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

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

Case number: 12297/2014

Date of hearing: 14 October 2019

Date delivered: 22 October 2019

In the matter between:

KHOZA, MBUSOWAKHE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

SWANEPOEL AJ:

[1] Plaintiff claims for damages resulting from a motor vehicle accident which occurred on 17 December 2011 when plaintiff was 19 years of age. The merits of the matter had become resolved previously on the basis that defendant is 80% liable for the plaintiffs proven damages. General damages have now been rejected by defendant, and are to be postponed. The only remaining issue before me is past loss of income, and loss of future earning capacity.

[2] The parties agreed that the plaintiff's expert reports may be accepted in evidence. In addition, an affidavit by an actuary, one Johan Potgieter, was handed

up by agreement between the parties. Plaintiff also called the industrial psychologist, Mr. P. Diedericks, to testify.

[3] Plaintiff was a pedestrian when he was struck down by a motor vehicle. He suffered a concussive head injury, a scapula fracture and a left sternoclavicular dislocation. He also suffered two broken teeth. He had lacerations to his right arm and an injury to his left knee. He lost consciousness after the accident, only waking up in hospital.

[4] As a result of the injuries plaintiff suffers from pain in the left shoulder when driving or lifting his arm, or when picking up heavy objects. He has pain in his chest when he sits for extended periods of time. His left knee pains when he walks or climbs stairs.

[5] Pre-morbid, plaintiff was a learner in Grade 11. He failed the Grade 11 examinations, although his failure was unconnected to the accident. He had also failed Grade 1. Plaintiff was absent from school for 4 months after the accident, notwithstanding which he passed Grade 11 the following year, and Grade 12 in 2013. He enrolled for an N2 course in electrical engineering in 2014. He suspended his studies because he felt that he was more interested in mechanical engineering. He successfully completed his studies in 2015.

[6] During November 2016 plaintiff obtained employment with Jomele Personnel Consultants, a labour brokerage. He resigned after a month because he could not cope with the physical demands of the job, which included lifting heavy objects, and lifting his arm above shoulder height. While he worked for Jomele he earned R 2 500.00 per week (including overtime).

[7] In 2017 plaintiff completed a one-year nursing course in community health. He then obtained employment as a taxi driver where he earned between R 1 500.00 and R 2 800.00 per week. He had only done long- distance trips for a week when his employer decided that plaintiff was not suited to be a taxi driver, and he terminated plaintiff's employment. Plaintiff had complained about arm, neck and back pain whilst driving. Plaintiff is currently unemployed .

[8] Dr. Troskie, the orthopaedic surgeon, indicated that plaintiff suffered from mild intermittent shoulder pain, but that he could nonetheless pursue a nursing career. Plaintiff has, however, expressed a disinterest in a nursing career. Pre-morbid, plaintiff was capable of performing heavy work, but post-morbid he is restricted to

work options in the light range. He might have to retire at age 60 instead of 65. The industrial psychologist, Mr. Diedericks postulates that plaintiff would likely, pre-morbid, have entered the job market on a NQF level 4, the equivalent of a Grade 12 qualification.

[9] From a cognitive perspective the accident had no effect on plaintiff. His physical functioning has however been affected. He is no longer competitive for physically heavy work, and a possibility of degenerative changes is present. He should be able to work until retirement age, although if he were to be forced to do heavier work, his retirement age might be accelerated. The pain which he experiences might lead to increased irritability and decreased motivation which might make him a vulnerable employee. He is not suited to administrative work. Diedericks testified that plaintiff would be most suited to a job **as a** machine operator.

[10] Mr Matladi, for defendant, put it to Diedericks that plaintiff gave up his employment with Jomele for personal reasons. Defendant further contended that plaintiff had given up on his electrical engineering studies and nursing career by choice. Diedericks could not gainsay that proposition. It was put to Diedericks that plaintiff was able to pursue other jobs, and that he was capable of studying further. The proposition put to Diedericks seems to me to be correct.

[11] According to plaintiffs actuarial calculations plaintiff suffered a loss of past income in the sum of R 259 807.00, and a future loss of income in the sum of R 1 470 251.00. Mr. Geech SC, acting for plaintiff, submitted that a 5% contingency deduction should be applied to past loss of income, and a 15% contingency deduction in respect of future loss of income. Mr. Matladi argued that plaintiff was capable of working, studying further, and that a higher contingency deduction should be made.

In ***Phalane v RAF [2017] ZAGPPHC 259*** Fourie J remarked as follows:

"Contingencies are the hazards of life that normally beset the lives and circumstances of ordinary people (AA Mutual Ins Co v Van Jaarsveld reported in Corbett & Buchanan, The Quantum of Damages Vol II 360 at 367) and should therefore, by its very nature, be a process of subjective impression or estimation rather than objective calculation (Shield Ins Co Ltd v Booysen 1979

(3) SA 953 (A) at 965G-H. *Contingencies for which allowance should be made, would usually include the following:*

- (a) the possibility of illness which would have occurred in any event;*
- (b) inflation or deflation of the value of money in future; and*
- (c) other risks of life such as accidents or even death, which would have become a reality, sooner or later, in any event (Corbett, The Quantum of Damages, Vol I, p 51).*

In the Quantum Yearbook (by Robert Koch, 2017 Edition, p 126) the learned author points out that there are no fixed rules as regards general contingencies. However, he suggests the following guidelines:

"Sliding scale: Yz% per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age...

Normal contingencies: The RAF usually agrees to deductions of 5% for past loss and 15% for future loss, the so-called normal contingencies."

I accept that this approach is only a guideline as contingencies, by its very nature, is a process of subjective impression or estimation rather than objective calculation."

[12] I am in agreement with defence counsel that a higher contingency should be allowed than the normal contingency deductions as set out above. I am not convinced that plaintiff's lack of progress in his career is solely as a result of the accident. Plaintiff made a conscious decision to give up on his electrical engineering studies, and having completed his nursing studies, he lost interest therein. Plaintiff is young and, given some motivation, he is in all likelihood capable of finding employment that would accommodate his physical difficulties. He is by all accounts quite capable of working.

[13] In the circumstances I am of the view that in respect of past loss of income a 20% deduction would be appropriate, and in respect of future loss of income, a 30%

deduction. Therefore the award is calculated as follows:

Past loss of income R 259 897 00 X 20% = R 207 917.60

Future loss of income: R 1 470 251.00 X 30% = R 1 029 175.70

Total loss of income and loss of earning capacity. R 1 237 093 30

R 1 237 093.30 X 80%= R 989 674.64

[14] I have been handed a draft order which provides for an undertaking in terms of section 17 (4) (a) of Act 56 of 1996, for costs, and for the postponement of the general damages. I have inserted the monetary award in manuscript.

[14] Consequently I make the following order:

[14.1] The draft order marked 11Xn is made an order of Court.

Swanepoel AJ
Acting Judge of the High Court,
Gauteng Division, Pretoria

“X”

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

ON 14 OCTOBER 2019 AT PRETORIA, COURT 8D

BEFORE HIS LORDSHIP MR ACTING JUSTICE SWANEPOEL

Case No: 12297/2014

In the matter between:

M KHOZA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

COURT ORDER

It is ordered THAT:

1. The Defendant must pay Plaintiff the sum of **R 989 674-64 (nine hundred and eighty nine thousand six hundred and seventy four rand, sixty four cents)** in respect of loss of earnings and earning capacity.
2. The Defendant must, within one (1) month from the date of this order, furnish the Plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996, as amended, limited to 80% of such costs.
3. The Defendant must pay the Plaintiff's taxed or agreed High Court costs of suit on the scale as between attorney and own client, including but not limited to:

- 3.1 the fees of the interpreter Mr R Buda;
 - 3.2 the reasonable travelling and subsistence costs for attending at court and for his examinations with the experts, of the Plaintiff, who is declared a necessary witness;
 - 3.3 the fees of two counsel;
 - 3.4 the costs of the reports by and consultations with as well as the reasonable preparation and qualifying fees of the Plaintiffs expert witnesses, Dr A J Troskie, L Taylor, P C Diedericks and GRS Actuarial Consulting, as well as the fees of P C Diedericks for attending and testifying at court.
4. The amounts payable must be paid directly into the trust account of the Plaintiffs Attorney of Record with the following details:
- Nell Kotze & van Dyk Attorneys
Absa Bank Arcadia Branch (Branch Code: 334945)
Account No:[....]
5. The issue of general damages is postponed sine die.
6. There is no contingency fee herein.

BY ORDER,

REGISTRAR.