

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

CASE NO: 73686/2014

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

Date: 30 November 2022

K. La M Manamela

In the matter between:

BABINI VANTYU **Plaintiff**

and

ROAD ACCIDENT FUND Defendant

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **30 November 2022**.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] The plaintiff was involved in an accident in the morning of 11 June 2010 whilst travelling on the N2 in the direction of Mthatha, Eastern Cape. He was 42 years old at the time as he was born on 4 November 1967. He was a passenger in one of the two motor vehicles involved in the accident. The plaintiff sustained the following injuries from the accident: compression fracture of the T12 vertebrae (resulting in the narrowing between T12 and L1); fracture and displacement of various ribs, and soft tissue injuries. He suffered damages or loss due to the injuries sustained in the accident and/or *sequelae*. He blamed the negligent driving of the driver of the other motor vehicle ('insured driver') which collided with the one he was being conveyed in. He subsequently lodged a claim with the Road Accident Fund, the defendant, as the statutorily liable entity for the liability of the insured driver in terms of the provisions of the Road Accident Fund Act 56 of 1996 ('the Act'). On 28 October 2013 the defendant wrote to the plaintiff fully conceding liability for the proven or agreed damages suffered by the plaintiff due to the injuries from the accident and/or their *sequelae*.

[2] On 6 October 2014, the plaintiff caused summons to be issued against the defendant for compensation for his loss in terms of the provisions of the Act. His claim was for future medical expenses; past and future loss of earnings, and general damages and was initially estimated to be in the amount of R1,3 million. The defendant disputed that the injuries sustained by the plaintiff constituted serious injuries by way of a special plea delivered through the defendant's erstwhile attorneys in October 2014. This was further from disputing the claimed amount. But in the course of time the defendant parted ways with its attorneys and also its defence was struck out by the order of this Court granted on 17 November 2021 *per* Tolmay J. The matter proceeded, thenceforth, towards the attainment of default judgment by the plaintiff.

[3] On 4 October 2022, Mr P van Reyneveld virtually appeared before me in a hearing for the determination of the application for default judgment against the defendant. There was no appearance on behalf of the defendant, ostensibly, due to what is stated above regarding the striking off of the defendant's defence. At the hearing, counsel informed the Court that the only issues outstanding for determination were in

respect of the plaintiff's loss of earnings and future medical expenses. Due to the rejection of the claim for plaintiff's general damages as non-serious by the defendant the issues relating to this head of claim will in due course be referred to the Health Professions Council of South Africa in terms of the provisions of the Act and the Road Accident Fund Regulations, 2008. Therefore, I will include in the order ultimately made in this matter that the issues relating to general damages be separated from the rest of the issues and, consequently, be postponed for later determination. I reserved this judgment after oral submissions by counsel. Counsel had gratefully also filed comprehensive written submissions in terms of the practice directives of this Court.

Evidence and submissions on behalf of the plaintiff

General

[4] To establish his claim against the defendant, the plaintiff was assessed by a number of medico-legal experts. These experts filed reports and, subsequently, filed addendum reports containing their opinions regarding the injuries sustained by the plaintiff and their *sequelae*. The experts, also, deposed to affidavits, which were filed, confirming the contents of their reports. Consequently, this Court allowed the plaintiff's evidence to be led by way of the affidavits filed, as envisaged by Uniform Rule 38(2)¹ of this Court.

[5] As stated above, plaintiff was born on 4 November 1967. This means he was 42 years old when the accident occurred on 11 June 2010 and 54 years old at the time of the hearing of this matter. He has a B Proc degree, but he is currently unemployed. He was working as a driver at the time of the accident.

[6] The plaintiff's career commenced in 1990 as an unskilled 'Pieceworker' and, thereafter, he worked as a junior researcher from 1997 to August 1998 at the Centre for Southern African Studies in Cape Town after completing his B Proc degree. He then

¹ Uniform Rule 38(2) reads as follows: 'The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit'.

joined the South African Secret Service as an intelligence officer and he was serving as director of security at the Department of Foreign Affairs towards the end of 2008, when he resigned from the public service and moved back to East London. According to the plaintiff, his reason for quitting his job and relocating to Eastern Cape was to be close to his very ill mother. The following year the plaintiff commenced work as a driver at PE Motor Transporters. He could not find work within his field of interest or experience in East London. He met the accident while he was still working as a driver and did not return to his position following the accident.

[7] After the accident, the plaintiff remained unemployed until July 2012, when he decided to open a restaurant business near East London Airport. The business closed down after a year due to lack of viability. From August 2013 until April 2015 he was an analyst at Foresight Advisory Services. He was rendered unemployed when this entity closed down. Thereafter, he applied for other positions or jobs, but with no luck. He, reportedly, remains unemployed.

Injuries, complaints and/or sequelae

[8] The plaintiff was a passenger in the backseat of a motor vehicle when the accident with the insured motor vehicle occurred. The motor vehicle the plaintiff was ferried in overturned. The plaintiff sustained injuries, as stated above, save that the plaintiff is reported to have also suffered a minor concussive head injury or mild diffuse concussive head injury by the medical experts retained on his behalf. He is also said to have sustained a laceration on his forehead.

[9] The plaintiff was reportedly unconscious for about an hour after the accident. He was taken by ambulance to hospital where he received initial treatment and later transferred to another hospital where he received further treatment for three weeks. He was fitted with a back brace for a period of a year. Further medical treatment or care received by the plaintiff included physiotherapy.

[10] The plaintiff complains of continuous pain in the lower thoracic spine and upper and lower lumbar spine for a frequency of about three times weekly. He takes medication and applies rubbing lotion for relief. As a result of the pain he finds it difficult

to attend to chores, hobbies or other activities of a personal nature, including collecting weekly firewood, gardening, travelling and sport (soccer, running, jogging and swimming). He also finds it difficult or painful standing especially in inclement weather. He has had this pain since 2010.

Medical opinion and/or evidence

[11] The clinical psychologist concluded that the plaintiff presents with a major depressive disorder, as well as post-traumatic stress disorder.

[12] The orthopaedic surgeon opines that the plaintiff will probably still be working as a driver and supervisor if it wasn't for the accident. This expert, further, is of the opinion that the plaintiff is unemployable. Also, that the plaintiff is not capable of performing the same work or tasks as before the accident. The symptoms relating to the plaintiff's back would contribute in him not easily finding work, it is also opined. Therefore, the plaintiff has lost ability to compete for work in the open labour market, despite his educational qualifications, unless he is self-employed in a managerial capacity performing light and supervisory work tasks.

[13] The opinions of the occupational therapist, include the following. The plaintiff will not be able to perform tasks relating to his pre-accident job as a driver/supervisor as he will not be able to endure the constant requirement of sitting required in driving prolonged distances. This would further strain his spine and is considered by the experts not advisable given the plaintiff's underlying pathology in his spine. The plaintiff is therefore unsuitable for his pre-accident job as a driver. He will also not be able to manage his other post-accident job of running or managing his own restaurant (categorised as sedentary to light work) or that of an analyst (categorised as a sedentary job) which he did at Foresight Financial Services.

[14] The plaintiff is likely to work in a sedentary or light category of work in future given his level of education and work experience in the open labour market. However, he would require adjustments to his work environment given the current condition of his back. It is opined that the plaintiff is unsuitable for working in a light, medium or heavy category of work due to injuries to his spine. This would have a significant limitation to

his choice of future career.

[15] Other limiting factors to the plaintiff's prospects of future employment include the following. The chronic pain which has been increasing over the years would require of the plaintiff to take more body breaks during working hours which would result in reduced job efficacy for tasks requiring prolonged position tolerance. This is likely to reduce his motivation and negatively influence his ability to sustain occupation. In the event of the plaintiff's symptoms or condition worsening he is likely to remain limited to performing sedentary jobs on a half day basis.

[16] The opinions of the industrial psychologist include the following:

[16.1] Pre-morbid, it can be accepted that the plaintiff would have been able to secure a relatively senior position within the public or private sector, for example, as a junior legal advisor by the age of 45, and, thereafter, progressed up to senior legal advisor. He would have remained in this position until normal retirement at 65 years of age.

[16.2] Post-morbid, the plaintiff did not return to his pre-morbid employment. He was reportedly unable to meet the physical demands of his pre-morbid driver position. He gained employment elsewhere albeit for a lower income and was ultimately rendered unemployed when his last employer closed down its business.

[17] The industrial psychologist gained the impression that the plaintiff has lost confidence in his abilities when assessing him. The plaintiff, reportedly, presented as a 'discouraged work seeker'. The best alternative for the plaintiff will be in a small informal business setting until he normally retires at the age of 65, according to expert opinion. The accident had a major negative impact on the functioning of the plaintiff including the various events following the accident, being, failing business and retrenchment superimposed on the plaintiff's post-morbid psychological vulnerability, it is opined by the industrial psychologist.

Actuarial calculations

[18] Based on the opinions of the experts, particularly those of the industrial psychologist, the actuarial calculation reflected the total capitalised value of loss of earnings capacity after

application of the so-called 'cap' in terms of the Act to be in the amount of R3 384 350, made up of R1 570 065 for past loss of earnings capacity after the RAF cap and R1 814 285 for future loss of earnings capacity after RAF cap, factoring in contingency deductions and a 40% apportionment deduction suggested by the industrial psychologist. It was submitted on behalf of the plaintiff that the amount of R3 384 350.00 represents a fair and reasonable compensation in the circumstances of this matter.

Further or revised Actuarial calculations

[19] On 4 November 2022, through my erstwhile registrar, I directed that a revised actuarial calculation be furnished. The revision sought was in the form of re-calculation of the plaintiff's loss with the application of 20% apportionment deduction to future loss of earnings of R5 233 057.00.

[20] The revised calculation was furnished on 8 November 2022. It was submitted that the plaintiff had no objection in applying the suggested 20% apportionment deduction, but that the application of same did not make any difference as the net amount remained unchanged at R1 814 285.00. This was attributed, among others, to the significant impact of the RAF cap.

[21] But something was actually amiss. I only realised upon receipt of the revised calculations that my directives for a revised calculation were erroneous and, further, the communication did not include my reasons for the contingency deductions, contemplated. On 18 November 2022, I caused another communication to be directed to the plaintiff's legal representatives to the following effect:

[21.1] that, the correct position is that, in my preliminary view, the plaintiff's loss should be reduced effectively by 20% in respect of both past and future loss;

[21.2] that, the postulations in 21.1 above should be achieved by increasing the original contingencies to 50% (i.e. the current 40% plus a further 10%);

[21.3] that, the sole reason for the contemplated contingency deduction is that the plaintiff quit his secured job with government in 2008 at the age of 42 and relocated to East London.

[22] Further, I explained that what appears in 21.3 above, in my view, had not been sufficiently considered or not even considered at all by the industrial psychologist when making the suggestions for the calculation of the loss to the actuary. Further, I stated that the issue is quite material and significant as it contributes to the plaintiff's present unemployment status.

[23] Also, I stated in my communication to the legal representatives that, another approach was to deduct an amount of 20% to the current total loss of R3 384 350 which would result in an award in the amount of R2 707 480.00.

[24] I requested the plaintiff to furnish a revised actuarial calculation and, if so minded, to include comments or submissions by his legal representatives with regard to the application of the suggested contingency deduction and reasons therefor,

[25] On 28 November 2022, the plaintiff's legal representatives furnished revised actuarial calculations. I am grateful that the revised calculations reflected the scenarios as contemplated in my request.

[26] Counsel for the plaintiff, ably, submitted that due to the impact of the RAF Amendment cap, the 60% (i.e. additional 20% to 40% already deducted) will not make any material difference. But ultimately, a calculation was furnished reflecting the application of the 20% contingency deduction to the loss of earnings in the pre-morbid scenario. This is done, mainly on the ground that, the plaintiff quit his secured job with government in 2008 at the age of 42 and relocated to East London. It is said that this leaves room to increase the pre-morbid contingencies by 20% contingency deduction, as follows:

[26.1] that, an increase of the 5% contingency deduction in respect of past loss by 20%, equalling to 25% deduction, and

[26.2] that, an increase of the 10% contingency deduction by a further 20% which equals 30 % in respect of the pre-morbid future earnings capacity.

[27] The abovementioned calculation (labelled 'Calculation B') is considered to be responsive to the contingency (i.e. 20%) I contemplated applying due to the fact that the plaintiff quit his job within government at the age of 42, which was all done pre-morbid. The result of this calculation is the amount of R2 766 851.00 for the plaintiff's total loss of earnings. Counsel for the plaintiff emphasised that his client persists with the claim for a higher amount in terms of the other calculation and the latter only as an alternative derived from the views expressed by the Court.

Conclusion

[28] Against what is stated above and counsel's submissions and further submissions for which I am appreciative, I consider the fair and reasonable amount to award to the plaintiff for his loss of earnings to be R2 766 851.00.

[29] The plaintiff's further claim is with regard to future medical, hospital and related expenses. I will also grant this claim by directing the defendant to furnish the plaintiff or the minor with an undertaking in terms of section 17(4)(a) of the Act in respect of 100% of the defendant's future medical, hospital or similar expenses.

[30] Costs will follow the outcome of this matter. The details of such costs appear in the order made below, essentially, in terms of the order contained in the draft order submitted by counsel in this matter.

Order

[31] In the premises, I make the order, that:

- a) the defendant is ordered to pay to the plaintiff 100% of the plaintiff's damages, proven or agreed, arising from the motor vehicle accident which occurred on 11 June 2010;

b) the defendant is ordered to pay to the plaintiff the amount of R2 766 851.00 (two million seven hundred and sixty-six thousand eight hundred and fifty-one rand) for the plaintiff's claim for loss of earnings;

c) the amount in b) hereof is payable by defendant to plaintiff on or before 180 days from date hereof by depositing same into the plaintiff's attorneys of record's trust account, the details of which are as follows:

ACCOUNT HOLDER:	MACROBERT INC
BANK:	STANDARD BANK
TYPE OF ACCOUNT:	TRUST
ACCOUNT NUMBER:	[...]
BRANCH:	PRETORIA
BRANCH CODE:	01-00-45
REFERENCE:	SM/1011940

d) the defendant is ordered to deliver to the plaintiff, within reasonable time, an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, wherein the defendant undertakes to pay to the plaintiff 100% of the cost of future accommodation in a hospital or a nursing home or treatment of, or rendering of a service or supplying of goods to the plaintiff pursuant to the injuries the plaintiff sustained in a motor vehicle accident which occurred on 11 June 2010;

e) the defendant will not be liable for interest on the outstanding amount on condition that the payment of the capital amount is made on or before 180 days from date hereof by depositing same into the plaintiff's attorneys of record's trust account, the details of which are stated in c) hereof;

f) in the event of the defendant failing to make payment of the capital amount on/or before 180 days from date hereof, the defendant will be liable for interest on the amount due to the plaintiff at the prescribed or statutory rate of interest per annum as from 180 days from date hereof to date of final payment;

g) the defendant is ordered to pay the plaintiff's taxed or agreed party and party costs on High Court Scale, including but not limited to:

- i. Dr HB Enslin – Orthopaedic Surgeon;
- ii. Dr PA Olivier – Independent Medical Practitioner (RAF 4 report);
- iii. Ms H Labuschagne & Ms CJ Hill of Bester Putter Occupational Therapists;
- iv. Mr JJ Prinsloo of Prinsloo & Associates – Industrial Psychologist;
- v. Ms S van der Merwe – Clinical Psychologist;
- vi. Dr PAG Botha – Urologist;
- vii. Dr JPM Pienaar – Plastic and Reconstructive Surgeon;
- viii. Dr KD Rosman – Neurologist, and
- ix. Mr K Pretorius – Actuary.

h) the fees and disbursements of the plaintiff's attorneys of record on the High Court scale up to and including the trial date of 13 August 2021, if any, the default trial date of 4 October 2022, as well as costs relating to the further submissions and other activities at the instance of the Court between 4 and 21 November 2022;

i) the fees of plaintiff's senior-junior counsel in respect of preparation, consultations, pre-trial conference(s), trials interlocutory court hearings, preparation of joint submission documents, heads of argument, a day fee for trial on 13 August 2021, if any, an appearance fee for default trial on 4 October 2022, as well as costs relating to the further submissions and other activities at the instance of the Court between 4 and 21 November 2022;

j) the costs of holding all pre-trial conferences, trials interlocutory court applications

(save where specific orders have already been made), as well as round-table meetings between the legal representatives or representatives for both the plaintiff and the defendant;

k) the costs of and consequent to compiling all minutes in respect of pre-trial conferences and judicial management meetings;

l) the costs of and consequent to compiling and preparation of the plaintiff's bundles for trial and default trial as well as the costs to upload same to Caselines and deliver to the defendant electronically;

m) the reasonable travelling, subsistence and accommodation costs including e-toll fees incurred by and on behalf of the plaintiff for attending all the medico-legal examinations arranged by the plaintiff and the defendant;

n) the reasonable taxable costs of one consultation with the client in order to consider the offer made by the defendant, if any;

o) the cost incurred in obtaining payment and/or execution of the capital amount and/or delivery of the undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996;

p) the costs payable by the defendant to the plaintiff by depositing same into the plaintiff's attorneys of record's trust account, the details of which are as follows:

ACCOUNT HOLDER:	MACROBERT INC
BANK:STANDARD BANK	
TYPE OF ACCOUNT:	TRUST
ACCOUNT NUMBER:	[...]
BRANCH:	PRETORIA
BRANCH CODE:	01-00-45
REFERENCE:	SM/1011940

q) the plaintiff is ordered to serve the notice of taxation of the plaintiff's party and

party bill of costs on defendant's attorneys of record, if any, and/or the defendant;

r) the defendant is ordered to pay the plaintiff's taxed and/or agreed party and party costs within 180 days from the date upon which the accounts are taxed by the Taxing Master and/or agreed between the parties;

s) in the event of the defendant failing to make payment of the party and party costs within 180 days after service of the taxed accounts on the defendant's attorneys of record, the defendant will be liable for interest on the amount due to the plaintiff at the prescribed statutory rate of interest per annum as from the date of taxation to date of final payment;

t) the plaintiff and the plaintiff's attorneys of record did not enter into any contingency fee agreement; and

u) the plaintiff's claim for general damages is separated from other claims and postponed *sine die*.

Khashane La M. Manamela
Acting Judge of the High Court

Date of Hearing:	4 October 2022
Date of Final Submissions:	21 November 2022
Date of Judgment:	30 November 2022

Appearances:

For the Plaintiff: Mr Paul van Reyneveld

Instructed by: Macrobert Inc Attorneys, Pretoria

For the Defendant: No appearance