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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 3865/2018

DATE: 8 OCTOBER 2018

DELETE WHICHEVER IS NOT APPLICABLE

1. Reportable: Yes / No
2. Of Interest To Other Judges: Yes / No
3. Revised

DATE:

SIGNATURE:

In the matter between:

NDLOVU, AGAIN MASITHA

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

WRIGHT J

1. In this trial action the only issue to be determined now is what contingency deduction is to be made on the pre-morbid accident scenario in the claim for future loss of earnings. The parties' counsel have signed a stated case as the basis for determining this sole issue. The stated case is set out below in paragraphs 2 – 22.
2. *"In terms of the provisions of Rule 33(1), (2), (3) and (6) the parties by agreement place before the above Honourable Court the following stated case for adjudication;*
3. *The plaintiff's claim is for personal injuries arising from a motor vehicle collision on 12 February 2013. In this collision the plaintiff suffered a fracture of the right femur.*

4. *The Plaintiff was born on [...] June 1969 and is currently 50 years old.*

B. COMMOM CAUSE

5. *The issue of liability was previously finalised between the parties with the defendant to pay 80% of the plaintiff's damages.*
6. *The defendant rejected the plaintiff's RAF4 and the parties will refer the issue of general damages to the HPCSA.*
7. *The matter was certified ready for trial on the issue of future loss of earnings. In particular, the only aspect that requires determination is the contingency deductions applicable to the pre and post-morbid scenarios.*
8. *The only issue for determination is the question of future loss of earnings from date of trial, 7 October 2019 for the next 15 years, that is the agreed remainder of the expected working life to age 65.*

C. FUTURE LOSS OF EARNINGS

Pre-Accident Scenario

9. *The plaintiff was in possession of grade 12 scholastic education and was already 44 years of age at the time of the collision.*
10. *The plaintiff held the senior position of General Manager within the Prestige Cleaning Services organization, which is a wholly-owned subsidiary of the Bidvest Group.*
11. *The plaintiff commenced his career as a Cleaner in 1989 and worked his way up to Handyman Driver, Supervisor, Area Manager, Operations Manager and finally General Manager in May 2011.*
12. *He elevated from the lowest level to the senior manager level taking responsibility of a wide and difficult portfolio.*
13. *For calculation purposes it is agreed that his post-accident position and remuneration be taken as the basis increasing annually by inflation until retirement age of 65 years.*

Post-Accident Scenario

14. *The plaintiff is employed in the position of Business Unit Manager by Masana Hygiene Services.*
15. *The plaintiff commenced employment at Masana Hygiene Services in February 2014.*

16. *The court is called upon to decide the contingency differential that must be applied.*

D. FACTORS TO BE TAKEN INTO ACCOUNT

17. *The plaintiff was in an accident in 2009 and injured his right femur. An intramedullary nail was inserted at the time.*
18. *A claim was lodged with the defendant for the 2009 accident but no compensation was paid out, for reasons unknown to either party.*
19. *A sliding scale of $\frac{1}{2}\%$ per annum to retirement is proposed by the plaintiff pre-accident. The plaintiff suggests 7.5%, based on his current age of 50 as fair and reasonable, that is, $\frac{1}{2}\%$ per year for the next 15 years.*
20. *The defendant is of the opinion that the pre-morbid contingency deduction should be 20% in view of the plaintiff's pre-existing injury and his diabetic status. The plaintiff has type 2 diabetes, not caused by the accident in question.*

21. *On the post-accident scenario and taking into account the various factors namely shortened leg, reduced range of motion, chronic pain and reduced working capacity, difficulty climbing stairs, difficulty walking long distances, compromised postures, possible knee replacement, it is submitted by both parties that the contingency deduction should be 25%.*
22. *The parties agree that the income of the plaintiff from 7 October 2019 for the next 15 years is R6 400 062. The parties agree that this figure is also the pre-morbid earnings.”*
23. Ms Adam, for the plaintiff, relying on the decision in *RAF v Guedes* 2006(5) SA 583 SCA argued for a half percent per year contingency deduction for the balance of the plaintiff’s working life of 15 years, that is for a deduction of 7.5 percent pre-morbid. Mr Tshigomana, for the Fund suggested 20%, on the basis of the 2009 leg fracture and the diabetic condition of the plaintiff prior to the accident in question. I agree with him but to a limited extent only.

24. While the plaintiff in Guedes was, pre-accident in a stable working environment with an expected remainder of working life of 38 years the plaintiff in the present case was subject, pre-accident to a possible impairment of capacity to work caused by the previous leg fracture and the diabetes, but, while this possibility is small it needs to be taken into account. The fact that the remainder of working life is only 15 years, compared to the 38 years in Guedes tends to keep the vulnerability of the plaintiff, pre-accident less rather than more. In my view, a deduction of 10% pre-morbid, meets the justice of the case.
25. I would have thought that where, as in the present case, it is agreed that the earnings are the same both pre and post-accident there is no loss. However, the parties have agreed to a post-accident contingency deduction of 25%, no doubt on the basis that damages are for loss of capacity to earn and the plaintiff is now more vulnerable economically than he was before the accident in question. I read the stated case to be an agreement that, despite its precise wording, the sum of R6 400 062 for both pre and post- accident earnings is to be read subject to the agreement on the post-accident

contingency reduction and the argument on the pre-accident contingency deduction. Both counsel expressly confirmed my understanding during oral argument.

26. R6 400 062 less 10% leaves a remainder of R5 760 055, 80 from which is to be deducted R6 400 062 less 25%, leaving R960 009,30. The plaintiff has proved R960 009, 30 as damages for future loss of income. This figure is to be reduced by the agreed apportionment of 20% against the plaintiff. The sum payable is R768 007, 44.

ORDER:

1. The question of future loss of earnings is separated from all other issues and the other issues are postponed sine die.
2. The defendant is to pay plaintiff R768 007,44 for future loss of earnings.
3. The defendant is to pay the plaintiff's costs in so far as they were reasonably incurred to allege and prove future loss of earnings.

Appearances:

On behalf of the Adv Adam
Plaintiff:

Instructed by: Corne Van de Venter Inc
011 883 7994

On behalf of the Adv Tshigomana
Defendant:

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Date of Hearing: 8 October 2019

Date of Judgment: 8 October 2019