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**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**CASE NO: 71956/2014  
18/7/2019**

In the matter between:

**O.N KHATHWANE**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

**JUDGMENT**

**STRYDOM (AJ)**

1. The matter stood down for a recess allocation from the 26<sup>th</sup> of April 2019.
2. The parties have agreed on all heads of damages, save for the issue for the loss of income.
3. It was confirmed that the reports and the joint minutes are common cause and that argument would proceed on the issue of the contingencies to be applied.

**INJURIES AND SEQUALAE:**

4. The Plaintiff, in this instance, sustained a severe injury to the ulnar nerve of his left arm, which has consequently resulted in a "claw-like" contracture

of the hand. This is caused by the paralysis and atrophy of his intrinsic hand muscles (which is supplied by the ulnar nerve) and therefore the extrinsic hand muscles pull the fingers into a claw configuration, as they are unopposed. This has caused a significant loss of left hand function and grip strength. It being 9 years since the accident, a primary repair of the nerve will not be possible and, as such, the condition is permanent.

5. The Plaintiff was in Grade 11 when the accident occurred in 2010. He was 19 years old at that stage. He returned to school and managed to obtain his Grade 12 in 2011 and proceeded to complete a certificate of competence in slinging and rigging in 2013.
6. The occupational therapists are in agreement that he is unable to work as a rigger in that he is, following the accident, only able to perform sedentary to light physical work and he is no longer able to function in a medium, heavy or very heavy work capacity. Even though he can manage some mid-level medium work it will aggravate his symptoms.
7. In their joint minutes, the industrial psychologists (with regards to his uninjured income potential) referring to the fact that the Plaintiff obtained a Grade 12, as well as a certificate, agreed that he would probably have entered the labour market as a semi-skilled worker, after completing his Grade 12 and a certificate.
8. In that event, having established himself in the corporate labour market sector, he potentially may have entered on the lower quartile of Patterson A3 level and progressed in a straight line to the medium quartile of a Patterson B4 level, at the age of approximately 45.
9. They further note that it would not have been easy for the Plaintiff to secure employment in the corporate sector given the fact that the corporate sector accounts for 25% of the workforce.
10. They are further in agreement that he would have struggled to obtain an appropriate position and would have experienced periods of unemployment. These risks are best addressed by way of way of an

appropriate pre-accident contingency.

11. Following the accident they agree that he will be able to follow a career progression as postulated pre-accident, but due to the limited job opportunities that would accommodate his injuries he may experience longer periods of unemployment and will no longer be able to reach his pre-accident potential employment ceiling.
12. The industrial psychologists, again, agree that this needs to be addressed by means of higher contingency deduction than pre-accident in the post-morbid scenario.
13. During argument, counsel for the Plaintiff sought to apply a so-called "*spread*" of 50% between the pre- and post-morbid income to countenance the effect of the Plaintiff's injuries on his earning potential. Counsel for the Defendant contended that this spread should be in the region of 20%.
14. It is important to note, at this juncture, that the concept of a "*spread*" merely refers to the differential between pre-morbid contingency and the post-morbid contingency.
15. In instances such as the present one, where the base earnings are exactly the same pre- and post-accident, mathematically the straight deduction of this "*spread*" comes to the exact same figures as it would have, had contingencies been applied to the pre- and post-morbid scenarios individually, before deducting the post-morbid income from the pre-morbid. (In the case where there is a difference between the earnings pre-morbid and post-morbid, naturally, one would apply specific contingencies to each of the scenarios first).
16. The Plaintiff's counsel led the oral evidence of the Plaintiff. The Plaintiff indicated that he did, in fact, study for the rigging certificate after the accident and that there was a theoretical component, as well as a written exam involved. This course took six (6) months.
17. The Plaintiff, furthermore, showed the Court the *sequelae* of the injuries to his ulnar nerve, and it was noted that his fingers are unable to extend and are fixed in a permanent claw-like position.

18. The Plaintiff testified that he had previously worked as a gardener, but that he found it difficult and, upon questioning by the Defendant's counsel, stated that, he could do other work, but he "*thinks*" that it would be too difficult for him.

#### **EVALUATIONS OF EVIDENCE AND ARGUMENTS:**

19. The issue of contingencies, as well as the correct application thereof, is one that has plagued practitioners since the inception of the mathematical approach and seems to be one of the main bones of contention in these types of matters before Court on a daily basis. The reason for this is, naturally, that because of the speculative "*crystal ball*" approach to be applied to determine the relative risks influencing the probability of an individual obtaining a hypothesised income in future.
20. While it may be so that there are general "*rules of thumb*" to apply to guide the Court as to the contingencies, each case has to be dealt with on its own merits.
21. Counsel for the Defendant calculated his 20% "*spread*" with reference to the so-called "*0.5% rule*" up to year of retirement, as per Koch, for instance. However, this reliance is incorrect: Koch's assertion applies to the "*general*" contingencies to be applied to each scenario pre- and post-morbidly and, specifically, relates to what one can consider as being a person's "*general*" risks of obtaining income (regardless of the compounding *sequelae* of the injury sustained).
22. One would use Koch's rule to determine, for instance, what a base contingency should be. Having determine the "*general*" risk, as such, one would then determine whether the proposed income, and chance of obtaining same, is higher or lower than the "*general*" risk as per Koch. Usually it is higher and the difference between these contingency percentages is referred to as the so-called "*spread*". Accordingly one cannot use Koch's 0.5% (half) percent a year to determine a "*spread*" as it is merely a basis to determine "*general*" risks.

23. Much reliance was placed by counsel for the Plaintiff, on the fact that the Plaintiff can no longer work as a rigger, however counsel for the Plaintiff correctly conceded that, while it was ill-advised for the Plaintiff to study rigging after the accident (given his injury), the Plaintiff has, in fact, shown that he can obtain some form of qualification.
24. Given the fact that the industrial psychologists quantify the Plaintiff's pre- and post-morbid earnings on the basis of a semi-skilled worker in the corporate sector, one has to have regard for the fact that, he is not only reliant on his physical capabilities to obtain employment.
25. The converse, however, is also true; it is undisputed that the Plaintiff has, since the accident and completion of his rigging certificate, not been able to obtain any employment in the corporate sector and has, in fact, only worked as a piecemeal gardener/labourer.
26. A careful balancing of the hypothetical and the *de facto* scenarios needs to be done, to ensure that justice is done between parties alike.
27. Both counsels in court (correctly, in my view) conceded that, their initial assessments should be adjusted; counsel for the Plaintiff was of the view that the "*spread*" should now be 40% whilst the Defendant's counsel raised his "*spread*" percentage to a 25 - 30%.

#### **FINDINGS AT TO CONTINGECIES:**

28. It is clear that the accident has in fact had a devastating effect on the Plaintiff's potential to earn income, especially in view of the realities of the labour market. However, the Plaintiff retains the capacity to study and to perform sedentary to light work.
29. I am accordingly of the view that a 35% so-called "*spread*" should be applied; i.e. the Plaintiff should be compensated for the "*loss*" of 35% of his projected earnings; that being the increase in risk of not obtaining the said earning level, now that the accident has occurred.
30. As such, with reference to the actuarial calculation, the following figure

would arrive at: R4 067 991.00 less 35% = R1 434 296,85.

31. I accordingly make the following order:

31.1 The order made on the 16<sup>th</sup> of July 2019 is hereby recalled and replaced with the following order.

31.2 The Defendant pays the Plaintiff the sum of R1 424 296,85 (One million four hundred and thirty-four thousand two hundred and ninety six rand and eighty five cents) with regard to loss of earnings directly into the trust account of Plaintiff's attorneys of record: NELL KOTZE & VAN DYK ATTORNEYS, ABSA BANK, ARCADIA BRANCH (BRANCH CODE: 334 945), ACCOUNT NUMBER: [....] , (Reference Number: AK0152) by no later than 30 August 2019.

31.3 The Defendant must pay the Plaintiff's taxed or agreed party and party costs of suit, on the High Court scale including the fees of counsel Adv G Lubbe, the reasonable travelling and subsistence costs for the Plaintiff attending court, the costs of the interpreter Ms JN Sithole, the costs of the reports and consultations with attorneys, joint minutes, as well as reservation and qualifying fees (if any) of the expert:

- Dr Troskie
- C Cruickshank
- AF Kok
- GRS Actuarial Consulting (all calculations and recalculations)

Subject to the following conditions:

- The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation of the Defendant's attorney of record; and
- The Plaintiff shall allow the Defendant 14 (fourteen) days to make payment of the taxed costs.

31.4 It is noted that there is no contingency fee agreement applicable.

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**K STRYDOM**  
**ACTING JUDGE OF THE HIGH COURT**  
**OF SOUTH AFRICA GAUTENG**  
**DIVISION, PRETORIA**

Heard on: 2 July 2019

Judgement delivered:

Appearances:

For the Plaintiff: ADV G LUBBE

Instructed by:

For the Defendant: ADV SINGQWENYANE

Instructed by: