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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 61614/2016

In the matter between:

BRINK, FRANCOIS JOHANNES

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

This judgment was handed down electronically by circulation to the plaintiff's legal representatives and to the Defendant and also by uploading on caseline and is deemed to be handed down by such circulation.

MABUNDA, AJ

- [1] The Plaintiff herein, Francois Johannes Brink, an adult male who was born on the 05 July 1980, is claiming damages from the Road Accident Fund, the Defendant, in terms of the Road Accident Fund Act, Act No

56 of 1996, as amended ("the Act"), as a result of injuries sustained in a motor vehicle accident which occurred on 07 April 2014. The Defendant conceded merits and agreed to pay 100% of the plaintiffs proven, alternatively, agreed damages.

- [2] The parties further agreed that in respect of future medical, hospital and related expenses, the defendant shall furnish plaintiff with an undertaking in terms of section 17(4)(a) of the Act. The parties have also settled the claim for general damages in the sum of R450 000.00. The issues outstanding issues which this court has to adjudicate relates to the plaintiff's claim for past medical and hospital expenses and plaintiffs claim for past and future loss of income.
- [3] The matter was set down for trial on the 02 February 2021, but was stood down for the 04 February 2021. On the 04 February 2021 Mr B Boot appeared for the plaintiff and there was no appearance for the Defendant. It appears from the documents filed, that the Defendant's attorneys withdrew as attorneys of records in June 2020. It also appears from the correspondence between plaintiff's attorneys of records and Defendant, that the Defendant was well aware of the trial date.
- [4] This judgment was reserved after hearing oral submissions by Mr Boot, on behalf of the plaintiff. The plaintiff's counsel had filed written heads of argument for which I am grateful. Plaintiff was allowed to adduce evidence of the expert witnesses he retained by way of affidavits or written evidence (on the basis of the reports filed) before the commencement of the proceedings.
- [5] I shall briefly refer to the background of the matter. Plaintiff was a passenger in a cash in transit truck when the driver, who was travelling at high speed, hit a speed bump which caused the plaintiff to be thrown out of the seat and then crash on top of the floor. He was taken

to Life Flora Clinic where he was admitted and treated for five days. He sustained the following injuries, *inter alia*, vertebral compression fracture of T12-L1 and instrument posterior fusion of T9-L3.

- [6] Plaintiff presently complains of constant backache, severe back pain with lifting of heavy objects. He experiences pain with driving a car, especially if longer than one hour. He cannot bend his back or sit for a long period of time. He struggles to lift his three (3) year old child, something he enjoyed doing prior to the accident. He uses pain medications such as stilpayne, tramazac and paracetamol and anti-inflammatory on a regular basis.
- [7] Prior to the accident plaintiff used to jog to stay fit and played pool. He could swim and walk quite far and did so on a regular basis. He could interact and play with his daughter. Since the accident he is unable to participate in any sport or hobbies.
- [8] Plaintiff appointed a number of medico-legal experts who submitted their respective reports which form the evidence before this court. No evidence was presented by the defendant and no expert report have been submitted by the defendant.
- [9] I do not intend to refer in detail to the expert reports submitted on behalf of plaintiff and shall merely refer to certain salient features of certain thereof. Dr Shaun East (orthopaedic surgeon) described the injuries sustained by plaintiff, as follows: vertebral compression fracture T12-L1 and instrument posterior fusion T9-L3. Following the accident, plaintiff was medically boarded after his spinal fusion and has never returned to any form of work. Plaintiff has constant back pain, unable to lift anything heavy, cannot sit for a period of time or spend more than one hour driving a car. The orthopaedic surgeon recorded that there is a 22% chance that he will require revision procedure within 10 years. He will also, in all likelihood, require two to three surgeries in his lifetime.

- [10] The orthopaedic surgeon recorded that after some few months after the accident plaintiff picked up a 25kg money box, herniated a disc and had an instrumented thoracolumbar fusion. The fusion happened 19 months after the accident but directly contributed to the surgery he required and the position he currently finds himself in. It is further recorded that the pre-existing compression fractures placed more stress on the underlying discs, causing it to herniate and requiring a long-term segment fusion transitioning from the rigid thoracic region to the mobile lumbar region. According to Park et al, transpedicular fixation leads to a 13% 5-year and 22% 10-year chance of reoperation. There is a 20% chance that plaintiff will end up with a flat back. The orthopaedic surgeon expects that plaintiff, when taking into consideration his injuries and sequelae, will retire at the age of 55 due to intractable pain, immobility of the lumbar and thoracic spine and a “flat back”.
- [11] Dr Truter’s (clinical psychologist) report records that since the accident and the consequent treatment plaintiff was never pain-free and was compelled to apply back hygiene. It is further stated in the report that plaintiff is restricted, fears of re-injuring himself and finds it difficult to share in some activities. Dr Truter opines that plaintiff suffers from chronic adjustment difficulties, sprouting from his medical condition, and will benefit from a multidisciplinary rehabilitation program.
- [12] He further opines that plaintiff’s competitiveness in the open labour market has been compromised as a result of the followings: his restrictions, his adjustment difficulties, his limited working experience, his constant fear to re-injure himself, the fact that he has already been declared medically unfit and that he will have to compete with healthy, young individuals for manual labour positions.

- [13] Dr David A Shavel (psychiatrist) recorded in her report that plaintiff suffers from on-going psychological adjustment difficulties. He diagnosed plaintiff with mild chronic adjustment difficulties with predominantly depressive features secondary to general medical condition. Dr Shavel opines that plaintiff's psychiatric condition has impacted negatively on his interpersonal skills and relationships and his general enjoyment of life have very markedly diminished and that plaintiff requires psychiatric treatment.
- [14] Nicola Heyns (occupational therapist) opines that plaintiff's functioning has been adversely affected and this is largely due to his physical injuries sustained in the accident in question. The assessment results and observation indicate that plaintiff does not meet the inherent physical demands of his previous job as cash-in-transit-officer, which justifies that he was medically boarded.
- [15] Plaintiff remains unsuited for any physically demanding or manual type of work due to back pain and risk of re-injury. He also does not meet all the inherent work demands of his present self-employed, part-time job as fruit/vegetable salesman, which justifies reasonable work accommodations to reduce risk of re-injury
- [16] Plaintiff's reduced work capacity has a direct impact on his productivity, occupational potential and subsequently his earning capacity when compared to his pre-accident potential. He is regarded as a vulnerable employee in the open labour market. The occupational therapist opines that plaintiff is a suitable candidate for re-skilling or re-training to better his chance of finding alternative employment in suitable semi-sedentary or light category of work in an accommodating work environment.
- [17] Plaintiff is regarded as a vulnerable worker in the open labour market when compared to his healthy peers. Considering his deteriorating back condition and expected revision surgery and even more

accommodation maybe required in future. Plaintiffs job options, occupational potential and subsequently his earning potential appear to have been curtailed by injuries sustained in the accident.

[18] Plaintiff's residual accident-related sequelae will however continue to impede on his ability to work at maximum levels of personal output when compared to his pre-accident ability. He will remain at the lower level than what he would have been capable of had he not been injured in the accident.

[19] Ms Noble (industrial psychologist) opines that considering his age, being medically boarded in 2016, with training and most of his experience in the security industry, plaintiff should be provided with an opportunity to complete security grade B and A training to improve his chances to at least be considered for a position in a control room. Security grades B and A will improve his chances for appointment in the permanent control room position, but there is no guarantee for such appointment. It was postulated that plaintiff will be able to obtain a position as a control room operator on a Paterson B4-level around April 2020, earning a total guaranteed package of approximately R 226 900.00 per year as per P-E Corporate Services' September 2018 general surveys for West Rand-area.

[20] In her addendum report, Ms Noble, record that she considers the control room operator ship to have sailed and accepts that plaintiff will have to continue working in self-employment, selling vegetable and fruit in order to generate income. She proposes that an average of plaintiff's earnings from self- employment to be calculated by an actuary, yearly increased with the consumer price index until early retirement at 55. She again recommended high contingency deduction. She concluded that should the plaintiff for whatever reason stops working in his self-employment, he is expected to remain unemployed.

- [20] Based on the expert evidence it is clear that plaintiff has suffered past loss of income and will suffer a future loss of income. Plaintiff has developed hunchback after the accident and his lumbar spine movement is restricted due to thoracic-lumbar fusion, stiffness and pain. It is clear from expert evidence that plaintiff's occupational functioning has been adversely affected. He is and remains unsuited for any physically demanding/ manual type of work due to his back injury and risk of his Injury. He does not sustainably meet all the inherent work demand of his present self-employed, part-time job as fruit/vegetable salesman.
- [21] The general approach of assessing damages for loss of earnings has been restated in the matters of ***Goldie v City Council of Johannesburg 1948 (2) SA 913 (W)*** and ***Southern Insurance Association Limited v Bailey NO 1984 SA 98 (A) at 112E - 114F***. Nicholas JA in *Sothorn Insurance Association v Baillie* (supra) at 113F - 114A stated as follows : *"Any enquiry into damages for loss of earning capacity is in 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 present value of the loss. It has open to it two possibilities approaches. One is for the Judge to make a round estimate of an amount which seem to him to be fair and reasonable. That is entirely a matter of guesswork, 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..."*

- [22] In the aforementioned matter, the court held that where it has before it material on which an actuarial calculation can be made, the actuarial approach is preferable, because the actuarial approach has the advantage of an attempt to ascertain the value of a loss of earnings on a logical and informed basis as opposed to a robust approach or an educated guess.
- [23] In the unreported case of ***Mashaba v Road Accident Fund 2006 JOL 16926 (T)***, Prinsloo J, referring to *Bailie* case above held that amongst others that where career and income details are available the actuarial calculation approach is more appropriate and the court must primarily be guided by the actuarial approach, which deals with the loss of income or earnings before applying the robust approach, which caters for loss of earning capacity. This, so said the learned judge, would help the court to ensure that the compensation assessed and awarded to the plaintiff is as close as possible to the actual facts relied upon.
- [24] For the plaintiff to succeed in a claim for loss of earnings, he is required to provide a factual basis that allows for an actuarial calculation. This is a process designed to assess actuarial or mathematical calculations on the basis of the evidence as well as over-all assumptions vesting or depending on such evidence. The approach is known as the actuarial approach.
- [25] The actuarial approach seeks to determine the loss of earnings as realistically as possible to what may be the plaintiff's actual losses. This approach comprises of providing a factual basis upon which the loss of earnings is to be calculated and, only then, by applying appropriate contingency deductions.
- [26] As a rule of practice plaintiff need not be burdened with an undue load of providing such a basis strictly. Plaintiff merely needs to demonstrate that his preferred and given scenario is more probable than another. A

fifty percent plus one likelihood constitutes a probability.

- [27] On behalf of the plaintiff Algorithm Consulting and Actuaries calculated the plaintiff's past and future loss of earnings, alternatively earning capacity. Regarding contingency deductions it was stated that that given the uncertainties discussed in paragraph 4.1 of the report, the actuary had allowed for a slightly higher contingencies than normal. For the scenario if the accident had not occurred, a contingency deduction of 5% was applied for past loss and 15% in respect of future income. Having regard the accident, a contingency deduction of 5% for past loss and 35% for future income were applied.
- [33] The actuary calculated the present value of the loss of income as follows as at 15/01/2021: without applying the legislative limitation, the value of income (uninjured) on past loss of earnings (with 5% contingency deduction) was R 1 333 701,00 and the value of income (injured) on past loss of earnings (with 5% contingency deduction) was R 293 573,00 with the net past loss of R 1 040 128,00.
- [34] On future loss of income, the actuary calculated the future loss of income as follow: without applying the legislative limitation, the value of income (uninjured) on future loss of earnings (with 15% contingency deduction) was R 5 024 521,00 and the value of income (injured) on past loss of earnings (with 35% contingency deduction) was R 272 330,00. The net total loss of earnings before the application of the limit was calculated at R 5 792 319,00 and, with the application of the limit, the net total was reduced to R 5 432 827.00.
- [35] Contingency deductions allow for the possibility that plaintiff may have less than normal expectations of life and that he may experience periods of unemployment by reason of incapacity due to illness, accident or labour unrest or even general economic conditions. See *Van der Plaats v Southern African Mutual Fire & General Insurance*

Co. 1980 (3) SA 105 (A) 114 - 114.

[36] The underlying rationale is that contingencies allow for general hazards of life such as periods of general unemployment, possible loss of earnings due to illness, savings in relation to travel to and from work now that the accident has somewhat incapacitated or impaired him as well as the risk of future retrenchment. The general vicissitudes of life are taken into consideration when contingencies are considered. The exact financial impact of these risks cannot be predicted reliably, and plaintiff's industrial psychologist recommended that these risks be dealt with by means of a higher-than-normal post-accident contingency deduction, which views I agree.

[33] Both favourable and adverse contingencies must be taken into account. Nicholas JA held among others in the Bailie case (*supra*) at 117 C - D, that: *"The generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse and all 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the buffets and ignore the rewards of fortune?"*

[34] The assessment of contingencies is largely arbitrary and will depend on the trial judge's impression of the case. I have considered the matter as a whole and am of the view that an appropriate pre-collision deduction is 7,5% on past loss and 20% on future loss and post-collision deduction is 5% on past loss and 35% on future loss. A revised actuarial calculations/report was requested by this court where the actuary was further instructed to apply the aforesaid contingencies based upon my findings.

[35] Upon a perusal of the revised calculations/report received by this

court it is clear that Algorithm Consultants have given credence to the instructions of this court in its calculations. In the circumstances, I am inclined to accept the revised actuarial report as the correct contingencies, in my view, have been applied as per the instructions of this court.

[36] On the revised calculations, the actuary has calculated the net past loss of earnings after the application of the limit to R 911 104.00 and the net future loss of earnings after the application of the limit to R 4 325 066 .00 with the net total loss of R 5 236 170.00. Consequently, I find that the total loss suffered by the plaintiff in respect of past and future loss of income, amount to R 5 236 170.00

[37] Plaintiff submitted the schedule and vouchers in support of his claim on past hospital, medical and related expenses which amount to R 18 298.00. Having considered the vouchers submitted, I am satisfied that the amount claim is proven, reasonable and appropriate.

[38] As far as the costs are concerned, there is no reason why costs should not follow the event. There was no submission to the contrary.

[39] On behalf of the plaintiff a draft order was submitted to me which contains the order in the usual format. I am satisfied that the draft order handed to me be made an order of court.

[40] In the result, the following order is made:

1. The draft order marked "X" and attached to this judgment is made an order of court.

MB MABUNDA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Counsel for Plaintiff:	Mr B Boot
Instructed by:	Adams & Adams
	Pretoria
	Tel: 0124326000
	Ref: DBS/KW/P1470
Dates of hearing	02 February 2021
	04 February 2021

Date of Judgement	25 February 2021
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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Before Honourable Acting Judge Mabunda.

ORDER GRANTED ELECTRONICALLY IN TERMS OF DIRECTIVES REGARDING SPECIAL ARRANGEMENTS TO ADDRESS COVID-19 IMPLICATIONS FOR ALL LITIGATION AND MANAGEMENT OF COURTS DURING THE NATIONAL STATE OF DISASTER.

CASE NO: 61614/16

In the matter between

BRINK, FJ

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

HAVING HEARD COUNSEL and considered the evidence submitted:

THE COURT GRANTS JUDGMENT in favour of the Plaintiff against the Defendant in the following terms: -

1. The evidence of the following experts, more specifically the facts, assumptions and opinions contained and expressed in their reports, notice of which was furnished in terms of Rule 36(9)(b) of the Uniform Rules of Court, as well as the factual evidence of the Plaintiff, are admitted into evidence at the hearing on affidavit in terms of Rule 38(2):
 - 1.1 Dr East (Orthopaedic Surgeon), reports dated 9 November 2016 and 27 July 2020;
 - 1.2 Dr DA Shevel (Psychiatrist), reports dated 8 March 2017 and 3 August 2020;
 - 1.3 Dr Truter (Clinical Psychologist), dated 9 May 2017;
 - 1.4 Ms N Heyns (Occupational Therapist), dated 30 July 2017;
 - 1.5 Ms E Noble (Industrial Psychologist), dated 3 June and 13 January 2021;
 - 1.6 Mr G Whittaker (Actuary), actuarial calculations dated 29 June 2018, 15 January 2021 ; and
 - 1.7 Mr FJ Brink, dated 20 January 2021

2. The Defendant shall, over and above the furnishing of the section 17 (4) (a) undertaking as well as any previous payments made and /or awarded to the Plaintiff, pay the additional total sum of **R 5 254 468.00 (Five Million Two Hundred and Fifty-Four Thousand and Four Hundred and Sixty-Eight Rands)** to the Plaintiffs attorneys, Adams & Adams , in settlement of the Plaintiffs action, which amount is calculated as follows:

Past and future loss of earnings and/or earning capacity R 5 236 170.00

Past medical expenses R 18 298.00

TOTAL R 5 254 468.00

The aforementioned total sum of **R 5 254 468.00 (Five Million Two Hundred and Fifty-Four Thousand and Four Hundred and Sixty-Eight Rands)** shall be payable by direct transfer into the trust account of Adams & Adams, details of which are as follows:

Account holder	: [...]
Bank	:[...]
Branch	:[...]
Branch code	:[...]
Account number	: [...]
Reference	:[...]

3. The Defendant shall, over and above any previous cost orders granted in the Plaintiffs favour, also make payment of the Plaintiffs additional taxed or agreed party and party costs of the action on the High Court scale, which costs shall include but not be limited to the following: -

3.1. The fees of Senior Counsel on the High Court Scale, inclusive of but not limited to Counsel's full day fees for

2 February 2021 and 4 February 2021 and his fees for the preparation of Heads of Argument, if any;

3.2. The reasonable, taxable costs of obtaining all expert, medico-legal RAF4 Serious Injury Assessment, addendum and actuarial reports from the Plaintiff's experts which were either furnished to the Defendant and/or included in the trial bundles and/or uploaded onto Caselines;

3.3. The reasonable taxable preparation, qualification, travelling and reservation fees, if any, of the following expert of whom notice has been given.

3.3.1 Dr S East (orthopaedic Surgeon)

3.3.2 Dr Shelve (Psychiatrist)

3.3.3 Dr K Truter (Clinical Psychologist)

3.3.4 Ms Nicola Heyns (Occupational Therapist)

3.3.5 Ms E Noble (Industrial Psychologist)

3.3.6 Mr GA Whittaker (Actuary).

3.4. The reasonable costs of all consultations between the Plaintiffs attorneys, and/or Counsel and/or the experts and/or the Plaintiff in preparation for the hearing;

3.5. The reasonable, taxable accommodation and transportation costs (including Toll and E-Toll charges) incurred by or on behalf of the Plaintiff in attending all medico-legal consultations with the parties' experts and all consultations with his legal representatives, the quantum of which is subject to the discretion of the Taxing Master;

3.6. The reasonable taxable costs associated with preparing the

Application in terms of Rule 38, and obtaining the affidavits attached thereto, as well as the experts' charges pertaining to their time and attendances spent *inter alia* in commissioning thereof;

3.7. The above costs shall also be paid into the aforementioned trust account

3.8. It is recorded that the Plaintiff's attorneys do not act herein in terms of a contingency fee agreement.

4. The following provisions shall apply with regards to the determination of the aforementioned taxed or agreed costs: -

4.1. The Plaintiff shall serve the notice of taxation on the Defendant and/or the Defendant's attorney of record;

4.2. The Plaintiff shall allow the Defendant 7 (SEVEN) court days to make payment of the taxed or agreed costs from date of settlement or taxation thereof, whichever occurs first;

4.3. Should payment not be effected timeously, the Plaintiff shall be entitled to recover interest at the rate of 7.00% per annum on the taxed or agreed costs from date of allocator settlement (whichever occurs first) to date final payment.

BY ORDER OF THE COURT

COUNSEL FOR PLAINTIFF:ADVC B BOOT

COUNSEL FOR DEFENDANT: