REPUBLIC OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 31641/2012

In the matter between:

VITORINO AUGUSTO **PLAINTIFF**

AND

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

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ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

BAQWA J

[1] This is an action for damages in terms of the Road Accident Fund Act 56 of 1996 (The Act) for damages as a result of an accident which occurred on 23 October 2009 at approximately 17h00 in Dolomite Street, Carletonville.

[2] The plaintiff was a passenger in motor vehicle T[…], the insured vehicle, which was driven by one David Monyau when the said vehicle left the road and collided with a tree.

[3] The issue of liability has been resolved in favour of the plaintiff and defendant is liable to compensate plaintiff for damages he sustained in the collision.

[4] Other issues that have been settled between the parties are past medical, hospital and related expenses, future medical, hospital and related expenses and general damages.

[5] Past medical expenses have been agreed at R109,501.61, general damages at R550,000.00 and defendant will provide plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 as amended namely an undertaking that the defendant will pay the costs for the plaintiff's accommodation in a hospital or nursing home for treatment or of, or rendering of a service or supplying of goods to him as a result of the injuries sustained a motor vehicle accident which occurred on 23 October 2009.

[6] The only issue that remains for determination is the issue of loss of earnings or loss of earning capacity.

[7] The approach which a court should adopt in considering the issue of future loss of earnings was eloquently described by Nicholas AJA in **Southern**

Insurance Association v Bailey NO 1984(1) 98 at 113G to 114A when he stated as follows:

''Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. 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 to 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 guess work, 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. See* ***Hersman v Shapiro & Co 1926 TPD 367*** *per Stratford J:*

''Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.''

[8] Only one witness took the witness stand in this case due to the fact that the medico-legal reports of various experts, including the correctness thereof were admitted by consent. The witness called by the plaintiff was Jacobus Johannes Prinsloo an industrial psychologist.

[9] Mr Prinsloo formulated the report on plaintiff assisted by Dr Yvette Wilms. He testified with reference not only to that report but with reference to other reports such as the report of Dr Kobus Truter, the clinical psychologist and Ms Abida Adroos an occupational therapist. He also made particular reference to the actuarial report filed by Messrs Human and Morris Consulting Actuaries.

[10] I do not propose to transverse, in this brief judgment, the various aspects of plaintiff's life, past and present physical and psychological condition in relation to the accident. The need to do so is circumvented by the fact that Mr Prinsloo has already gone through that process in his report. In that report he covers aspects such as the injuries sustained by the plaintiff, his level of education and educational history, his physical appearance and clinical history, current complaints and more relevantly to the issue. I now have to determine his employability and career prospects.

[11] In this regard, in both his testimony and in the report he dealt with plaintiff's pre-morbid employability and career prospects and his post-morbid employability profile.

In the synthesis of his employability profile he states that at the time of the accident plaintiff was forty two(42) years old and functioning in the 'achievement career phase'. He is of the opinion that plaintiff had already realised his career pinnacle and that he would most probably have worked in a position of similar complexity until sixty (60) years of age.

He states that plaintiff only returned to work in October/November 2010 approximately twelve (12) months after the accident in question occurred. As no documentation was available, he could not testify about his loss of income in this regard.

[12] Mr Prinsloo gave a synopsis of diagnosis, prognosis and opinions, with regard to post morbid employability and earning capacity with reference to other reports as aforesaid which he summarised as follows:

- Mr Augusto has limited tolerance for standing, walking, climbing and load handling.
- His postural endurance for standing is limited and he struggles with prolonged stooping.
- His work speed falls below the open labour market standards and his walk speed falls below the norm of his age and gender.
- He will experience difficulty with prolonged walking, especially on uneven terrain.

[13] In reference to Ms Adroos's report Mr Prinsloo stated that plaintiff would not be able to perform the work he did prior to the accident. He further stated that whilst plaintiff has the employment potential capacity (EPC) to function in the South African Labour Market he has a number of career handicaps which would negatively impact his capability for obtaining new employment if required, his career development and his ability to sustain employment.

He comes to the conclusion that based on his limited educational attainment, focused competencies and physical restrictions, to wit, light sedentary work where he can sit for most of the day, he has become functionally unemployable in the open labour market.

[14] It is common cause that plaintiff returned to work about twelve months after the accident and his employer for whom he had worked for a period of twenty three (23) years gave him alternative work in the laundry section of the mine. It is also common cause that he worked in this position which was mostly sedentary for a period of about two (2) years until he was retrenched.

[15] It was precisely because of this fact and the views expressed by Dr Van Den Bout and Birrell (orthopaedic surgeons) that Mr Prinsloo was cross examined by Mr Kokelo (for the defendant) to challenge Mr Prinsloo's conclusion regarding plaintiff's being functionally unemployable in the open labour market.

Mr Prinsloo gave what appears to me to be a fairly plausible explanation of what on the face of it could appear to be a contradiction. He explained that whilst the orthopaedic surgeons gave the clinical conclusions and the occupational therapist gave an opinion regarding the functional side of the plaintiff, he had to deal with the industrial psychologist or open labour market perspective. This is the paradigm that led him to the functional unemployability conclusion.

[17] As explained by Mr Prinsloo and contrary to Mr Kokelo's submissions, the fact that plaintiff had been re-employed in a sedentary position, given the physical and psychological sequelae of the accident, does not logically translate into plaintiff employing the same capability in the open labour market. I accordingly accept the views expressed by Mr Prinsloo in this regard. I do so precisely because there is no countervailing evidence presented by the defendant be it expert or otherwise.

[18] Using the information supplied and assumptions made contained in the report of the actuaries both parties have accepted the figures contained in that report

with regard to past income contingencies. The agreed past income figure is R218.243 less five (5) per cent contingencies which gives a total of R207,330.85.

[19] A hotly contested issue has been the contingencies applicable to the net future income. Mr Kokelo has also submitted that if is incorrect to assess future income(injured) at zero because according to him plaintiff could still possibly earn a living. Needless to say Mr Alberts S.C has argued strenuously to the contrary and submitted that the appropriate contingency percentage to the net future income should be 10 percent whilst Mr Kokelo argued for a thirty per cent contingency deduction. Mr Alberts submits and I accept that whilst previous decided cases can be of assistance each case should be adjudged on its own merits. I am not persuaded that a thirty percent contingency would be appropriate in the present case and I have decided to apply a ten percent contingency.

[20] The net future income applicable according to the actuarial calculation is R988,170.00 and applying a ten per cent contingency deduction to that figure gives us the amount of R889, 353.00.

[21] The total loss of income (past and future is therefore the sum of R1,096,683.85.

[22] The total award to the plaintiff is therefore as follows:

Past medical expenses	R109,501.61
General damages	R550,000.00
Net past income	R207,330.85
Net future income	R889,353.00

Total	R1,756,185.46

[23] In the result the draft order handed in (as amended) is marked ‘’**X**’’ and made an order of court.

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S.A.M BAQWA

(JUDGE OF THE HIGH COURT)

Counsel for the plaintiff:	Adv G.W Alberts S.C
Instructed by:	Savage Jooste & Adams Inc
Counsel for the defendant:	Adv F.J Kokela
Instructed by:	Ledwaba Inc