IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: 3583/2015

In the matter between:

J. S. Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT BY: HINXA, AJ

HEARD ON: 12 AUGUST 2016

DELIVERED ON: 20 DECEMBER 2016

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[1] The plaintiff instituted action proceedings against the defendant herein, the Road Accident Fund ("RAF"), pursuant to a motor vehicle collision which occurred on 24 October 2013.

[2] On 20 December 2016 I made the following order with an

endorsement that the reasons hereof would follow:

"1. The defendant shall pay the plaintiff the following amounts:
R960 00.00c being in respect of general damages
R3 583 084. 00c being in respect of loss of income
R1 214 395.16c being in respect of past medical and hospital expenses.

2. The defendant is ordered to pay interest on the amounts set out in paragraph 1 at the prescribed legal rate from a date 14 days after the date of this judgment to the date of payment.

3. The above amounts shall be paid into the trust account of Honey Attorneys, to wit, Nedbank – Maitland Street Branch, Branch Code 11023400; Account no. [1...]; BLOEMFONTEIN.

4. The defendant shall pay the plaintiff's costs of the suit on the High Court party and party scale. Such costs shall include:

4.1 The fees and the qualifying expenses of the following experts:

4.1.1 Dr. JJ Schutte (Statutory RAF 1 medical report);

4.1.2 Ms. R Van Biljon (Occupational Therapist);

4.1.3 Dr. E Jacobs (Industrial Psychologist);

4.1.4 Munro Actuaries

4.1.5 Dr. LF Oeloefse (Orthopaedic Surgeon);

4.1.6 Dr. W De Beer Lange (Endocrinologist);

4.1.7 Dr. Cronje (Urologist)

4.1.8 Ms. R Botha (Counselling Psychologist)

4.2 Reservation and preparation fees and travelling costs of the following experts:

4.2.1 Dr. E Jacobs (Industrial Psychologist)

4.2.2 Mr. A Munro from Munro Actuaries

4.3 Counsels' fees"

FACTUAL BACKGROUND

[2] On 24 October 2013 at ± 14h45 at the intersection of Hudson Drive and Van der Lindi Streets, Fichardtpark, Bloemfontein, the plaintiff who was 17 years old grade 11 learner suffered severe bodily injuries as a result of an accident. The accident was occasioned by a vehicle collision between a motor cycle with registration number [F...] driven by the plaintiff and a motor vehicle with registration number [0...] driven by a certain Mr. PJ Makhoe ("the insured driver").

PLAINTIFF'S CASE

[3] In paragraph 4 of his pleadings, the plaintiff contended that the aforesaid motor vehicle collision was caused exclusively by the negligence of the insured driver who was negligent in one or more or all the respects highlighted in sub-paragraphs 4.1-4.7 (which I didn't deem prudent to reproduce in order not to unnecessarily overburden this judgment).

[4] Pursuant to the collision, the plaintiff sustained severe bodily injuries inclusive of, *inter alia*, the following:

4.1 Left tibia plateau fracture;

4.2 Bilateral superior and inferior pubic rami fractures;

4.3 Multiple rib fractures on the right side with a pneumothorax;

4.4 Internal bleeding due to a ruptured spleen;

4.5 Left orbital fracture;

4.6 Rupture of the urethra;

4.7 Disfigurement.

[5] As a direct consequence of the aforestated injuries the plaintiff underwent medical treatment as follows:

He was taken to the Life Rosepark Hospital by ambulance;

He was admitted to the Intensive Care Unit;

He was taken to theatre for a splenectomy, open reduction and internal fixation of the left tibia plateau fracture, as well as open reduction and internal fixation of the left orbital fracture;

He was sedated, intubated and mechanically ventilated in the Intensive Care Unit;

His Glasgow Coma Scale ranged between 7/15 to 10/15 on 3 November 2013;

He had severe haematuria and received bladder irrigations via the urinary catheter;

He had a bronchoscopy in the Intensive Care Unit as part of his lung toilet;

On 13 November 2013 he was taken to theatre for a cystoscopy and retrograde pielogram, as well as debridement of both legs.

On 15 November 2013 he was extubated and given oxygen via face mask and the orogastric tube was removed;

On the 15 November 2013 his Glasgow Coma Scale was recorded as 15/15;

He started mobilizing with the help of physiotherapist on 28 November 2013 to the chair;

On 29 November 2013 he was again taken to the intensive care unit for 3 days;

On 4 December 2013 he was again admitted to the Intensive Care Unit with urethral bleeding. A new urinary catheter was inserted and continued bladder irrigation started;

On 5 December 2013 he had an RT scan of the pelvis and was taken to theatre on 6 December 2013 for an angiogram and embolectomy of the right pelvis artery at the Universitas Hospital;

On 8 December 2013 a new intravenous line was inserted in the right sub-clavian artery;

His urinary catheter was removed on 13 December 2013 after which he struggled with bladder control.

The urinary catheter was re-inserted on 18 December 2013 and the ranger knee brace was removed from the left leg;

He was taken to theatre on 19 December 2013 for debridement and skin graft on the right calve;

He was transferred to the ward on 20 December 2013 and was discharged on 23 December 2013;

He received numerous blood transfusion while he was in the hospital for a low haemoglobin count;

He received physiotherapy, occupational therapy and psychiatric counseling while he was in hospital;

He had numerous follow up consultations and procedures

with his general surgeon and urologist;

He is currently still experiencing pain and suffering on a daily basis;

His competitiveness on the open labour market has severely been impaired.

DEFENDANT'S CASE

[6] In essence, the defendant in its pleadings denied all the material allegations by the plaintiff.

[7] In the alternative, it (the defendant) contended that the plaintiff's claim should be apportioned in terms of the Apportionment of Damages Act 34 of 1956.

[8] In its Heads of Argument, the defendant submitted that the plaintiff had recovered dramatically and, on his (plaintiff's) version, he had been employed twice after the collision. He was coping well with his daily activities including his employment demands.

[9] The defendant concluded by submitting that an amount of R2 496 900.20 would be a reasonable amount to be awarded.

SETTLEMENTS

[10] a) The merits of the plaintiff's claim were, by agreement between the parties, determined on 23 February 2016.

In terms of the aforestated agreement and the

subsequent court order the defendant accepted 80% liability towards the plaintiff in respect of the latter's agreed or proven damages arising out of the accident. The defendant was furthermore ordered to furnish an undertaking to the plaintiff in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 ("the act") for 80% of the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods to him arising out of the injuries that he sustained in the motor vehicle collision.

b) At the commencement of the trial on 16 August 2016, the parties settled the plaintiff's claim in respect of his general damages, being for pain and suffering, loss of enjoyment of amenities of life, disfigurement and disability, totaling R1 200 000-00.

ISSUES FOR DETERMINATION

[11] At the commencement of the trial the issue of liability was settled between the parties in the total amount of R1 200 000.00. The liability agreed upon pertained to the general damages encapsulating pain and suffering; loss of enjoyment of amenities of life; disfigurement and disability. The basis of the aforesaid settlement was that the damages would be apportioned as to 80% to 20% in favour of the plaintiff, being the amount of R960 000.00. Consequently, the only issues for determination in this trial were the plaintiff's claim for the past medical and hospital expenses;

future loss of income, as well as the costs of the quantum related trial. For the costs, the plaintiff claimed R1 517 993.95[c], and R4 387 300.00 for the rest.

COMMON CAUSE ISSUES

[12] Both parties engaged various medical experts with a view to determining the extent of the plaintiff's injuries and the sequelae thereof. The aforestated experts then filed their reports and produced joint minutes wherein they recorded their unanimous opinions regarding the plaintiff's injuries as well as their sequelae.

[13] The aforesaid opinions may be summarised as follows:

13.1 ORTHOPAEDIC SURGEONS – DRS L OELOFSE AND HL MOLOTI

According to the orthopaedic surgeons' joined minute dated 11 March 2016, it is common cause that:

a) The plaintiff suffered facial, chest, abdominal, bladder, bilateral pelvic and left lower leg injuries;
b) The plaintiff was hospitalised from 4 October to 23 December 2013, and underwent numerous medical treatments.
c) The plaintiff is still experiencing bilateral pelvic pain, bladder and urination problems, a painful left lower leg and knee and post-traumatic stress disorder;
d) The plaintiff's amenities of life have been drastically affected by the injuries;
e) Both doctors opine that the plaintiff should be

accommodated in a sedentary working environment and that the injuries triggered long term impairment and loss of bodily functions.

13.2 OCCUPATIONAL THERAPISTS: MESDAMES E VAN ZYL AND S MOAGI

Both agreed that:

a) The plaintiff would benefit from occupational therapy intervention;
b) The plaintiff would require assistance of domestic and garden assistance;
c) The work that the plaintiff performed as a mechanic in 2015 resorts under medium to heavier work categories.
d) The plaintiff is fit to do work in a sedentary to light work as his current physical abilities are below the physical requirements of the job of a mechanic; that he is not an equal competitor for work in the medium, heavy and very heavy work categories; and that his reduced memory and concentration may adversely affect his work performance and promotional prospects, particularly in relation to sedentary to light work.

13.3 INDUSTRIAL PSYCHOLOGISTS: DR EJ JACOBS AND M KHESWA

13.3.1 The two agreed that, pre-accident;

a) The plaintiff could have been an artisan starting his career on a Patterson B1-B3

and reach his career ceiling on a MQ of C2 Package (Koch Quantum Yearbook, 2016);

b) He would have reached his career plateaux at age 45;

c) He would have had a probable retirement age of 65 years if the accident did not happen.

13.3.2 They further agreed that, post-accident:

a) The plaintiff's competitiveness has been compromised and that he is not an equal competitor in the open labour market;

b) He will not achieve similar higher academic qualifications he would achieve had the accident not occurred.

13.3.3 It bears mentioning, subject to paragraph 13.3.4 hereunder, that the two could however not agree on the plaintiff's post-accident career income:

a) Dr. Kheswa (for the defendant) is of the opinion that the plaintiff may enter the labour market at a lower quartile of a Patterson A3 level and then progress to B3/4 median.

b) Dr. Jacobs for the plaintiff is however of the opinion that it is unlikely that the plaintiff will obtain work in the corporate sector and that he will only be able to

obtain more sympathetic jobs around the median of the semi-skills in the non-corporate sector. His career will probablybe categorised by periods of unemployment and early retirement, concluded the opinion. The view is also premised on the collateral information obtained by his post-morbid employer that he just could not cope with an environment where physical capacity is required.

13.3.4 Despite the aforesaid different views, both experts agreed that opinions regarding the plaintiff's physical condition should be considered to guide the lost probable post-morbid career scenario.

EVIDENCE FOR THE PLAINTIFF

[14] PLAINTIFF'S EVIDENCE

He was a grade 11 learner when the accident occurred. After the accident, he only resumed school academic activities during February 2014; commenced, and completed his grade 12 year. Although he did not write his grade 11 final examinations, he was "*put through*" to grade 12. Before the accident, he was aspiring to become a mechanic - he had a passion for the type of work and was resolute that he would become a qualified artisan after completing his grade 12 year. Pursuant to the injuries, he not realise his dream because he could not meet the physical

requirements of a mechanic-related work. He got employed as an assistant in the mechanical environment in 2015. He could not cope with the physical demands of the type of work, experienced constant pain and, consequently, was dismissed during the beginning of December 2015.

He was thereafter, around February 2016, employed as a driver at SAC Trucks and earned a monthly salary of R4 000.00. At the time of his testimony he was still so employed.

His job description entailed delivery of heavy vehicle parts and accessories. He had to, more after than not, travel long distances in Free State and Northern Cape provinces. When travelling long distances he experienced pain. He could not, by himself, load and offload heavy parts and objects onto and from the vehicle. He repeatedly relied on the assistance of other people. Consequent upon the injuries and the fact that he still experienced pain and limited functionality, he will not be able, in future, to live up to the physical demands and nature of the mechanical work. He would only be suitable for an environment that would not dictate medium or heavy work. He would be confined to work akin to a driver or an office calibre. He was unfortunately not qualified in the field of administrative or other sedentary work.

[15] Under cross-examination, he stated that he was unable to continue as an assistant in the mechanical environment as he was experiencing a lot of pain and emotional relapse due to his realisation that he will never accomplish his dream. He insisted that he was experiencing pain when he had to lift heavy objects and he could not cope with mechanical work. He also highlighted that he only obtained

his driver’s licence after eight unsuccessful attempts.

[16] DR. JACOBS'S EVIDENCE

He gave expert evidence regarding the plaintiff's loss of earning capacity. A summary of his experience and qualifications was admitted as Exhibit "B", the defendant having not taken issue with his expertise. During his testimony, he confirmed the contents of the report dated 19 January 2016 he had compiled after scrutinising the reports by Dr. Oeloefse (orthopaedic surgeon); Dr. P Cronje (urologist); Ms. E Van Zyl (occupational therapist); and the RAF4 report completed by Dr. Schutte pertaining to the plaintiff's injuries. He also testified that he conducted an interview with the plaintiff on 2 December 2015. In the aforestated report he expressed his opinion, substantiated by the relevant facts and reasons, in respect of the plaintiff's pre- and post-accident career development, earning capacity, and potential loss of earning capacity. The report was admitted by consent as exhibit "C". He further testified that it is the domain of the industrial psychologist to determine whether the injuries and sequelae will have an adverse effect on the plaintiff's career development and future earning capacity. The industrial psychologist’s determination and opinion ultimately constitute the basis of the determination and calculation by a qualified actuary of a plaintiff's actual loss of future income. He compiled his report after having obtained the expert report from Dr. Chews (an industrial psychologist of the defendant). They both compiled a joint minute in which they recorded their unanimous views as well as the issues in dispute. The joint minute was admitted by consent as Exhibit "D". In the aforesaid joint minute they agreed that the plaintiff would have, pre-accident, become an

artisan starting his career on Patterson B1-B3 level and would reach his career ceiling on the MQ of the C2 package as published in the Koch Quantum Verkook, 2016. The relevant employment levels (Patterson/FSA Level), with the yearly basic salary and total package in respect of each, are, according to him, yearly published in Koch's Annual Income Tables. Consequently, according to the industrial psychologists' agreement, the plaintiff would have, barring the accident, started his career on a Patterson B1-B3 level. That would be the semi-skilled corporate sector with a career ceiling, and being the highest level of employment on the median quartile of C2 package with a retirement age of 65 years.

Whilst both industrial psychologists agreed that the plaintiff's competitiveness was compromised pursuant to the injuries and that he was not an equal competitor in the open labour market, they could not reach consensus on his post- accident career developments. Dr Jacobs was of the view that the plaintiff would experience protracted periods of unemployment; would be restricted to light sedentary work with lower compensation; and exposed to the risk of early retirement, most probably age 60 or even earlier.

Under cross examination, Dr. Jacobs stated that his opinion in relation to the plaintiff's post-accident career opportunities was fortified by the fact that the plaintiff attempted to work as assistant mechanic for some period, but could not continue therewith due to the physical functional impairment ignited by the injuries. He conceded that the plaintiff was employable, but his career was, due to the injuries, lower than what it could be had the accident not struck. He firmly stood his ground that the plaintiff would be limited to sedentary work, even if his present condition might improve.

He concluded by opining that according to his expertise:

The possibility that the plaintiff would and could, post-accident, enter the non-corporate semi-skilled market and remains therein, is highly unlikely; and

The view expressed by Dr. Chews that the plaintiff could, post-accident, enter the labour market in the corporate sector and advance to a B2 median quartile, was improbable.

[17] MR. A MUNRO'S EVIDENCE

He qualified as an actuary in 2000 and has since then been incessantly practising as such. He summarised the role of an actuary as follows:

"M"lord the actuary's role is to assist the court in capitalising, so calculating the value of the claim that the other experts provided. So we generally receive most of our instructions from industrial psychologists where they have assessed their earning potential, both pre - and post the accident, and it is our job then using long term economic assumptions and the other experts' input, it is our job to calculate the value of that claim, the value of the loss of income".

He alluded to the contents of his report dated 21 January 2016 and elaborated on the method he followed in assessing the plaintiff's loss of future income as encapsulated and calculated in that report. He stated that his report was based on the agenda presented to him as contained in Dr. Jacobs report. On those two scenarios the plaintiff's losses were calculated and determined by him in the amounts of R2 950 520.00 and R4 387 300.00, respectively. His report was compiled before Dr. Jacobs and Dr. Kheswa compiled their joint report which was filed during July 2016. He had, before testifying in court, considered the joint minute and also the actuarial report of Dr. W Boshoff, which was

filed by the defendant in terms of Rule 36(9)(a) and (b) on 2 August 2016.

According to Dr. Boshoff's report the plaintiff's loss of income was calculated on the two post-accident scenarios as entailed in industrial psychologists' joint minute, being the scenario in terms of Dr. Kheswa's opinion. In terms of the aforesaid opinion the plaintiff would enter the labour market at the lower quartile of the Patterson A3 and then progress to a B3/4 median. In respect of the opinion of Dr. Jacobs the plaintiff would get work in the median semi-skilled non-corporate sector.

Pre-accident, the income scenario as agreed upon by the industrial psychologists was applied in terms of which the plaintiff could have become an artisan, starting his career on a Patterson B1/B3 and reaching his career ceiling on the MQ of the C2 package. Mr. Munro further highlighted that:

Dr. Boshoff is known to him. He was involved in Dr. Boshoff's training.

He scrutinised the contents of the joint minute of the industrial psychologists as well as the contents of Dr. Boshoff's report.

The facts on which the Boshoff report was based as well as the method followed in assessing the plaintiff's loss in terms of the two scenarios were indeed according to his expertise, correct and it amounted to R4 888 700.00.

According to him, it is in the court's discretion to determine the contingency percentage that may be applied in calculating the said loss, which will have the result that the calculated loss might decrease in accordance with the said contingency percentage.

Mr. Munro also testified that the plaintiff was presently earning an amount of R48 000.00 per year, as he (plaintiff) testified. Actual

loss of future income will be higher because Dr. Boshoff calculated his loss of income, post-accident, on a yearly earning of R56 000.00 at the date of calculation. In this regard, he testified that a slightly lowered injured income will increase the claim and, if the loss of income was calculated based on the plaintiff's present earning of R48 000.00 per year, his claim would therefore logically increase. Resultantly, the calculated loss of income based on Dr. Jacobs evidence, as calculated in scenario two of Dr. Boshoff's report i.e. R4 888 700.00, was thus advantageous to the defendant.

Under cross-examination, Mr. Munro was only asked about the basis on which his initial report dated 21 January 2016 was compiled, being based on Dr. Jacobs' report. He testified that if the calculation was based on that report, the plaintiff's loss of income would be in accordance with his initial actuarial report, in particular scenario two as that scenario was in harmony with Dr. Jacobs' report.

DEFENDANTS CASE

[18] The defendant closed its case without tendering any evidence.

ARGUMENTS

[19] The plaintiff's counsel placed reliance in a substantial measure on the following cases in support of the plaintiff's claim:

19.1 *Road Accident Fund v Guendos* 2006 (5) SA 583 (SCA), paragraph 13 wherein the Court held that,

generally, contingencies of whatever nature serve as a controlling mechanism to adjust the loss to the circumstances of the individual case in order to achieve justice and fairness to the parties.

19.2 *Southern Insurance Association Ltd v Bailey N.O* 1984 (1) SA 98 (A). At 113 F-114 A the court brazed the trail with regard to the loss of the earning capacity as follows:

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without benefit of crystal balls, soothsayers, augurs or oracles. All that a court can do is to make an estimate, which is often a very rough estimate, the present value of the loss.

It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems 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 and these may vary from the strongly probable to the speculative".

[20] Counsel for the defendant on the other hand submitted that the court should award the plaintiff an amount of R 2 496 900.00 for the future loss if income. He relied heavily on the actuarial report of Dr. W Bohoff based on scenario 1 which indicated that the plaintiff's career and income would have progressed as depicted below had the accident not occurred:

20.1	December 2014	Completed G12
20.2	January 2015	PattersonB1 earning R158 000.00 p/a
20.3	January 2016	Patterson B2 earning R171 000.00 p/a
20.4	January 2017	Patterson B2 earning R193 000.00 p/a
20.5	December 2040 (Age 45)	Patterson C2 earning R378 000.00 p/a

[21] Further reliance for the defendant was pinned by its counsel on the following cases:

21.1 Mutual and Federal Insurance Company LTD v Swanepoel 1988 (2) SA 1(A) where the court held,

"The primary aim of compensation to the plaintiff is to try to mitigate the loss suffered by him in monetary value and the aim is not to unduly enrich him by giving him more than what is due to him".

21.2 *Marine and Trade Insurance Co. Ltd v. Goliath* 1968 (4) SA 329 (A). Herein the court opined as follows:

"*There has never been two separate cases in which injuries sustained by both plaintiffs are the same. The only reason why injuries are compared in these cases are to assist the courts to come closer to a just and equitable amount and not to expect the court to give the exact amounts".*

ANALYSIS OF EVIDENCE

[22] First and foremost, it bears mentioning that the defendant's counsel did not contest the plaintiff's claim for general damages and for the past medical and hospital expenses in

the heads of arguments. Of crucial importance is that during the oral arguments the court pertinently elicited address on those two issues and the defendant's counsel conceded to the amounts claimed by the plaintiff. Consequently, what remains in dispute is the claim for the loss of income and costs.

[23] I deem it prudent to start with the claim for the loss of income. For the plaintiff to succeed in his claim he has to prove on a balance of probabilities that he will suffer financial loss of diminution of his income. In this regard I can do no more that refer to *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 198 where the court held, *"It is no doubt exceedingly difficult to value the damage in terms of money, but that does not relieve the court of the duty of doing so upon the evidence before it. This is a principle which has been acted on in several cases in South African Courts".*

[24] The court elaborated further on this issue in Rudman v Road Accident Fund 2003 (2) SA 234 (SCA) at paragraph [11] as follows,

> *"There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss".*

[25] In this regard Mr. Munro testified that if the plaintiff was earning R48 000.00 per annum as he averred, then his actual loss of future income will be higher because Dr. Boshoff (for the defendant) calculated the loss of income post-accident on a yearly income of R56 000.00 at the date of calculation. On this aspect, he opined that if a slightly

lowered injured income is based on the plaintiff's current earnings of R48 000.00 per annum, his claim will thus effectively increase. Therefore, the calculated loss of income premised on Dr. Jacobs evidence, as calculated in scenario two of Dr. Boshoff's report (R4 888 700.00) is to the defendant's benefit.

[26] At this juncture, it may be well to recall that Mr. Munro was never cross-examined on the calculation produced by the industrial psychologists' joint minute. The same holds true of Dr. Boshoff's calculation which was endorsed by Mr. Munro's testimony.

[27] In his report Mr. Munro indicated that he had applied and illustrated contingencies of 5% and 15% on the past and future injured income respectively. Furthermore, he had assumed that the claimant's income would increase with inflation until his retirement age of 60. At this stage it is apt to state that Mr. Munro's material evidence in its entirety stands unrefuted.

[28] Contingencies have been described as the normal consequences and circumstances of life, which beset every human being and which directly affect the amount that a plaintiff would have earned (See AA Mutual Insurance v Van Jaarsveld 1974 (4) SA 729 (A)).

[29] In his book "The Quantum Yearbook (2011)" at 104, Koch opines that when assessing damages for loss of earnings or

support it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is in the prerogative of the court. General contingencies cover a wide range of consideration which may vary from case to case and may include taxation, early death, loss of employment, promotion prospect, diverse, etc.

[30] When a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to accept them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should, in exercising its discretion, lean in favour of the plaintiff as would have to be the subject of speculation if the accident had not occurred (Dlamini v Road Accident Fund Unreported Case No. 59188/13 North Gauteng Division).

[31] In *casu* the defendant did not tender any opposing expert evidence, nor was the plaintiff's expert testimony disputed on the loss of income. Notwithstanding this anomaly, Adv. Khokho contended during oral argument that the defendant's case would be sustained on the records and documents of Dr. Kheswa filed of record.

When asked by the court if it was his submission that if the

documents and records were filed, there was no need for corroborating *viva voce* evidence, he replied affirmatively. On a follow up question by the court if he had any authority for that contention, he further replied positively and undertook to favour the court with same soonest, an undertaking he did honour.

[32] Under the circumstances, I am driven to an ineluctable conclusion that the actuarial calculations as reflected supra are fair and just in the interests of both parties.

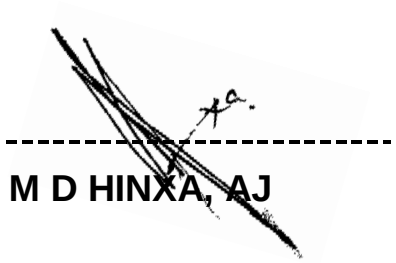
[33] In turn next to the question of costs.

Adv. Pienaar for the plaintiff argued for the costs on an attorney and client scale. He submitted that the court should show its displeasure in the manner in which the defendant conducted its case. He specifically alluded to his request for admission of Dr. Boshoff's report to minimize costs. Adv. Khokho objected yet Dr. Boshoff was their own expert. Mr. Munro (on behalf of Dr. Boshoff) had to be flown from Cape Town on a Friday to testify yet Adv. Khokho did not ask him any questions.

Adv. Khokho counter argued that there was no justification for the punitive costs because the qualifications of Mr. Munro were not in issue. The issue was only the flouting of the rules by the plaintiff. Plaintiff’s conduct was also blameworthy in that at some stage he (plaintiff) decided to abandon his own actuarian report and accepted the evidence of Dr. Boshoff. The plaintiff was clutching on straws, concluded Adv. Khokho.

[34] At this juncture I must hasten to state that I was not persuaded by any of the aforestated submissions. That having been said, I nevertheless exercised my discretion in favour of the defendant, albeit on different grounds. It was my finding that the punitive costs order would be substantially, if not totally, covered under paragraph 4.1.4 and 4.2.2 of the order encapsulated in paragraph 2 infra. Consequently, the costs on a High Court party and party scale would meet the interests of justice in *casu* and it was so ordered.

[35] In the circumstance, I still abide by the order I pronounced on 20 December 2016 as encapsulated in paragraph 2 infra.



M D HINXA, AJ

On behalf of the plaintiff: Adv. C. D. Pienaar
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of the defendant: Adv. N. D. Khokho
Instructed by:
Maduba Attorneys
BLOEMFONTEIN