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

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

SIGNATURE DATE: 17 May 2021

Case No: 33365/2018

In the matter between:

CALVIN THABO MONNAKHOTLE Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

WILSON AJ:

1 The plaintiff ("Mr. Monnakhotle") sues the defendant ("the Fund") for loss caused during a motor vehicle collision ("the collision"). The collision took place at a four-way stop on the Golden Highway to the south of Johannesburg on 5 October 2017. Mr. Monnakhotle was a front-seat passenger in a minibus taxi. The taxi collided with a vehicle which could not, apparently, be identified

or traced. That vehicle and its driver were presumably able to leave the scene of the collision unaided.

Mr. Monnakhotle's injury

2 Mr. Monnakhotle was not so lucky. He sustained a compound fracture of his right tibia and fibula, and was taken to Sebokeng Hospital. There, it was determined that Mr. Monnakhotle had suffered one of the more severe kinds of compound fractures.

3 Dr. Hannes Volkersz, who testified before me to the nature of Mr. Monnakhotle's injuries, said that Mr. Monnakhotle had a class 3b compound fracture on the Gustilo-Anderson scale. Medical professionals use that scale to grade the severity of bone fractures. A class 3b fracture is the second most severe class. In laymen's terms, a class 3b fracture means that, instead of providing a protective layering around the fracture, the haematoma that forms around the wound has flowed out through a break in the skin, the bone is exposed, and the wound has become contaminated.

4 Mr. Monnakhotle apparently received excellent treatment at Sebokeng Hospital. His leg was appropriately debrided, and a ring fixator was fitted to his leg to help the bones set. Serious infection was avoided. Although Mr. Monnakhotle faced a long period of convalescence, his wound was treated as well as it could have been at the time.

5 Nonetheless, the fracture had so damaged the bones and tissues of Mr. Monnakhotle's right leg that it was, in the end, just over two centimetres

shorter than his left leg. The wound has left Mr. Monnakhotle with sporadic bouts of mild pain. His right calf muscles have begun to waste.

6 More importantly, the wound was such that there is a high likelihood of post-phlebitic syndrome developing. This syndrome is caused by damage to the veinous system, which impairs the body's capacity to drain metabolic wastes from the tissues surrounding the compromised vessels. The syndrome can take up to 13 years to develop to its fullest extent, but it is exacerbated by long periods of standing and walking, or any strenuous physical activity involving the affected area. At its most severe, post-phlebitic syndrome can lead to widespread inflammation, pain and ulceration at and around the site of the wound that has led to it.

7 Dr. Volkersz examined Mr. Monnakhotle for the first time just over a year after the accident, on 12 November 2018, and again shortly before the trial commenced before me, on 12 May 2021. He observed that the area of discoloration around Mr. Monnakhotle's wound had expanded by about an inch in the two and a half years since his first examination. This, Dr. Volkersz testified, indicates a heightened likelihood of post-phlebitic syndrome. He stated that Mr. Monnakhotle "will" develop the syndrome, which I take to mean that the onset of the syndrome is at least more likely than not.

8 I deal with Mr. Monnakhotle's injury at this level of detail because its nature and likely consequences are at the centre of this case. After the collision, Mr. Monnakhotle claimed compensation from the Fund. He eventually instituted this action to recover his damages. The Fund admitted liability for all of Mr. Monnakhotle's proven damages. The parties were able to agree on what most

of these damages were, but the effect of the collision on Mr. Monnakhotle's past and future income remained in dispute.

The trial

9 The trial proceeded before me on that issue alone. Mr. Killian, who appeared for Mr. Monnakhotle, informed me that there was no appearance expected for the Fund, because it had recently terminated the mandate of all its private attorneys. The State Attorney was formally on record for the Fund, but, according to Mr. Killian, had only been given instructions to file a discovery affidavit, and nothing more. During the trial, Mr. Killian informed me that, after I had started hearing evidence, the Fund had made an offer to settle, which was being discussed. The trial would nonetheless proceed unless and until an agreement was reached. I have not been informed of any agreement.

10 From all of this, it was clear to me that the Fund had a vital role to play in the proceedings before me, but had chosen not to participate. The Fund clearly had reservations about the nature and extent of Mr. Monnakhotle's claim for loss of past and future income. It remains unclear why the Fund did not state what those reservations were, or at least send a representative to court to assist in the calculation of the damages due.

11 The Fund's defence had, it is true, been struck out by order of Nkosi AJ on 9 March 2021, but Mr. Killian accepted that this did not mean that my task in assessing Mr. Monnakhotle's damages was in any way a straightforward matter. The calculation of damages for future loss of income involves the exercise of discretion, and requires a degree of moral imagination – or what Van der Linde J once more bluntly described as "crystal ball-gazing" (*Chakela*

v Road Accident Fund (33599/2015) [2017] ZAGPJHC 141 (5 June 2017), para 32).

12 In all of this, there is clearly a role for the Fund to assist the court. The decision not to participate in this case (or apparently any other case involving an ordinary claim against the Fund) is said to be motivated by a drive to save costs by settling matters rather than opposing them (see *MT v Road Accident Fund; HM v Road Accident Fund* [2021] 1 All SA 285 (GJ), para 68). But this policy cannot sensibly apply in cases, such as this one, where matters have not been settled by the time the trial commences. Nor does it seem to me to be a cost-saving measure where there is room for a genuine debate about the quantum due, in relation to which the Fund could at least make helpful submissions that might result in it being ordered to pay less than it otherwise would.

13 In other words, it seems to me that each case has to be assessed on its own facts. In cases, like this one, where a court is being asked to engage in a difficult and inexact calculation of damages, an appropriate cost-benefit analysis may well favour sending a representative to court to at least assist it in arriving at a reasonable award.

Mr. Monnakhotle's damages

14 Be that as it may, the action proceeded by default, and I must determine the award without the assistance of the Fund. At the outset of the trial, Mr. Killian abandoned Mr. Monnakhotle's claim for loss of past earnings. He sought only to persuade me that Mr. Monnakhotle's injury would probably result in a loss

of earning capacity in future, and to motivate for an award of damages that would reasonably reflect that loss.

15 I have already summarised the nature and impact of Mr. Monnakhotle's injury. Because it was well-treated, the injury has not debilitated Mr. Monnakhotle as much as it might have. He is still expected to have a working life of an ordinary length, and to retire at a normal age. For the purposes of this case, all of the experts set that age at 65, which seems to me to be reasonable in the circumstances.

16 Mr. Monnakhotle is a pipe-fitter. From the evidence, it seems that he is quite a good one. This sort of skilled manual work does not tend to yield secure, permanent long-term employment, but rather a series of short-term contracts on different construction projects. For several years preceding the collision, Mr. Monnakhotle enjoyed regular, productive and solidly remunerated work. When each of his contracts ended, it did not take him long to attract a new one. Though he was unemployed at the time of his accident, this seems to have been because he had chosen not to take up new work in order to deal with some family affairs that required his full attention. After he recovered from the collision, he found work again fairly quickly, even though he has continued to suffer from mild sporadic pain, and a limited range of movement in his right ankle, which has lowered his productivity.

17 It does not take much imagination to conclude that being a pipe-fitter is physically demanding. But, if expert evidence of this proposition is needed, it has been provided ably by Joanne Tarry, an occupational therapist who testified to the impact of Mr. Monnakhotle's injury on his capacity to work. Ms.

Tarry assessed Mr. Monnakhotle's work capacity by reference the duties of a pipe-fitter, as set out in the Dictionary of Occupational Titles, a professional reference work.

18 Ms. Tarry concluded that the duties of a pipe-fitter (assembling, laying-out, installing and maintaining pipe systems) inevitably involve a great deal of standing, crouching, walking, fetching, carrying, weight-bearing and so on. Ms. Tarry assessed what is required of a pipe-fitter as falling in the high mid-range of the United States' Department of Labour's classification of the physical demands of work, which is apparently a fairly standard scale on which the physical demands of a job are routinely assessed by occupational therapists.

19 Having regard to that scale, a pipe-fitter must generally be able to consistently apply 22 kilogrammes of force to a range of objects. In Ms. Tarry's assessment, after his injury, Mr. Monnakhotle can only consistently apply 15 kilogrammes of force. Ms. Tarry accepted that her assessment showed that Mr. Monnakhotle is capable of applying up to 25 kilogrammes of force when he exerts himself, but Ms. Tarry stated that this level of force could not be kept up for long, and any attempt to do so in Mr. Monnakhotle's state would mean chronic pain and further injury. It is only safe for him to work consistently at the 15 kilogramme level.

20 The deficit between what Mr. Monnakhotle can do, and what he is required to do, is currently made up by his employer tolerating a lower level of productivity, and Mr. Monnakhotle being provided with *ad hoc* assistance from his colleagues at work. This emerged from the report of Karen Kotze, an industrial psychologist. Ms. Kotze was not called as a witness. Her report was confirmed

under affidavit, and Mr. Killian asked that I accept the report into evidence on that basis.

21 A court has a discretion, at least in default judgment proceedings, to receive evidence of damages on affidavit (*New Zealand Insurance v Du Toit* 1965 (4) SA 136 (T)). Where the evidence sought to be admitted is of an expert nature, that discretion should, in my view, only be exercised where the contents of the report are themselves placed under oath by the expert, and the report itself clearly lays out a logical structure of reasoning that links its factual premises to its expert conclusions. Reports that are in any way obscure or weighed down by impenetrable jargon should not be admitted in this way, because the expert can and should be called upon to clarify their process of reasoning by giving oral evidence.

22 Happily, Ms. Kotze's report was confirmed under oath, and set out its process of reasoning and its conclusions clearly and lucidly. Accordingly, I acceded to Mr. Killian's request that Ms. Kotze's affidavit and report be entered into evidence. Where Ms. Kotze relied upon what Mr. Monnakhotle told her, this was confirmed by an affidavit from Mr. Monnakhotle himself.

23 Ms. Kotze confirmed that Mr. Monnakhotle can reasonably expect to work until retirement, and that his average annual income (at least in today's prices) would ordinarily be R232 699.

24 This is not materially different from Mr. Monnakhotle's pre-injury income. However, the nature of Mr. Monnakhotle's work means that he will have to return to the open labour market in future to obtain new contracts on a fairly regular basis. The damage in this case arises from the facts that he is less

productive than he used to be, that he is more vulnerable to injury, and that he is a less attractive prospect on the labour market because of this. The creeping spectre of post-phlebitic syndrome, which Dr. Volkersz has described as a near-certainty, and which is at least a probability, must also be taken into account. If that happens to any significant degree, the impact on Mr. Monnakhotle's ability to earn an income will be fairly severe.

25 In other words, because of all of this, Mr. Monnakhotle probably cannot expect to earn until retirement what he earned before his injury.

26 What has been demonstrated, then, is a loss of earning capacity. It is clear that this is a form of patrimonial loss, and not a species of general damages. See *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) and *Botha v Road Accident Fund* 2015 (2) SA 108 (GP) (see especially paragraphs 14 to 45).

27 Once a loss of earning capacity has been established on a balance of probabilities, that loss is generally quantified by actuarial calculation. The claimant's notional future income is first established. In this case, that income (excepting inflationary adjustments) is the same as his past income. Mr. Monnakhotle is a pipe-fitter. Although he has a qualification in business management, he does not expect to do anything other than pipe-fitting for the rest of his working life.

28 Once a notional future income is established, a "contingency" is subtracted. A "contingency" is a value that represents the vicissitudes of life. Even though we may all hope that our productive capacity will proceed unhindered to retirement, this seldom happens. We get sick. We face unemployment. There

are lean years. Sometimes these years outnumber the plentiful ones. The contingency deduction is meant to account for that.

29 The third step is to incorporate the claimant's injury into the contingency deduction. Although contingencies happen to us all, the injury that Mr. Monnakhotle has suffered is, in the usual course of things, not something that an ordinary person can expect to have to deal with. The increase in the contingency deduction is meant to reflect this. It seeks to quantify the substantially increased likelihood that Mr. Monnakhotle's injury will mean a loss of capacity, employment and income.

30 The final step is to subtract the claimant's probable future income calculated with the increased contingency deduction from the probable future income calculated without it. The difference is the quantum of the claimant's likely loss.

31 In Mr. Monnakhotle's case, this exercise was performed by Mr. Daniel Saksenberg, an actuary who testified to the process of quantifying Mr. Monnakhotle's loss. Mr. Saksenberg testified that awards made in similar cases, and the nature and probable effect of Mr. Monnakhotle's injuries, justified a doubling of the usual contingency deduction applied to actuarial calculations of future income.

32 In other words, if it was not for the accident, Mr. Saksenberg would have reduced Mr. Monnakhotle's notional future income by 15%, to reflect the ordinary contingencies that we are all likely to face and which are likely to reduce our expected future income. The loss of productive capacity caused by Mr. Monnakhotle's injury, in Mr. Saksenberg's view, justified a contingency deduction of 30%, in predicting Mr. Monnakhotle's likely future earnings.

The award

33 On this basis, Mr. Saksenberg testified that Mr. Monnakhotle can expect to earn R699 072 less before retirement than he would have done had he not been injured in the collision.

34 I am not bound by this calculation. The cases appear to take actuarial calculations as generating starting values, to which adjustments can then be made (see, in particular, *Southern Insurance Association v Bailey NO* 1984 (1) SA 98 (A), 116G-117A). This is, at least in part, to recognise the unusually inexact nature of the exercise a court often performs when it calculates damages for loss of earning capacity.

35 A loss of earning capacity does not easily translate into a precise figure that reflects the actual reduction in income a claimant can in future expect. In this case, the loss is latent in the fact that Mr. Monnakhotle does not have the strength he used to have. His residual physical abilities are probably not going to be enough to sustain him, without appreciable loss of income, until retirement.

36 Because of the once and for all rule, we cannot wait and see what loss actually occurs. What is required is a sensible estimate of how the loss of earning capacity will in future translate itself into an actual loss of income. The range of reasonable figures that would compensate Mr. Monnakhotle for his probable loss of future income is accordingly quite broad.

37 The problem in this case is that I have been given no basis on which to make any adjustments to the figure Mr. Monnakhotle has provided.

38 Mr. Killian very fairly pointed out that the Fund administers public money, and that I should have regard to that. But it cannot follow from the mere fact that Mr. Monnakhotle's award will draw on public funds that I should adjust the only sum that has been placed before me that quantifies his loss in any logical fact-based manner.

39 The Fund has declined to participate in the proceedings. Mr. Monnakhotle's representatives have fully documented the claim. Oral evidence in support of the claim has been led for the better part of a day. That evidence shows that the quantum claimed is at least reasonable on the facts. I accept that the evidence led is clear, satisfactory and reliable in every material respect.

40 Accordingly, I do not think it is right to do anything other than accept the evidence and give judgment accordingly.

41 Mr. Monnakhotle Is currently 34 years old. He faces living the bulk of his working life with significantly reduced earning capacity through no fault of his own. The point of the Fund is to insure people like Mr. Monnakhotle against precisely the kind of reduced life circumstances he faces as a result of his injury.

42 The Fund has accepted that it must do so in this case. Mr. Monnakhotle is entitled to what he has proved.

43 There is no reason why Mr. Monnakhotle ought not to be awarded his costs, including the costs of the experts who testified.

44 Accordingly I give judgment for the plaintiff in the sum of R699 072 plus interest and costs.

45 My order is attached to this judgment and marked "**X**".

S D J WILSON

Acting Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 17 May 2021.

HEARD ON:	12 May 2021
DECIDED ON:	17 May 2021
For the Plaintiff:	J Killian Instructed by De Broglio Attorneys
For the Defendant:	No appearance