors’ is not substantiated by any collateral sources. The Industrial Psychologist referred to collateral information obtained from Ms. Lezaar and Ms. Otto. Neither referred to any relational problems with supervisors. Ms. Otto described the plaintiff as a sharp employee who mastered a new system and alluded that Mr. Ndhlela gets frustrated by his team members.
- [8] In the Industrial Psychologist’s updated addendum report, it is stated that Mr. Ndhlela indicated that he struggles to build productive relationships with his managers. Mr. Ndhlela also informed the Industrial Psychologist that he moved between different employers because of his inability to connect positively with management – no specific employers were identified, and no collateral or documentary information was obtained except Mr. Ndhlela’s say-so. From the payslips uploaded, it can be deduced that Mr. Ndhlela salary again improved with his last move.
- [9] Even before the accident, Mr. Ndhlela moved to improve his salary. After being demoted initially, he once again improved his salary with each move. I accept that he struggles and probably has reached his career ceiling, but he can do the work he is qualified to do. Even though he might be regarded as a vulnerable employee, he secured permanent employment with different employers after the accident and cannot be said to be in sympathetic employment.
- [10] In quantifying loss of future income, particularly where there is a possibility, even slight, that a plaintiff may become unemployable in the future because he might develop epilepsy, a court has to speculate. Pondering how a plaintiff’s injuries’

sequelae would, in the future, impact his employability also entails a speculative exercise. The evidence of the expert witnesses leads a court, but also the reality of the plaintiff's position when the damages are quantified.

- [11] I accept the foundation basis on which the plaintiff's counsel calculated the loss. I accept that Mr. Ndhlela will, in all probability, not reach his pre-accident earning potential. I disagree, however, with the proposed contingency deduction applied to the post-morbid having-regard-to-the-accident scenario.
- [12] Does the evidence indicate that the accident impacted Mr. Ndhlela's future income by impacting his earning capacity significantly? – Without a doubt. Does the evidence indicate that, due to the accident, the possibility of Mr. Ndhlela becoming epileptic and that it may render him unemployable is higher than normal? – Yes. However, the evidence also indicates that Mr. Ndhlela is currently physically and cognitively able to fulfill the functions of an occupational nurse despite the injuries sustained and their *sequelae*.
- [13] Mr. Ndhlela only has one opportunity to claim his loss, and despite uncertainties, the court must quantify his claim. Courts apply contingency deductions to allow for the discounting of these and other uncertainties of life. In calculating his client's loss, counsel submitted that a 70% contingency deduction be allowed for the postulated future 'having-regard-to-the-accident' scenario. This submission is based on the Industrial Psychologist's opinion that higher-than-normal contingencies must apply in quantifying future post-accident earnings.
- [14] As stated, the foundational calculation for post-accident future earnings, having regard to the accident, is based on the assumption that Mr. Ndhlela will be employed as an occupational health nurse and only inflationary increases are provided for. Are the uncertainties that come into play so extensive that the court must accept that Mr. Ndhlela will, in all probability, only earn 30% of his proposed post-accident future income? Definitely not. Having regard to the normal uncertainties faced by employees, as well as the context-specific uncertainties of this matter, e.g., the greater than normal likelihood of epilepsy, I am of the view

that it is just and fair to both parties to allow a 50% contingency deduction on the future having-regard-to the accident scenario.

[15] I already requested the plaintiff's legal representatives to provide me with an appropriate calculation. As far as this calculation is concerned, the order granted is based on the updated actuarial calculation provided, and the plaintiff's claim for loss of income is quantified at R5 491 856.00 before apportionment.

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. L Eloff
Instructed by:	PAS Attorneys
Date of the hearing:	15 February 2024
Date of judgment:	21 February 2024