# IN THE HIGH COURT OF SOUTH AFRICA
# GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

_____ _____

DATE SIGNATURE

CASE NUMBER: 18/5807

In the matter between

**Z, P** **Plaintiff**

and

**ROAD ACCIDENT FUND** **Defendant**

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## JUDGMENT

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**DOSIO AJ:**

**INTRODUCTION**

[1] This is an action for damages sustained by P Z ("the plaintiff"), against the Road Accident Fund ("RAF"), resulting from an accident that occurred on the 28th of June 2017.

[2] The merits were settled and the defendant offered merits 80% in favour of the plaintiff and same was accepted. So too was the issue of general damages settled at an amount of R400 000 subject to an apportionment of 80% in favour of the plaintiff.

[3] The defendant offered an undertaking for future medical treatment relating to the injuries sustained in the motor vehicle collision, limited to 80%.

[4] There are joint minutes by the occupational therapists and industrial psychologists. Both the plaintiff and the defendant obtained actuarial calculations.

[5] The plaintiff obtained an educational psychologist's report, however the defendant did not. The defendant's counsel stated that the RAF did not give an instruction to appoint an educational psychologist. The remainder of the plaintiff's reports remain uncontested.

[6] The defendant's counsel argued that the defendant does not agree with the contents of the report of Ms Mattheus (the educational psychologist), where it states that the plaintiff would have completed his N4-N6 level qualification. Counsel argued that the plaintiff was unable to complete modules for his N2 and N3 qualification and this will not change post the accident. The defendant's counsel contends that Ms Mattheus's opinion influenced the industrial psychologists to make their findings.

[7] The defendant's counsel argued that I should disregard the contents of paragraph 2.12 of the industrial psychologist's joint minute which states that "*We agree should the opinion of Ms Mattheus be accepted, and should Mr Z have had the opportunity to obtain an NQF level 6 qualification (it is however impossible to predict exactly when this may have occurred), Mr Z would have been eligible to secure employment at around the Paterson B2/B3 level. (Basic only).*"

[8] It is within this context that I am to decide the issue of past and future loss of income.

[9] The defendant's actuarial calculation makes provision for two scenarios. The defendant's counsel has requested that I consider the first scenario. The plaintiff's counsel, however, has requested me to disregard the first scenario, as there is no basis upon which the defendant's actuary based it's calculation.

**BACKGROUND**

[10] The plaintiff was born on […] June 1982. He is accordingly 37 years of age. He was 35 years of age at the time of the accident. In 2009 to 2011, he enrolled to complete his N2 and N3 Engineering studies. He passed four of his N2 modules and four of his N3 modules. In August 2016, he re-enrolled in his N2 Engineering studies on a part-time basis but passed only one of his two modules.

**QUANTUM**

[11] As a result of the accident, the plaintiff sustained a left wrist trans radial styloid perilunate dislocation, considered to be severe by Dr. Scher, (the plaintiff's appointed orthopaedic surgeon). As a result of his injuries the plaintiff underwent open reduction and k-wire stabilization, which were later removed. The plaintiff still suffers from a stiff left wrist, moderate left wrist functional and symptomatic impairment, and secondary degenerative changes of the lunate and intercarpal joints. According to Dr. Ramogale, (an independent medical examiner), the plaintiff suffers loss of sensation of the left thumb and index finger which has resulted in episodes of burning himself. His grip strength is weak, preventing him from any weight lifting. In summary he has no left hand function. The plaintiff's neuropsychologist, Ms Talitha da Costa, diagnosed the patient as suffering from severe depression, extreme anxiety / panic and physical pain. Prior to the accident the plaintiff was active, enjoying his gym. He was sociable, patient and friendly. Post-accident he is short tempered, frustrated, and self-conscious about his injured hand. He worries and lacks energy and motivation. The severe pain he is experiencing has reduced attention ability.

[12] The plaintiff's educational psychologist, Ms Mattheus, recorded that the plaintiff obtained his matric in 2001 and obtained a N3 qualification in 2011. During 2016 to 2018 he obtained a learnership at Ekurhuleni Municipality, where he worked as an electrical assistant. Ms Mattheus opines that but for the accident, the plaintiff would have been able to complete his N4-N6 (NQF level 6) in electrical engineering. As a result of his accident he would most probably remain on NQF level 4. In the joint minute of the occupational therapists at paragraph 3.5, the experts agreed that based on Ms Mattheus's findings, the plaintiff's difficulties would have rendered him a vulnerable person and he would not be an equal competitor in the open labour market. Ms Mattheus opines that due to the sequelae of his physical injuries the plaintiff would be excluded from working in the field of electrical engineering.

[13] The occupational therapists, Ms Fletcher and Mr. Makhoba opine that as a result of his injuries the plaintiff is now unsuited to return to any of the previous occupations he has held in the past as he does not meet the physical demands for the occupations. The previous occupations consisted of working as an electrician, a fitter assistant, a crane operator and a fire fighter. The plaintiff will be confined to consider sedentary occupations which are mostly administrative. The plaintiff has been unemployed since May 2018.

**Loss of earnings**

[14] In the joint minute of the industrial psychologists, Ms Leibowitz and Tshepo Kalanko, agree that but for the accident the plaintiff would probably have had the opportunity to obtain an NQF level 6 qualification, even if it is impossible to predict exactly when this may have occurred. As a result, the plaintiff would have been eligible to secure employment at around the Paterson B2/ B3 basic level. Ms Leibowitz opined that the plaintiff would have reached his career ceiling by the age of between 50-55, where he may have been earning in line with the Paterson C3/C4 levels. Thereafter only inflationary increases would have applied until retirement age of 65.

[15] Having regard to the accident the plaintiff earned R2000 per month during his learnership contract which ended at the end of April 2018 and he has remained unemployed to date. He will not meet his pre-accident potential, but may secure employment at the Paterson A3 level with possible progression to the Paterson B1/B2 levels.

**THE LAW**

**Contingencies**

[16] To claim loss of earnings or earning capacity, a patient must prove the physical disabilities resulting in the loss of earnings or earning capacity and also actual patrimonial loss. *Rudman v Road Accident Fund* 2003(SA 234) (SCA).

[17] There must be proof that the disability gives rise to a patrimonial loss, this in turn will depend on the occupation or nature of the work which the patient did before the accident, or would probably have done if he had not been disabled. *Union and National Insurance Co Limited v Coetzee* 1970(1) SA295 (A) AT 300A.

[18] Over time, our courts have accepted that the extent of the period over which a plaintiff's income has to be established has a direct influence on the extent to which contingencies have to be accounted for. Put differently, the longer period over which unforeseen contingencies can have an influence over the accuracy of the amount adjudged to be the probable income of the plaintiff, the higher the contingencies that have to be applied. *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W)392H – 393G.

[19] Based on the decision in *Goodall supra*, Koch[1] argues that as a general guideline, a sliding scale of 0.5% per year over which the applicable income has to be calculated, can be applied.

[20] The basic guideline of a deduction of 0.5% per year for every year over which the income has to be determined was considered by the Supreme Court of Appeal in *Road Accident Fund v Guedes*[2]. Zulman JA considered the argument of Koch pursuant to the Goodall decision and found that the court *a quo* had erred in incorrectly applying Koch's sliding scale. The Supreme Court of Appeal's application of contingencies was furthermore in line with Koch's sliding scale. It is not evident from the judgment what the age of the plaintiff in casu was at the time of the trial, but the plaintiff was 22 years of age at the time of the accident and 28 years at the time of the appeal and therefore probably approximately 25 years at the time of the trial, leaving 40 years up to retirement. The court decided on a deduction of 20%.

[21] In the case of *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at paragraph [9] the court referred with approval to *The Quantum Yearbook*, by R Koch under the heading 'General contingencies', where it states that when:

"[in] assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court. . . ." [my emphasis]

[22] The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%, depending upon the facts of the case. (*AA Mutual Association Ltd v Maqula* 1978(1) SA 805 (A) 812; *De Jongh v Gunther* 1975(4) SA 78

[1] Robert J Koch, The Quantum Yearbook, 2009, p 100
[2] 2006 (5) SA 583 (SCA) paras 9-10, 587H-588F, para 17, 590 H-591A.

(W) 81, 83, 84D; *Goodall v President* 1978(1) SA 389 (W) 393; *Van der Plaats v SA Mutual Fire & General Insurance Co Ltd* 1980(3) SA 105(A) 114-115A-D).

[23] The advantage of applying actuarial calculations to assist in this task was emphasised in the leading case of *Southern Insurance Association Ltd v Bailey* 1984 1 SA 98 (A) 113H-114E , where the Court stated :

"Any enquiry into damages for loss of earning capacity is of its nature speculative… All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award."

[24] Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right". One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. (see *Southern Insurance Association Ltd* supra 116G-H).

**SUBMISSIONS MADE BY THE PLAINTIFF**

**Pre-morbid contingencies**

[25] The plaintiff's counsel contended that normally 0.5% per annum be applied for the remainder of the plaintiff's working life of 30 years since the accident. This will amount to 15%. It was contended that a slightly higher contingency be applied due to the uncertainty whether the plaintiff would have obtained a NQF level 6 qualification in his uninjured state. However, on the other hand, plaintiff's counsel contended that the

dedicated career and educational characteristics of the plaintiff pre-morbid, which were reflected in his continuous efforts to better educate himself, all militates against a much higher contingency deduction. Accordingly it was argued that these particular aspects of the life of the plaintiff merits a consideration of positive contingencies.

**Post-morbid Contingencies**

[26] As positive an influence as the plaintiff's pre-morbid attributes has on the application of contingencies, the exact opposite is true of his attributes and circumstances in the post-morbid scenario. The plaintiff's position is extremely vulnerable, exacerbated by his post-morbid emotional condition. His mental status may prevent him from performing his job to the best of his abilities. Prior to the accident the plaintiff had vast experience in doing medium to heavy work. He has no experience in sedentary administrative work. Post-morbidly, sedentary administrative work seems to be the only work he is suited for.

**DEFENDANT'S SUBMISSIONS**

[27] The defendant's counsel contended that Mr Molapo, who was the supervisor of the plaintiff during the period of internship and who also observed the plaintiff's quality of work after the accident, found that the plaintiff was coping with his work. Counsel contended that due to the fact that the plaintiff is able to cope with his work, he has prospects of securing future employment.

[28] Counsel contended further that due to the fact that the defendant's occupational therapist indicated that he can do sedentary work, this proves that he did not suffer a total loss of earnings. Counsel requested me to use the actuarial calculations of the defendant with specific reference to scenario one, and that in the event that I decide to use the actuarial calculations of the plaintiff, that higher contingencies should be applied on past loss of earnings and future loss of earnings.

**EVALUATION**

[29] Post-morbidly, the plaintiff is a changed individual. He is presently unemployed. He is sad, feels hopeless, can't get pleasure out of the things he used to enjoy, has lost confidence, suffers from severe depression, extreme anxiety/panic and physical pain. The industrial psychologists agree that the plaintiff is more vulnerable and he would not be an equal competitor in the open market. From the joint minute of the occupational therapists he is unsuited to return to work in any of the previous occupations that he

has had in the past and for which he has experience or training. This will affect his employability as he will be competing against similarly qualified individuals in the open labour market. He has no experience or training in sedentary occupations and furthermore such sedentary occupation would have to be completed using one hand and this would significantly reduce his employment opportunities in the labour market.

[30] Even though the educational psychologist stated that it would be unknown when the plaintiff would have completed his N4-N6 level qualifications, Ms Mattheus is still convinced that he would have been able to achieve this.

[31] The defendant's counsel, as previously stated *supra*, contends it is improbable that the plaintiff would ever have completed NQF level 6.

[32] It was crucial for the defendant to have obtained their own educational psychologist report to counteract what was stated by Ms Mattheus. In the absence of any report disputing the findings of Ms Mattheus, I accept that it is probable, notwithstanding the previous failed attempts, to secure the necessary modules to proceed to N4 and to obtain and NQF level 6.

[33] The defendant obtained a calculation from their own actuary, which is called Rosewood Technologies. This actuarial report is based on the joint minute of the industrial psychologists. Scenario one, which relies on the supposition that the plaintiff would never obtain a NQF level 6 calculation, is however not based on the joint minute between the experts. I accordingly find no reason to rely on such calculations alluded to in scenario one and they are disregarded.

**Pre-morbid contingencies**

[34] I accordingly find that but for the accident, the plaintiff would have, (notwithstanding when this would have occurred), have progressed on his career path, as foreseen by the industrial psychologists. Bearing in mind the personal circumstances and work record of the plaintiff, there is accordingly no basis for drastically deviating upwards from the general guideline utilised in the *Goodall* decision supra and ostensibly supported by the Supreme Court of Appeal in the case of *Guedes supra.*I accordingly find that a 20% contingency should be applied in the pre-morbid scenario.

**Post-morbid contingencies**

[35] Although the plaintiff will be confined to sedentary occupation, he will have to complete his work using one hand. This will significantly reduce his employment opportunities. It stands to reason that in the current world wide economical slump, commercial realities will outweigh sympathies and accordingly plaintiff is under a real threat of losing his employment and probably remain unemployed.

[36] I accordingly find that a contingency deduction of no less that 30% should apply in respect of the plaintiff's income projection, having regard to the accident.

[37] Based on the calculation performed by the plaintiff's actuary, the past loss of income in the pre- and post-morbid scenarios are the same (i.e. R19 190). In respect of future income, but for the accident, the plaintiff would have earned R5 436 544 and now that the accident had occurred he will only earn R2 748 959.

[38] After an application of a 5% contingency in respect of past loss and a 20% contingency on the future loss in the pre-morbid scenario, the loss amounts to:

. a. Past loss R19 190
b. Future Loss R4 349 235
(Total) R4 368 425)

[39] After an application of a 5% past loss and 30% future loss contingency in the post-morbid scenario the loss amounts to :

a. Past loss R19 190
b. Future Loss R1 924 271
(Total) R1 943 461)

The difference between the pre- and post-morbid scenarios is accordingly R2 426 964.00.

[40] Although I have disregarded the defendant's actuarial calculation in respect to scenario one, I have still considered the actuarial calculation in respect to scenario two and compared it to the calculations compiled by the plaintiff's actuary.

[41] The defendant's calculations in respect to past loss, remains the same in the pre- and post-morbid scenarios, namely R121 869 versus R19 190 as per the plaintiff's calculation. In respect of future income, but for the accident, the plaintiff would have earned R5 922 980 versus R5 436 544 as per the plaintiff's calculation. Now that the accident has occurred, the plaintiff will only earn R2 900 749 versus R2 748 959 as per the plaintiff's calculation.

[42] In applying the exact same contingencies, namely, 5%, 20% and 30% respectively, (as applied in the plaintiff's actuarial report), to the defendant's figures, the amounts would total the following:
past loss amounts to R115 775.55 (R121 869 – 5%).
But for the accident plaintiff would have earned R4 738 384 (R5 922 980 -20%).
Having regard to the accident plaintiff will now only earn R2 030 524 (R2 900 749 - 30%). Accordingly the difference in future income is R2 707 860 plus past loss of R115 775.55 which amounts to a total loss of income of R2 823 635.55 based on the defendant's calculation versus R2 426 964 as per the plaintiff's calculation.

[43] I accordingly find that the average of R2 823 635.55 and R2 426 964, which amounts to R2 625 299.78 is fair and reasonable compensation for the plaintiff in respect of loss of income.

**ORDER**

[44] In the premises the following order is made;

1. The defendant is ordered to pay a capital amount of R400 000 (FOUR HUNDRED THOUSAND RAND) in respect of the plaintiff's claim for general damages and an amount of R2 625 299.78 (two million six hundred and twenty five thousand two hundred and ninety nine rands and seventy eight cents) in respect of the plaintiff's claim for loss of earnings. Payment shall be made into the trust account of the plaintiff's attorneys on or before 31st of July 2019, details as follows:-

   Mokoduo Erasmus Davidson Attorneys Trust Account
   First National Bank, Rosebank Branch
   Account Number: […]
   Branch Code: 253305.

2. The defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for the costs of the future accommodation of the plaintiff, in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision of 28 June 2017, after such costs have been incurred and upon proof thereof, limited to 80%.

3. The defendant will pay the agreed or taxed party and party High Court costs of the action up to and including 10 May 2019, such costs to include:-

3.1 the costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 1 above;

3.2 all reasonable travelling and accommodation costs of the plaintiff to attend all medico-legal appointments of the defendant and to attend at relevant consultations in preparation for trial and the trial itself;

3.3 the reasonable preparation, qualifying, reservation and travelling and accommodation fees, if any, of all the plaintiff's experts, Such experts to include, but not limited to, Dr Scher, Burger Radiologists, Dr Ramagole, T da Costa, A Mattheus, S Fletcher, L Leibowitz & W Loots, if any as may be agreed or allowed by the Taxing Master;

3.4 time spent in the preparation of indexes and a minimum of 6 (six) copies of said bundles; and

3.5 the plaintiff's attorneys shall serve the notice of taxation on the defendant's attorneys and shall allow the defendant 14 (fourteen) court days within which to make payment of such costs.

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**D DOSIO**
**ACTING JUDGE OF THE HIGH COURT**

**Appearances:**

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|---|---|
| **On behalf of the Plaintiff** | **Adv. AM van der Merwe** |
| **Instructed by:** | **MED Attorney** |
| **On behalf of the Defendant** | **Adv. KH Muswobi** |
| **Instructed by:** | **Twala Attorney** |

**Heard on 5th May 2019**
**Judgment handed down on 18th June 2019**