REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: A163/16

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: YES/NO
2.OF INTEREST TO OTHER JUDGES: YES/NO
3.REVISED

07 December 2020
DATE

In the matter between: -

BEKITHEMBA MASIZA **Appellant**

and

ROAD ACCIDENT FUND **Respondent**

Delivered: This judgment is handed down electronically by circulation to the parties' legal representatives through email and released to the court's library. The date for hand-down is deemed to be 07 January 2021.

Summary: Appeal – The appellant claiming delictual damages arising from motor vehicle collision. Expect evidence – court cannot not ignore joint expert minute, even if one of the expert witness did not testify. Admission of inadmissible evidence – the appeal court has a duty to hear the matter and determine admissibility of evidence. Duty of the trial court to reject inadmissible evidence when giving

judgment, even if there was no objection to such inadmissible evidence. Hearsay evidence on the collateral information from the employer of the applicant and the expert witness declared inadmissible. Hearsay evidence agreed to in the joint minutes admissible.

JUDGMENT

Madiba AJ

INTRODUCTION

[1] This is an appeal with leave of the court *a quo* (Khumalo J. presiding) against certain parts of the judgment delivered on the 23 April 2014. The issue for determination by this court is whether the court *a quo* erred in the approach it adopted in dealing with past loss of earnings (R181 282.52) and the dismissal of the appellant's claim for future loss of earnings / and or earning capacity.

[2] A claim for damages was instituted by the appellant in the court *a quo* as a result of injuries sustained in a motor vehicle collision. He sustained the following injuries in the collision: -

(a) Fractured left clavicle;

(b) Bruised face;

(c) Contusion to the lower back and the right rib area;

(d) Soft tissue injury to the right knee and neck; and

(e) Psychological stress and trauma.

[3] Merits were settled at 100% in favour of the appellant and general damages were resolved on the basis that the respondent (Road Accident Fund) shall pay to the appellant the sum of R150 000.00. An undertaking in terms of Section 17 (4) (a) of the Road Accident Fund Act 56 of 1996 as amended was provided to the appellant.

FACTUAL BACKGROUND

[4] The circumstances that led to the launching of the claim for damages by the appellant are: -The appellant, a Zimbabwean citizen born on the 18 April 1981 was involved in a motor vehicle collision in Limpopo on the 31 May 2008. He was a passenger in a motor vehicle when it was involved in an accident caused by the negligent driving of an insured driver. At the time of the collision, appellant was an illegal immigrant who secured employment in 2002 with his fellow country man as an assistant boilermaker. He had no formal qualifications and earned the sum of R4 500.00 per month. The appellant passed an equivalent of grade ten at a school in his country of birth.

[5] As a result of the injuries sustained in the aforesaid accident, the appellant could not cope with the workload as an assistant boilermaker and had to look for alternative employment. He was ultimately employed as a cleaner in a butchery earning R3 300.00 per month after his business as a vendor selling tomatoes, was unsuccessful.

[6] The appellant consulted the following experts regarding quantification and assessment of his damages claim: -

(a) Dr H.B Enslin: Orthopaedic surgeon

(b) Dr J.J Viljoen Neurosurgeon

(c) Elsabe Krone: Occupational Therapist

(d) Dr W. Pretorius: Industrial Psychologist

(e) Dr J.D Erlank: Plastic and Reconstructive surgeon

(f) Hume and Morris: Actuary

[7] The respondent appointed Dr D.A Birell orthopaedic surgeon, Dr P.C Diedericks Industrial psychologist and Ntebo E Thembo as its experts. Joint minutes reports between Ms Ntebo E Thembo and Ms Elsabe Krone, Occupational therapists and the Industrial psychologists Dr W. Pretorius and Dr P. Diedericks were handed up by agreement between the parties.

[8] The appellant as well as his expert witness Dr Pretorius, Industrial psychologist, testified in the court *a quo.* There was no evidence presented by the respondent during the trial. The only outstanding issue to be decided, in the *court a quo* concerned the appellant's present and future loss of earnings and earning capacity.

[9] The appellant partially succeeded in the court *a quo* in respect of his claim for loss of past earnings in the sum of R181 282.52. His claim for future loss of earnings was dismissed. It is against the order dismissing his claim for future loss of earnings

and/or earning capacity that the appellant approached this court with leave to appeal.

CONDONATION APPLICATION

[10] The appellant applied for condonation for the late filing of the application for a date of hearing of the appeal and the late filing of the record and requests that the appeal be reinstated. The application was granted considering the interest of justice and the fact that it was not opposed.

NOTICE OF AMENDMENT OF NOTICE OF APPEAL

[11] The appellant applied to amend the grounds of appeal to add the ground the court *a quo* erred in calculating the appellant's claims for past and future loss on earnings / earning capacity based on the report by Dr P.C Diedericks. It is common cause that the report did not serve as evidence before the court *a quo* nor did he testify during the trial. The other ground which the appellant wished to include was that the court *a quo* should have relied on the report by Dr Willie Pretorius in determine the Appellant's loss.

[12] It is trite law that an amendment will be allowed only in the event that the issues raised have been thoroughly canvassed in the court *a quo.* In *Sentrachem BPK V. Wenhold 1995 (4) SA 312 A at 606 B-C* the court held that where all relevant evidence is before the court of Appeal, the court ought to decide the case on the real

issues canvassed during the course of the trial in the court *a quo*, without placing undue emphasis on the pleadings.

[13] A reading of the record of the court *a quo* reveals that the ground of appeal sought to be added was canvassed and argued and does not amount to the raising of a new point of law in this instance. In any event a new point of law may be raised on appeal on condition that it was canvassed in the court of first instance and covered in evidence.

[14] A court of appeal will accordingly allow an amendment if it will not be prejudicial to the other party. See *Quartermark Inv. Pty Ltd .V. Mkhwanazi 2014 3 SA 96 SCA at page 103A-D*. The best interest of justice will, at all times, be considered if an amendment should be granted.

[15] I am persuaded that the amendment is in the best interest of justice and that it will cause no prejudice to the respondent. In the circumstances the amendment is granted.

[16] The court *a quo* granted the claim for past loss of earnings and ordered the Respondent to pay to the appellant the sum of R181 282.52. Following the order of the court *a quo* the appellant accepted the payment. However the claim for future loss of earnings and / or loss of earning capacity was dismissed by the court *a quo*. When leave to appeal the order dismissing the refusal of the claim for future loss of earnings and / or earning capacity was launched by the appellant, he failed to appeal against the order granted in respect of the past loss of earnings.

THE PER-EMPTION RULE

[17] The rule in regard to per-emption is that if the conduct of an unsuccessful litigant points indubitably and necessarily to the conclusion that he deliberately did not assail the order of the court *a quo*, he is held to have acquiesced in it. The conduct of such litigant must be unequivocal and inconsistent with any intention to appeal. See *Dabner .V. South African Railways & Harbours 1920 AD 583.* The party alleging per-emption bears the onus to establish that position.

[18] The issue in the present matter is whether the appellant initially not appealing against the order relating to the past loss of earnings and accepting payment made in terms of the order of the court *a quo* should be regarded as having acquiesced in the said judgment.

[19] It is apparent from the reading of the record that the Appellant had intended appealing against the calculation of the past loss as determined by the *court a quo.* In *Minister of Defence and Others .V. South African National Defence Force Union and Another 161/11 (2012) ZA SCA 110,* the court held that the rule of per-emption may be disregarded if it is in the interest of justice to do so.

[20] In any event, a person has a right to appeal a decision he thinks is prejudicial to him unless he has waived his right to do so or his conduct is unequivocal and inconsistent with any intention to appeal.

[21] I therefore hold that the appellant's conduct is not inconsistent with an intention to appeal the court *a quo's* judgment on the basis that it is in the best interest of justice.

EVIDENCE IN THE COURT A QUO

[22] In a nutshell, the appellant's evidence can be summarized as follows: He passed an equivalent of grade 10 at school and worked as an assistant boilermaker earning R4 500.00 per month from 2002 until date of the accident in 2008. He further testified that he had no formal qualification or vocational training in line with boiler-making trade. He acquired knowledge and experience in his trade over a period of time working as an assistant boilermaker at his place of employment. His salary would escalate to about R6 000.00 – R9 000.00 in the event they were contracted to do several big jobs during some months. As a result of the injuries that he sustained, the appellant was no longer in a position to perform and work as an assistant boilermaker. His evidence was never challenged or disputed by the respondent during the trial.

[23] Dr Pretorius testified that the appellant qualified as a semi-skilled boilermaker and that a salary of R4 500.00 per month under his circumstances was not far-fetched as it was commensurate in the open market for semi-skilled employees. He based his conclusion on the appellant's qualifications, comparisons to the corporate sector, the Paterson table / levels and on Koch Quantum Yearbook and other expert reports submitted. Dr Pretorius concluded that based on the evidence of the appellant that he qualifies to be considered on a scale of a higher level semi-skilled

employee and that the appellant would reach a pinnacle of his career at the age 45 years, the same pinnacle of other semi-skilled workers at an open market as well as in the corporate sector.

[24] In a joint minute report Dr Diedericks, differs with the assertions of Dr Pretorius who regards the appellant as an unskilled worker not worthy of earning a salary of R4 500.00 per month as there is no proof to justify the alleged salary. He further questions the fact that the appellant could have worked as a lower level semi skilled worker as at 2002 until the date of the collision.

[25] Both experts (Pretorius and Diedericks) agree that the appellant would struggle to cope with the occupation of an assistant boilermaker due to the said accident and would be expected to cope with sedentary, light and moderate work tasks.

THE JUDGMENT OF THE COURT A QUO

[26] According to the court *a quo,* the only contentious issue to be determined was in respect of the appellant's present and future loss of earnings and earning capacity.

[27] In considering the evidence presented, in particularly that of the appellant, the court *a quo* found that: -

a. The appellant was a single witness to the history and circumstances of his employment, and as such his evidence cannot be trusted. His evidence

was also rejected on the basis that it had serious discrepancies, inconsistencies, contradictions and was highly improbable.

b. The appellant failed to stick to one version as to why he could not produce his salary envelopes,

c. he initially denied having gone to his place of abode after the accident and

d. during cross-examination he admitted that he visited his place of residence and could not find his salary envelopes.

[28] The court *a quo* further pointed out the following discrepancies and inconsistencies in the version of the appellant:

a. He could not with certainty explain where he was actually residing and that his employer was a boilermaker from whom he honed his trade and experience.

b. He conveniently mentioned his employer knowing fully well that the employer was killed in the said accident and no verification could be made.

c. It was strange and suspect that the appellant worked for a period of six years as an assistant boilermaker earning the same salary

d. His explanation as to the grade level he passed was found to be suspect.

[29] In rejecting his version about the grade he passed the court *a quo* noted that Dr Pretorius, testified that the appellant told him that he passed an equivalent of grade 10 (i.e Form 3 in Zimbabwe) and Dr Diedericks on the other hand mentioned that he told him that he completed Form 4 an equivalent of grade 11.

[30] In light of the above the court *a quo* concluded that the appellant's evidence was unreliable. It also found that the other experts' opinions on the earning capacity of the appellant were inconsistent and thus unreliable. It was for this reason that it rejected the version of Dr Pretorius that the appellant was a semi-skilled assistant boilermaker based on the basis that he earned R4 500.00 per month.

[31] The court *a quo* further found concerning the issue of illegality (appellant being an illegal immigrant) will still pervade plaintiff's earning capacity into the future. This issue is dealt with later in this judgment.

[32] Dr Diedericks's recommendation that the appellant's past earnings be discounted found favour with the court *a quo*. It concluded that the appellant failed to establish that at the time of the accident, he had an enduring capacity to legal earnings with a value that in the future would have potentially exceeded his present earning capacity.

GROUNDS OF APPEAL

[33] The main grounds of appeal are that the court *a quo* erred in the following respect:-

a. The court *a quo* erred in dismissing the appellant's claim for future loss of earnings and \ or earning capacity.
b. The court *a quo* used an incorrect calculation in determining the past loss of earning of the appellant.

c. The court *a quo* erred in finding that there were serious discrepancies, inconsistencies and contradictions in the appellant's version.

ISSUES TO BE DECIDED

[34] The issues to be determined in this appeal is the delictual damages for past and future earnings and / or earning capacity and the contingencies to be applied.

SUBMISSIONS AND ARGUMENTS PRESENTED

[35] We are greatly indebted to the appellant's counsel for his in depth submissions which were very helpful. The respondent was not represented during the hearing.

[36] Counsel for the appellant submitted that the evidence tendered by the appellant was never challenged or contradicted and that no witnesses testified on behalf of the respondent including its expert witness Dr Diedericks, the industrial psychologist. He argued that the court *a quo* should have accepted the appellant's evidence.

[37] The appellant's expert witness Dr Pretorius also testified on behalf of the appellant. Counsel for the appellant contended that since the Respondent's expert witness Dr Diedericks did not testify and was not subjected to any cross examination his recommendations are to be rejected. In other words the opinion of Dr Diedericks should not have been considered and accepted as correct.

[38] Both industrial psychologists on behalf of the appellant and respondent prepared a joint minute report and as per their agreement, submitted it to the court. The argument by the appellant's counsel is that despite Dr Diedericks having agreed to the joint minute, he was supposed to have testified to support his views in that report.

[39] My view is that the court cannot simply ignore a joint minute for the reason that its author did not testify. The joint minute report agreed upon constitutes admissible evidence. See *Thomas V. BD Sarens Pty Ltd (2007/6636).* In any event the fact that no evidence to contradict the evidence given by appellant and his expert witness does not mean that the court is bound to accept such evidence. See *Nelson .V. Marich 1952 (3) SA 140 A.*

[40] The parties' Industrial Psychologists could not agree on the basis to be used in the calculation of past and future loss of earnings. The recommendations of Dr Diedericks held sway in the court *a quo* and thus the basis of calculating the past loss of earnings of the applicant by Dr Pretorius was rejected.

[41] The bone of contention in the court *a quo* seems to be; whether the appellant should be classified as a semi-skilled employee in the boiler-making industry and deserving to earn a salary of R4 500.00 per month. Dr Pretorius thinks so while Dr Diedericks has a different view.

[42] The appellant could not provide any proof of his earnings, Dr Diedericks applied the comparison and upper quartile earnings of an unskilled worker which drastically differs with Dr Pretorius who held that appellant was a semi-skilled worker and an assistant boilermaker and should be treated as such. It was contended on behalf of the appellant that the court *a quo* erred in finding that the appellant's evidence was inconsistent and contradictory despite no contrary testimony by the Respondent or its witnesses was before the court *a quo.* Counsel for the appellant further submitted that the court *a quo* failed to consider that the appellant was employed as an assistant boilermaker but granted a claim for past loss of earnings based on 15% contingency factor as opined by Dr Diedericks' basis of calculation. His further submission is that the 15% contingency factor should be deducted from the actuarial calculation in determining appellant's past loss of earnings.

[43] The appellant submitted that the court should have found that a higher than normal post morbid contingency be applicable regard having been had to the appellant's earnings of R4 500.00 per month and his skill as an assistant boilermaker.

[44] My view is that, proof of earnings will be a determining factor in calculating loss of earnings and in the absence thereof the experience and type of work performed by the employee will be of great assistance as it could be compared with an employee of similar skill and experience.

HEARSAY EVIDENCE

[45] The appellant's counsel contended that the evidence tendered by Dr Pretorius included hearsay evidence relating to the collateral information obtained from the appellant's current employer and reports of other appellant's expert's witnesses on appellant's diminished work capacity. The appellant argues that such evidence was not objected to and that the respondent even cross examined on it. Besides conceding that indeed the said evidence amounted to hearsay, the submission is that the parties in the court *a quo* agreed that the court should take cognisance thereto.

[46] The principle of the law is that, where in an appeal it appears that inadmissible evidence has been admitted at the trial without an objection, it is the duty of the appeal court in a civil case to rehear the case and determine for itself on the admissible evidence whether the decision of the court *a quo* was correct. *See President of the Republic of South Africa and Others v South African* Rugby Football Union and Others 2000 (1) SA 1 CC pp 37 – 38 para. 61 – 66.

[47] Where inadmissible evidence has been admitted with or without objection, it is the duty of the trial court to reject it when giving judgment and if it has not done so, it will be rejected on appeal, as it is the duty of the court to decide matters on legal evidence only. A party may however by his conduct at the trial, be precluded from objecting to such evidence. See *Writing of trials by a judge alone Phipson 8th Edition, page 673.*

[48] Although the court *a quo* did not expressly pronounce that the parties did agree it took cognisance thereof (inadmissible evidence). It is apparent that in making its finding the court *a quo* considered the collateral information of witnesses.

[49] In dealing with the reliability or otherwise of the appellant the court *a quo* held as follows:

> *"The evidence of the unreliability of Plaintiff's evidence was unquestionably remarkable. Apparently even the information that the other experts, besides Dr Pretorius and Diedericks, based their assessment on to determine the nature, extent and effect the accident had on Plaintiff's capacity to earn as presented in their reports was inconsistent and discrepant". (In paragraph 21 thereof)*

[50] In rejecting Dr Pretorious' hearsay evidence the court *a quo* in paragraph 20 of its judgment held that: -

> *"… The court also has a problem with the hearsay evidence by Dr Pretorius on the status and environment of the present work of the Plaintiff that he introduced through his testimony and was not adduced by the Plaintiff"*

[51] I am of the view that considering the above, it could not be concluded that the parties in fact agreed that the learned judge in the court *a quo* should take cognisance of the hearsay evidence tendered.

[52] Accordingly, I find that the hearsay evidence on collateral information obtained from appellant's current employer and the appellant's expert witnesses' reports other than those agreed upon in joint minutes are declared inadmissible.

[53] Having said that, and having considered the admissible evidence and joint minutes reports of the industrial psychologists and occupational therapists, I am of the view that appellant's work capacity diminished as a result of the injuries sustained in the collision.

ANALYSIS AND LEGAL PRINCIPLES

[54] In essence, the crisp issue to be determined in this appeal relates to the basis on which the court *a quo* calculated or should have calculated past and future loss of earnings / earning capacity and to make a determination on the contingencies to be applied to the pre-morbid and post-morbid scenarios. There is no doubt that the appellant suffered serious injuries in the accident.

[55] The record and the evidence tendered in this matter, clearly reveal that the appellant was employed at a boiler-making environment and as an assistant boilermaker earning R4 500.00 per month. The argument that there was no proof that he was not earning the said amount is unsustainable more particularly when regard is had to the concession by Dr Diedericks in this regard. The expert witness conceded that it was possible that appellant could have earned R4 500.00 per month.

[56] The view by Dr Diedericks and the finding of the court *a quo* that appellant's version be rejected on the basis that there is no proof of earnings (R4 500.00 per month) despite no contrary evidence to that effect is of no moment. The court *a quo* actually acknowledged and accepted that the appellant was indeed employed and

determined his past loss of earning on 15% contingency following Dr Diedericks view that the salary of R4 500.00 per month was exceptionally high for an unskilled assistant boilermaker such as the appellant. Thus the argument that the appellant was not employed falls to be rejected.

[57] The court *a quo* having determined the past loss of earnings, I with respect, fail to understand the rationale of dismissing the appellant's claim for future loss of earning and / or earning capacity. Dr Diedericks indeed made a calculation on future loss of earnings of the appellant. Accepting Dr Diedericks calculation on past loss of earnings and rejecting his calculations on future loss of earnings while Dr Diedericks used the same basis on both calculations seems to be problematic and unjustifiable.

[58] Simply rejecting the appellant's evidence on the basis that he was the only witness as to the circumstances of his employment history and some contradictions and inconsistencies, is according to me, not enough.

[59] In *S .V. Sauls and Others 1981 3 SA 172 A,* the court held that there is no rule of thumb test or formula to apply when it comes to the consideration of the credibility of a single witness.

[60] The court should weigh evidence of a single witness and should consider its merits and demerits having done so, should decide whether the truth has been told despite its short comings or defects or contradictions in the evidence.

[61] In *S .V. Mkhole 1990 (1) SACR 95 (A),* the court held that, contradictions per se do not lead to the rejection of a witness' evidence, they may simply be an indication of an error. Not every error made by a witness affects his credibility.

[62] In view of the appellant's failure to state with certainty whether he did go to his place of abode or not after the accident to check on his salary envelopes could not have materially affected his credibility to the extent that it warranted a credibility finding against him.

[63] Despite the appellant being a single witness as to the history and circumstances of his employment and some contradictions and inconsistencies, I find that such contradictions, inconsistencies and discrepancies were immaterial and did not negatively affect his credibility.

APPELLANT AN ILLEGAL IMMIGRANT

[64] It was contended on behalf of the Respondent that the appellant being an illegal immigrant in South Africa had to justify the consideration of his illegal earnings which he failed to do.

[65] A litigant has to raise the issue of illegality in his pleadings and can therefore not rely upon and argue it as a dispute not contained in his pleadings. The submission by the counsel for the Respondent that appellant's alleged income should not be considered at all as it was illegal was correctly rejected by the court *a quo* as misguided. To dispute appellant's alleged salary of R4 500.00 per month on

the basis that as an illegal immigrant would not get the same opportunities like South Africans and would therefore earn less without any evidence to that regard is unfortunate and should accordingly be rejected as it is factually and legally incorrect.

[66] Equally so, that a court should take judicial notice that foreigners get less opportunities and earn less solely based on the notion that they are illegal immigrants is not supported by any fact or evidence in this matter and cannot be accepted. The notion that his being illegal in South Africa will pervade appellant's earnings into the future without any proof thereof is unfortunate.

CALCULATION OF PAST AND FUTURE LOSS OF EARNINGS

[67] Dr Diedericks based his calculation on the medium and upper quartile earnings of an unskilled worker in the non-corporate sector in the labour market. Whereas Dr Pretorius calculations are based on a higher level of a semi-skilled employee thus relying on appellant's qualifications as compared to corporate sector, Paterson table and on Koch Quantum Year book as well as the market rates for a semi-skilled employer. There is no dispute that the appellant was employed and that he has a claim for past loss of earning and earning capacity.

[68] It is not contested that the injuries sustained by the appellant have compromised his ability to perform the work of an assistant boilermaker as he had done pre-accident.

[69] Although the appellant is able to cope with sedentary physical parameters of his current work, he has not been trained to perform any other work of a physical nature. The appellant would therefore be disadvantaged to compete fairly in the open market.

[70] In view of the evidence presented by the appellant on his claim for future loss of earnings and/or earning capacity, I conclude that a case for a claim for future earnings is justified under the circumstances and should not have been rejected in the court *a quo.*

FUTURE LOSS OF INCOME

[71] When claiming for future loss it is to be proved on the balance of probabilities that the claimant will suffer financial loss or diminution of his income. There must be proof that the reduction in earning capacity gives rise to pecuniary loss. See Rudman .V. Road Accident Fund 2003 (2) SA 234 SCA.

[72] In *Sandler .V. Wholesale Coal Suppliers Ltd 1941 A 194 it was stated that: -*

> *"It is no doubt exceedingly difficult to value damage in terms of money, but that does not relieve the court of a duty of doing so upon the evidence placed before it. This is a principle which has been acted on in several cases in South African Courts."*

[73] As aforementioned the issue is really which contingencies are to be applied under the circumstances.

> *"Contingencies have been described as the normal consequences and circumstances of life, which beset every human being and which directly affect the amount that a plaintiff would have earned."*

See AA Mutual Insurance .V. Van Jaarsveld 1974 SA 729 (A).

[74] In determining the probabilities, the courts usually allow for certain contingencies from deducting a certain percentage from damages awarded. The court has to decide what is fair and reasonable on the information provided. It is stated in The *Quantum Year Book 2018 by Robert Koch at page 114* that: -

> *"When 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 and there are no fixed rules as regards general contingencies."*

NORMAL CONTINGENCIES

[75] The normal contingencies acceptable are 5% for past losses and 15% for pre-morbid future income.

[76] In *Southern Insurance Association Ltd .V. Bailey No 1984 1 SA 98 (A) at 113* G the court held that:-

> *"An enquiry into damages for loss of earnings capacity is of its nature speculative, because it involves a prediction to the future, without the benefit of the crystal balls, soothsayers, augurs or oracles. All the court has to do is to make an estimate, which is often a very rough estimate of the present value of the loss."*

[77] As aforesaid the calculation of quantum for future loss of earning capacity is not a matter of exact mathematical calculation. Despite all this hurdles, the court has to make an award which is fair and reasonable based on the evidence presented.

CALCULATIONS BY HUMAN AND MORRIS ACTUARIES

[78] The past and future loss of earnings has been calculated by Human and Morris Actuaries. No contingencies have been applied by the actuaries and are left for the court to determine. Both favourable and adverse contingencies have to be taken into account. Bearing in mind that contingencies are not always adverse, the court should in exercising its discretion lean in favour of the appellant as he would not have been in the position where his income would have to be the subject of speculation if the accident had not occurred.

[79] I find that there is no reason why the normal contingencies i.e. 5% for past loss of earnings and 15% for future loss of income should not be applicable regard being had to the evidence presented.

[80] As per the actuarial report, the calculations are based on the information which indicates that the appellant will no longer be able to earn an income as an assistant boilermaker due to the sequelae of the collision he was involved in. Based on the evidence tendered including the joint minute reports by Occupational Therapists and Industrial Psychologists, a higher contingency of 50% is justified under the circumstances of this matter. In consideration of the factors such as limited job choices, decreased competitiveness and work performance as well as the need for treatment and accommodation at the place of work, a higher than normal post morbid contingency had to be applied. Both experts (Dr Pretorius and Dr Dierdericks) proposed a higher contingency to be considered due to not being able

to determine with a level of certainty the potential future impact of the accident. My view is that 50% contingency deduction should be applied.

[81] Accordingly, the delictual damages for future earnings and earning capacity should have been calculated on the basis of 5% for past loss of earnings, and 15% for future uninjured loss of income with a 50% deduction contingency for future loss of income. My finding is therefore that the contingency deduction of 5% for past loss of income and 15% for future loss of earnings with a 50% contingency deduction for future loss of earnings will be fair and equitable in the circumstances of the present case.

[82] The court *a quo* therefore erred in dismissing the appellant's claim for future loss of income and relying on Dr Diedericks contingency calculations.

[83] I accept as fair and appropriate the proposed amount of loss to be awarded to the appellant as reflected in the actuarial report of Human and Morris Actuaries (**BUNDLE E page 116)** as follows: -

	UNINJURED	INJURED	NET
PAST INCOME CONTIGENCIES	272 2229. 00	37 700. 00	238 529.00
NET PAST INCOME	272 229	33 700	238 529
FUTURE INCOME CONTIGENCIES	1 348 182 .00 1348 182	671 535 0 671 535	676 647 0 676 647

NET FUTURE INCOME			
TOTALS	1 620 411	705 235	915 176

[84] Taking into account the contingencies as determined and as per the finding on contingencies aforementioned, the following calculations are fair and equitable.

Past Loss of earnings	R272 229 – 33 700.00
	= R238 529.00
Minus 5% contingency	R11 926.45
Past Loss	R226 602.55
Minus past loss	
Already paid	R181 282.52
Total past loss	R45 320.03

FUTURE LOSS OF INCOME

Future Uninjured Income	R1 348 182.00
Minus 15% contingency	R202 227.30
Total Future Uninjured Income	R1 1459 954.70
Future Injured Income	R671 535.00
Minus 50% contingency	R335 767.50
Total Future Injured Income	R335 767.50
Future Loss of Income	
Future uninjured income	R1 145 954.70
Less: Future Injured	R335 767.50
Total Future Loss	R810 187.20
TOTAL Loss	R45 320.03

ADD TOTAL FUTURE Loss	R810 187.20
Total loss	
	R855 507.23

CONCLUSION

[85] Having considered the circumstances and evidence presented in this matter, the appeal is upheld. In the circumstances the appellant is awarded the following amounts for damages:-

Past Loss of Income	226 602.55 (181 282.52 + 45 320.03)
Future Loss of Income	R810 187.20
TOTAL Loss	R1 036 789.55

[86] Accordingly, and in view of the above, I propose the following order: -

ORDER

1. The appeal is upheld with costs.
2. The judgment of the court *a quo* is set aside and replaced with the following: -

2.1 The appellant's claim for past and future loss of earnings are granted.

2.2 The Respondent is ordered to pay to the appellant the following amounts for damages: -

Past Loss of Income	R45 320.03
Future Loss of earnings	R810 187.20
TOTAL Loss	R855 507.23

3. Interest on the amount of R855 507.23 at the rate of 10.25% per annum calculated 14 days from date of judgment to date of payment.

4. The total amount is payable to the appellant's attorneys of record's trust account within 14 days from the date of judgment, details being: -

SAVAGE JOOSTE & ADAMS INC. PRETORIA
Nedbank NEDCOR – ARCADIA
ACCOUNT TYPE TRUST ACCOUNT
BRANCH CODE: 16-33-45-07
ACCOUNT NO: [….]

_____

MADIBA AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

I agree

_____

MAKUME J

Judge of the High court

Gauteng Division, Pretoria

I agree

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MOLAHLEHI J

Judge of the High Court

Gauteng Division, Pretoria

REPRESENTATION

FOR THE APPELLANT: ADV. P.J VERMEULEN SC

INSTRUCTED BY: SAVAGE JOOSTE & ADAMS INC.

ATTORNEYS FOR RESPONDENT: IQBAL MAHOMED ATTORNEYS

NON REPRESENTATION ON APPEAL

HEARD ON: **05 Agust 2020**

DELIVERED: **07 January 2021**

APPELLANT'S ATTORNEYS

SAVAGE JOOSTE & ADAMS INC.

CNR BROOKLYN & JUSTICE MAHOMED STREETS

MENLOPARK

PRETORIA

E MAIL: rghnotices@savage.co.za

REF: Mr Hayes/M Havemann/RP2733

TEL: 012 452 8200

AND TO:

IQBAL MAHOMED ATTORNEYS

ATTORNEYS FOR RESPONDENT

262 VERMEULEN STREET

PRETORIA

REF: M20198/P Moonsamy/RAF/DM

AND TO:

ROAD ACCIDENT FUND