




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
DATE 9/2/16	 SIGNATURE

CASE NO: 6668/2013

9/2/2016

In the matter between:

JOSEPH POTGIETER

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MOTHLE J

1. Joseph Potgieter, a major male truck driver, (*"the Plaintiff"*) has instituted action against the Road Accident Fund (*"the*

Defendant") for damages arising out of injuries sustained in a motor collision which took place on 14 February 2012 on the N2 near Victoria West.

2. The parties have settled the merits with the Defendant accepting liability. Certain aspects of the claim such as general damages have also been settled by the parties. The only issue on which the parties proceeded before this Court was the question of contingency deduction which should apply in determining the future loss of income.
3. The Plaintiff contends that 8% contingencies should be deducted on the amount claimed for loss of income, while the Defendant contends that 60% should be deducted as contingency.
4. In support of its contention, the Plaintiff called one of the experts Dr Read, an Orthopaedic Surgeon who filed two post-accident reports, after examining the Plaintiff. The Defendant on the other hand had neither witnesses to call nor any expert report filed. Its submissions were based solely on the reports of the Plaintiff's experts.
5. It is apposite to state the facts briefly as follows:

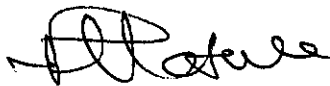
- 5.1 Dr Read in his medico-legal report notes that prior to the accident, the Plaintiff had numerous procedures and injuries which included an appendectomy when he was 8 years old; he has had four prior back surgeries to his lumbar spine as a result of injury while in the army in 1988; he had a fractured C-spine which was treated with traction in 1993; in 1997 the patient had renal and liver injuries, caused in a motor vehicle accident; in 2001 he had an injury to his right shoulder; in 2011 he had a Myocardial infraction and he is on treatment for cholesterol and hypertension.
- 5.2 In 2012, the Plaintiff had undergone a popliteal by-pass on the left lower limb. The surgical wound from that by-pass was in the process of being healed when he was involved in this accident in February 2012. As a result of the accident in question, the open surgical wound that was sealed during the by-pass re-opened. During the accident itself he suffered bone structure on the tibia below the knee.
6. Dr Read testified further that shortly before this accident and following the vascular by-pass, the Plaintiff was cleared by Dr Pillay as being fit to resume work as evidence showed that he was on the road to recovery. The accident occurred a few days after he was so cleared. In fact, it was stated that he met the

accident in February 2012 on the first day of his reporting to work while travelling from Johannesburg to Cape.

7. After the accident the Plaintiff had four surgical operations two of which resulted in the amputation, first of the lower limb of the left leg below the knee and thereafter the amputation of the rest of remaining left leg. The other two operations were made in an attempt to rescue the leg.
8. It seems to me that from the report of the Plaintiff's experts, one of which was confirmed by Dr Read giving evidence in Court, agree that the loss of the left leg which has rendered the Plaintiff unemployable as concluded by the Industrial Psychologist, Dr Fourie, was jointly caused by the Plaintiff's pre-accident medical condition as well as the injury sustained during the accident itself. Their view is that the pre-existing conditions have substantially contributed to the loss of limb to the extent of 60% (by Professor Pantanowitz) and to the extent of 50% (by Dr Read).
9. The Plaintiff placed before the Court an actuarial assessment of compensation and calculations prepared by Ivan Kramer CC, Fellow of the Actuarial Society of South Africa. In that calculation, he applied a deduction of 8% for contingencies.

10. Much as the evidence before Court, which has not been contested or disputed by the Defendant, is that the Plaintiff at the time of the accident was on the road to recovery from his pre-accident medical condition, it is not suggested anywhere in the evidence that the injury on the lower left leg by itself was the sole cause of the amputation which has rendered him unemployable. Under these circumstances, I am of the view that a contingency deduction of 8% is too low. On the other hand, a contingency deduction of 60% as contended for by the Defendant loses sight of the fact that but for the accident; the Plaintiff's prospects of recovery would have been good. 60% contingencies deduction would not under the circumstances be fair to the Plaintiff. It needs to be mentioned that the Defendant did not file any expert report or presented any evidence that would have been of assistance to the Court.
11. I am of the view therefore based on the expert reports before me a contingency deduction of 15% would be fair and reasonable for both parties.
12. I have requested the parties to submit a draft order and include therein all other items that have been settled as well as a recalculation by Ivan Kramer based on my finding concerning contingency percentage.

13. I have received the draft order and the re-calculation by Ivan Kramer CC, which have been agreed to by the parties. I have endorsed them as an order of this Court. Both documents are attached to this judgment as annexures A and B respectively.



SP MOTHLE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

PRETORIA.

Date of Hearing: 28 January 2016.

Date of Judgment: 9 February 2016.

This loss of income calculated consists of two components:

Accrued Loss	The loss of earnings for the period between the accident date and the valuation date.
Prospective Loss	The loss of earnings for the future period after the valuation date.

The actuarial assumptions used in calculating the loss are as follows (where applicable):

FACTOR	ASSUMPTION
Future Rate of Salary Inflation	In addition to any promotional increases, future income after the valuation date is assumed to increase in line with future salary inflation taken to be at the rate of 6% pa. Salary inflation between the report date and the valuation date has also been taken as 6% pa.
Investment return on lump sum	The capital value of the prospective loss needs to be reduced to take account of future investment income that could be earned on the capital sum until the occurrence of the future losses. I have assumed an after tax investment return of 8.65% pa. This has been chosen in conjunction with the 6% pa salary inflation rate mentioned above, to give an investment return, net of inflation, of 2.5% pa (1.0865 divided by 1.06 equals 1.025).
Past Mortality	No allowances are necessary (the claimant has survived until the valuation date).
Future Mortality	I have assumed that Mr Potgieter was in good health prior to the accident in terms of factors that may have impacted on mortality, and that the accident has not affected his life expectancy. I have used Life Table 4 Males (Quantum Yearbook) to assess his future life expectancy.
Past Income tax	Actual tax rates have been used in the calculations.
Future Income Tax	It is assumed that tax rates applicable for 2015/2016 will continue at the same level in future adjusting for inflation.
Interest on Accrued Losses	No allowance has been made in the calculations.

7. GENERAL CONTINGENCIES

A deduction for general contingencies needs to be made to allow for savings in travelling to and from work and the possibility of loss of income due to illness or unemployment. This contingency factor is a subjective issue, which would be a decision of the court. I have been instructed to use the deductions below.

S. J. P.

	Value of income but for the accident	Value of income having regard to the accident
Accrued	5.0%	0.0%
Prospective	15.0%	n/a

8. R160,000 LIMIT

For accidents after 1 August 2008, the Road Accident Fund Act 1996 makes allowance for a maximum loss of R160,000 pa. The calculations have been done in accordance with RAF v Sweatman (162/2014) [2015] ZASCA 22 (20 March 2015).

Allowance is made to adjust the annual limit every 3 months after August 2008 until the accident date to counter the effects of inflation.

The limit has been applied to the present value of the loss after allowance for deduction of taxation, mortality, net discount rate, contingency deductions.

The limit is not applied individually to the value of income "but for the accident" or "having regard to the accident" but is only applied to the net loss.

Note that the limit is based on the general contingencies shown above. If the contingencies change, the limit may be affected.

The results first show the net loss without the application of the limit and then the net loss once the limit is applied.

9. RESULTS

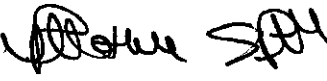
Results are shown on the next page. The loss of income shown is the difference between the value of income "but for the accident" and "having regards to the accident".

The full loss of income is shown in the results. Any apportionment should be applied the loss shown.

Note that the values will change with the passage of time and may need to be recalculated if there a significant delay between the valuation date and the settlement date.

Yours faithfully

I B Kramer
Fellow of the Actuarial Society of South Africa


4/2/16

JOSEPH POTGIETER

Values below are in Rands

but for the
accident

having regard to
the accident

NO LIMIT APPLIED
net loss

LIMIT APPLIED
net loss

Gross accrued value of income	444 679	39 494		
Less contingency	22 234	0		
Net accrued value of income	422 445	39 494	382 951	379 780
Gross prospective value of income	2 541 158	0		
Less contingency	381 174	0		
Net prospective value of income	2 159 984	0	2 159 984	2 159 984
Total value of income	2 582 429	39 494	2 542 935	2 539 764
Contingency %				
accrued	5.0%	0.0%		
prospective	15.0%	0.0%		

28/09/10
9/12/10