



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: 2871/2018

In the matter between:

LOUIS COETZEE

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

CORAM: OPPERMAN, J

HEARD ON: 31 August 2021, 1 & 3 September 2021

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 9 September 2021. The date and time for hand-down is deemed to be 9 September 2021 at 15h00.

JUDGMENT BY: OPPERMAN, J

INTRODUCTION

- [1] The matter serves before Court to determine the aspect of future loss of earnings/earning capacity. Before the matter went on trial the parties settled as follows:
1. The defendant is liable for 100% (hundred percent) of the agreed damages;
 2. general damages in the amount of R350,000.00;
 3. the defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996.
- [2] The parties requested for the Court to order in terms of Rule 33(4) that the issue of past medical expenses be separated and postponed to the Pre-Trial roll of 22 November 2021.
- [3] The plaintiff is Louis Coetzee, who was born on 21 January 1972.
- [4] Mr Coetzee was involved in a motor vehicle accident on the 17th of August 2016. He alone, driving from Bloemfontein to Koffiefontein, stopped at a traffic intersection and was rear ended by another vehicle. It is common cause that the impact was at high speed.
- [5] The plaintiff's pre-accident recall was intact and he suffered no loss of consciousness. He was attended on the scene by paramedics and was transported by ambulance to a private general practitioner in Koffiefontein. He was assessed, received pain medication and was sent to Bloemfontein Mediclinic.
- [6] At the hospital in Bloemfontein, he was treated for lower back injury, neck injury (whiplash) and a slight concussion. He received pain medication, x rays, scans and bed rest. He was admitted to hospital for two days.
- [7] In the Particulars of Claim he claimed to have suffered: "Pain and discomfort, loss of amenities of life, had to undergo medical treatment, may have a loss of earnings/earning capacity in future."

[8] As a result of the injuries which the plaintiff sustained, he claimed damages in the amount of R949,944.74 that have been calculated as follows as on the date of the claim on 7 June 2018:

1.	Past medical and hospital expenditures	R29,944.74
2.	Estimated future medical treatment	R200,000.00
3.	Past loss of income	R20,000.00
4.	<i>Estimated future loss of income</i>	<i>R500,000.00</i>
5.	General damages	R200,000.00
	Total	R949,944.74

DISPUTE AND THE EVIDENCE

[9] The plaintiff, during oral argument on 3 September 2021, claimed R1,108,620.00 for future loss of earnings/earning capacity. The defendant opposed the claim and prayed for the Court to grant an amount of R471,188.00. The difference to lie and the dispute to be the contingencies to be applied to the calculations for loss of earnings.

[10] The parties agreed that the expert reports may be handed in and the defendant accepted the contents thereof with the only point of contention in regard to the experts' recommendations being the contingencies applied by the plaintiff's actuary. The calculation date of the actuary was 18 August 2021 and for R1,051,550.00.

[11] The factual dispute was summarised by Counsel in their Heads of Argument. The defendant's views were the following:

PLAINTIFF'S EVIDENCE

5. Mr Coetzee was the only witness for the Plaintiff. During examination in chief, Mr Coetzee testified that he is the Area Manager for NPCC Cleaning Contractors, responsible for 5 provinces. Part of his duties entails driving to different locations and providing clients with stock. He is required to load and offload stock, which includes heavy items such as a 25-litre soap bottle.
6. He testified that after the accident, he is struggling to load and offload heavy objects, that his trips take him longer due to the need to stop and rest regularly. This results in extending his trip with one day, which has financial implications for the company.

7. Mr Coetzee also testified that his productivity has decreased and that a possible promotion that he was in line for pre-accident, was now definitely off the table.
8. During cross-examination, Mr Coetzee testified that his supervisor at no stage had a discussion with him relating to reduced performance or the fact that he was no longer in line for a promotion. This was a conclusion that he come (sic) to on his own accord.
9. He confirmed that his supervisor was Mr Hein Rall.

FUTURE LOSS OF EARNINGS

10. The Industrial Psychologist, Dr AC Strydom, indicated that Mr Coetzee was off work for two weeks following the accident, that during this time he was paid his full salary and therefore no past loss of earnings was suffered. (Expert notices, volume 2, page 173 at par 13.2).
11. The mandatory retirement age for employees is between 60 and 65 years as confirmed with the employer (page 168 at par 8.1.7).
12. Dr Strydom had a telephonic conversation with the National Manager at NPCC Cleaning, Mr Hein Rall, on 11 November 2020 as well as 11 August 2020. The following discussion points are highlighted for the Honourable Court's consideration:
 - 12.1 The performance of Mr Coetzee is still good and could be rated 8/10;
 - 12.2 He has not received any disciplinary warnings.
 - 12.3 Any time off from work for accident-related problems will be paid time off.
 - 12.4 *They were going to promote Mr Coetzee by giving him additional areas to manage, however, due to the Covid 19 pandemic, they could not.*
 - 12.5 *Mr Coetzee has a 100% chance of being promoted, and that the accident in question did not affect his chances to be promoted.*
 - 12.6 *The criteria for a promotion were long service for the company, trustworthiness and being a hard worker.*
 - 12.7 *If Mr Coetzee so chose, he will be accommodated after the retirement age for employees, under the same conditions.*
 - 12.8 *His attendance record is still very good (Page 174 at par 14.1).*
12. Dr Strydom points out that Dr Marin, the Orthopaedic Surgeon, attributed 50% of the spinal injury to the accident in question, as degeneration was present pre-morbidly (Page 180 at par 16.4). This is confirmed by the report of Dr Marin in which he indicated degenerative changes in the lumbar spine of Mr Coetzee at the time of the accident (Expert notices vol 1, page 19 at par 8.6).
- 13 With regards to the post-morbid retirement age, Dr Strydom refers to the report of Dr Marin where it is indicated that if accommodated, Mr Coetzee would be able to work until the age of 65 years. If not accommodated, he would be able to work to the retirement age of 55. (Accentuation added)

[12] Counsel for the plaintiff relied heavily on the *viva voce* evidence of the plaintiff during the trial that he will likely not be promoted due to his injuries causing him not to be able to perform on the level required before promotion can be considered. She also emphasized the possibility of a change of management that will be less accommodative.

[13] The expert's views as depicted by the plaintiff are the following:

1. DR. TB NAKA – RAF 4:

Dr Naka is of the opinion that the plaintiff's injuries are serious in terms of the narrative test and falls under serious long-term impairment or loss of body function.

2. DR. JP MARIN – ORTHOPAEDIC SURGEON:

1. The plaintiff's injuries qualify in terms of the narrative test as serious long-term impairment or loss of a body function.
2. Injuries Sustained: Injury of the cervical spine resulting in residual pain and restricted range of movement. Lumbar spine injury with residual symptoms, restricted range of movement of the back and aggravation of pre-existing spondylosis of the lumbar spine.
3. Employment: The plaintiff needs to be accommodated in a light duty/ergonomically spinal friendly position (as determined by an Occupational Therapist). Dr Marin believes that the injuries had an impact on the plaintiff's productivity and working ability and will continue to do so in future. The plaintiff is going to be absent from work on a regular basis for conservative and/or surgical interventions. With successful treatment, the plaintiff's productivity will improve. However, as the degeneration in his lumbar spine progresses, it will decrease again. Consequently, the neck and back will always be regarded as a deficit for the plaintiff. It is Dr Marin's opinion that the plaintiff **MUST BE** accommodated in a permanent light duty/spinal friendly working environment.
4. Retirement: The plaintiff stated to the surgeon that he would have been able to work to the normal retirement age of 65 (sixty-five) years, if not for the

accident and injuries sustained. The plaintiff is 47 (forty-seven) years old and was able to do physical labour prior to the accident. Even with successful treatment the patient will always have a deficit. The plaintiff's working abilities have been negatively affected by the accident. If not accommodated in an ergonomically spinal friendly environment, the plaintiff will only be able to work to the retirement age of 55 (fifty-five) years.

3. CLAIRE HEARNE – CLINICAL PSYCHOLOGIST:

1. The plaintiff is struggling to adjust to the injuries sustained in the accident under discussion and *sequelae* thereof. From a physical perspective it appears that the injuries sustained in the accident and *sequelae* thereof have a restrictive impact on the plaintiff's functioning compared to previous levels of functioning. His lifestyle has been curtailed by the injuries as he experiences physical impairment, pain and discomfort. *The injuries are associated with subjective fear by Mr Coetzee pertaining to future employment and financial security and a general assault on priorities of daily life.*
2. The emotional effects, particularly those related to enduring pain, are likely to interact, resulting in deleterious effects on performance. These difficulties may interfere with his ability to function to his full potential across all activities of daily living, contributing to loss of confidence in his abilities.
3. The plaintiff is at risk of experiencing despondency and fluctuating motivation and commitment in his work environment due to the extra physical and emotional effort required in completing work tasks particularly on awareness of his dysfunction. The physical discomforts may also make him emotionally vulnerable in his work environment which could place work relationships at risk. In addition to the *sequelae* of injuries and the enduring pain he has suffered loss of emotional stability, loss of employability, loss of meaningful interaction and loss of amenities, independence and enjoyment of life.

4. Ms Hearn reported that the plaintiff is a smoker and that he smokes around 10 cigarettes per day.¹

4. DR AC STRYDOM – INDUSTRIAL PSYCHOLOGIST:

1. The plaintiff reported to the psychologist that as an Area Manager, he works from 07:00 until 17:00 but the hours were not stagnant. He indicated that he travelled to Eastern Cape, Free State, Northern Cape and North-West. The travelling distance per week amounted to approximately 3000km to 4000km. He did inspection and offloaded stock at these various locations.
2. He started working for the company in 2006 as an Area Manager on a permanent basis.
3. His job description was to manage all the branches in Northern Cape, Eastern Cape, Free State and North-West. The key performance indicators to be: Control stock, handle queries, inspect all branches and he needs to travel a lot. His position could be classified as heavy in nature, as he is required to lift and carry stock up to 25kg.
4. The mandatory retirement age for employees is between 60 and 65 years. Increases are determined by the employee's performance. *He did not belong to a medical aid, nor a pension fund.*
5. He did have promotional prospects where he would have been given more branches to control, although his title would have remained as Area Manager. Although Mr Rall, National Manager, could not indicate when the promotion would have been given, he reported that the salary for the promotion would have been R23,000.00 per month.
6. He had a 100% chance to receive the above-mentioned promotion, as he was a very good and hard-working employee, who was also very trustworthy. The criteria for the promotion were to be a hard worker and they must have 3-5 years' service with the company.

¹ Bundle: Expert Notices Volume 1, page 37, paragraph 6.9.

7. His performance at the time of the accident was very good and could be rated at 8/10. He did not receive any disciplinary warnings before the accident in question. Employees are entitled to 30-days sick leave within a 3-year cycle. *His attendance record at the time of the accident was very good.* He worked very little overtime, maybe one hour every two years.
8. But for the accident and considering the plaintiff's age, educational and employment history, he most probably had the capacity to continue working as an Area Manager (B4/5 median) at the same employer until such time he would have been promoted to be in control of more branches as an Area Manager (C1 median) until the normal retirement age. From the collateral information obtained, *this promotion was his career ceiling* and no further promotions would have been expected. The expert estimated the promotion to be at age of 50 years. *As it is impossible to determine when he would have received the above-mentioned promotion, it was suggested that a pre-morbid contingency deduction to accommodate this uncertainty, be applied.*
9. If he needs to take time off from work for accident-related problems he will be paid in full.
10. They were going to promote him by giving him extra areas to manage, however, due to the COVID-19 pandemic, they could not. As said, Mr Rall was uncertain of the promotion salary but suggested that a 7% increase would suffice and the age of 50 years would be reasonable for the promotion. He has a 100% chance of being promoted and the accident in question did not affect his chances to be promoted. The criteria to be promoted is long service for the company, trustworthiness and being a hard worker. In Mr Rall's opinion, the plaintiff is unlikely to opt for early retirement. If the plaintiff so chooses, he will be kept after the retirement age for employees under the same conditions.
11. In terms of his title as Area Manager, he has reached his career ceiling as there are not many management positions in the company. His attendance

record is still very good. His overtime conditions are the same as pre-morbid.

12. As to Post-Morbid Potential Dr Strydom opines that the plaintiff is suffering a loss of employability, productivity and work capacity which may in turn, result in a loss of earning capacity. *At the age of 48 years, the plaintiff still has a long working lifespan ahead of him and would always have to analyse his future positions in order to perform work, which would not aggravate his symptoms. He can be regarded as a physically and psychologically vulnerable employee within the open labour market.*
13. In the plaintiff's case he would be limited to light physical demanding type of work and would need to be accommodated. Alana Stroebe and Rita van Biljon opined that although his current employment falls within his residual physical working capacity, he still needs constant accommodation by taking frequent rest breaks when travelling and certain types of adaptations need to be implemented. Should he thus lose his current employment the chances are likely that the plaintiff would have difficulty securing employment where he can be accommodated.
14. Dr Marin indicated that although his condition may improve after the suggested treatment, his condition will however deteriorate again, once the degeneration of his spinal injury sets in. Dr Marin also opined that if he is not accommodated then the plaintiff is likely to only work until the age of 55 years which would result in a future loss of earnings. It is uncertain whether he would always be accommodated and thus, the plaintiff's chances to take full advantage of his remaining employment years are at risk. *Dr Strydom noted that Dr Marin indicated that the apportionment of the spinal injury is only 50% to the accident in question, as degeneration was already present pre-morbidly. For this reason and the uncertainty of his continued employment up to the normal retirement age, Dr Strydom suggests an appropriate post-morbid contingency deduction.*
15. It is well known that a person, who is constantly exposed to pain and discomfort, is unable to perform at their best or perform at the required

standard and may thus be at risk of losing their employment. According to collateral information obtained, the plaintiff's performance has remained satisfactory with a rating of 8/10. *It is possible that the employer is not aware of the problems experienced by the plaintiff at work and once he becomes aware of his condition or if accommodations are requested, he may become less tolerable.* To undergo the treatment/surgery as indicated by Dr Marin he will need to take time off from work, which may alter the employer's perception. The employer indicated that the plaintiff's promotion prospects have not been affected by the accident in question. *Thus, the plaintiff is likely to still be promoted, however the increase in work will pose a threat on his performance and pose a further threat on his continued employment.*

16. The psychological *sequelae* would further pose a threat on the plaintiff's motivation, commitment to and despondency in his workplace.
17. Dr Strydom suggests that the *plaintiff be compensated for the above losses and the chances of him being at risk not taking full advantage of his remaining employment years, which would depend on his tolerance for pain and discomfort. Dr Strydom suggests a substantially higher post-morbid contingency deduction in this regard.*

5. ALANA STROEBEL (RITA VAN BILJON) – OCCUPATIONAL THERAPISTS:

1. The plaintiff did not suffer a loss of income during the period of absence. After the accident, his job duties and critical job demands have remained unchanged. He however, no longer assists workers with spring cleaning duties / emergency cleaning services, which entailed tasks such as climbing in roofs (estimated once a month, not monthly). He now only instructs and supervises in this regard.
2. Where possible he also restricts himself from handling loads, by instructing cleaners to assist him when offloading stock. He however, still experiences lower back pain when required to handle stock when receiving stock once a month (lifting / carrying large 25litre bottles of soap) or loading stock prior to

daily visits. In addition, he also experiences lower back pain when handling equipment (unloading and loading) and with forward bending whilst cleaning carpets (twice a month). Prior to the accident, he was able to drive long distances ($\pm 800\text{km}$) without a stop break, but now he is required to take more regular stop breaks, as he experienced lower back and neck pain when driving for a prolonged distance. Prolonged sitting and driving, requiring continuous concentration, such as when he is required to travel to Transkei / Port St Johns (1125km); results in a migraine. His Transkei route used to take 4 days, but after the accident, the same route now takes an additional day to complete. In addition, prolonged driving also results in radicular symptoms of the left lower limb i.e., numbness, which results in difficulty in terms of clutch control. He reported some neck discomfort when required to observe blind spots.

3. Loss of Earning Potential: Pre-Accident education and Work History shows the plaintiff is a 46-year-old male, who matriculated and now holds an NQF Business Management Diploma. He resigned with the rank of a Captain, after being employed at the South African Army for a period of 10 years. From 2001 until the date of the accident (17 August 2016) he was employed within managerial positions, respectively as a Foods Manager (Woolworths), a Store Manager (Pick and Pay) and an Area Manager (NPCC Cleaning Contractors).
4. On 29 August 2016, the plaintiff returned to his pre-accident occupational duties (12 days of sick leave). He did not suffer a loss of income during the period of absence. On the day of assessment (1 year 8 months after the accident), he was still employed as an Area Manager. After the accident, his job duties and critical physical demands have remained unchanged. He however reported the following modifications; he now only instructs and supervises versus assisting, when required to perform spring cleaning / emergency cleaning services (therefore no postural demands such as climbing in/out and mobilising in roofs) and where possible he restricts load handling (cleaners off-loads stock).

5. His current occupation can therefore still be categorised as predominantly light work, with medium aspects of work required a few times a month.
6. Impact of Injuries on Work and Future Earning: When considering his residual capacity (sedentary to light), it can be expected that he would have difficulty with load handling demands exceeding light loads such as when handling a large 25- litre soap bottle and with postural demands such as with frequent forward bend standing on days when cleaning carpets and when assisting with emergency/spring cleaning duties. He is currently still able to cope with his predominant job demands (light); but as mentioned it can be expected that neck pain, lower back pain and radicular symptoms of his left lower limb will have a negative influence on his ability to drive for prolonged distances and in terms of clutch control. He would require more regular stop breaks while driving, which will have a negative impact on his work productivity. Within his current position he will require continuous accommodation, which would include allowing intermittent stop breaks while driving; adjusted ways to task approach and the use of specialised devices (an ergonomic chair within his office, an adapted trolley with wheels, a back and neck support cushion while driving and additional mirrors). In Me. Stroebel's opinion an employee requiring accommodation will be disadvantaged in a competitive work place with regards to productivity in comparison to uninjured peers. Therefore, while symptomatic and prior to intervention, the plaintiff will remain an unequal competitor in the open labour market, even within sedentary to light categories because of his need for accommodation.
7. Me. Stroebel noted the following reports of Dr B Naka (Medical Practitioner), "He has not reached 30% of the whole person impairment but qualifies under the narrative test. His injuries warranted an award under general damages, his neck and lumbar injuries will require to be reviewed every 2 to 3 years. The motion deficits will continue interfering with his future work ability and current work output (page 4 of his report)." Deferral was made to an Orthopaedic Surgeon to provide commentary in terms of prognosis and

future treatment required (such as surgical procedures). Should a poor prognosis be indicated, the plaintiff would likely remain compromised within the open labour market, even with treatment. With a poor prognosis, more regular rest breaks i.e., stop breaks while driving, would be necessitated with a further negative impact on his work productivity and this could result in vulnerability to retain his current position. Psycho-social concerns and pain (including migraines experienced) will likely have a further negative influence on his work motivation, work speed and interpersonal relationships if not effectively addressed. In addition, these aspects may also have a negative influence on the plaintiff's ability to concentrate for prolonged periods such as when driving.

8. Me. Stroebe agrees with Dr Marin that his future work choices would remain restricted to sedentary and light work categories. In addition, he will require continuous accommodation in future in terms of sedentary and light work. He would need to alternate between sitting and standing tasks, avoid static posturing, be required to implement self-pacing (i.e., such as more regular stop breaks whilst driving), adjusted ways to task approach and ergonomic adjustment. As degeneration progresses with age, his work productivity would also remain compromised, even in sedentary and light categories of work (such as more regular stop breaks whilst driving). He is thus expected to remain disadvantaged in his current workplace and within future work positions, with regards to efficiency and effectiveness in comparison to uninjured individuals. He is not considered an equal competitor in the open labour market, as he is restricted to sedentary and light work and would even require accommodation within these work categories (i.e., with increased accommodation as he ages and degeneration progresses).
9. As degeneration in the lumbar spine progress and should a condition such as spondylosis develop in his neck, spasms and pain in his neck and back will likely increase. He will then require more physical accommodation with age and degeneration and have to rely on more regular conservative treatment resulting in regular absence from work. In her opinion, even with

successful treatment, it is likely that the plaintiff's physical and functional ability will deteriorate with age as degeneration progresses. His work productivity will likely also decrease with age. This could result in vulnerability to retain a position such as his current position until retirement age.

THE LAW

[14] Both Counsel for the plaintiff and the defendant submitted comprehensive Heads of Arguments and their exposé of the relevant law is appreciated.

[15] The following is applicable *in casu*:

1. Allowances for contingencies is a process of subjective impression or estimation rather than an objective calculation that is positioned in the sole discretion of the Court.²
2. The adjudication of contingencies deductions in the calculation of the *quantum* of an amount for future loss of earning capacity are complicated and multifaceted with speculation inevitably existing.
3. The Court has a wide discretion that must, however, be based upon a consideration of all the relevant facts and circumstances. Justice and fairness for the parties is served by contingencies to be applied on the particular proven facts of the case.³
4. The discretion of the Court may not be usurped by the evidence of the experts such as the actuary. Actuaries' evidence only serves as a guide to the Court.⁴
5. Many factors come into calculation such as the possibility of forced retirement before the age of 65, possibility of death before 65 years of age, the likelihood of suffering an illness of long duration, unemployment, inflation and deflation, alteration in costs of living and any other contingency that may affect earning capacity.⁵

² *AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A).

³ *AA Mutual Insurance v van Jaarsveld* 1974 (4) SA 729 (A).

⁴ *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at paragraph 8.

⁵ *Gilbanks v Sigourney* 1959 (2) SA 11 (N).

6. In *Phalane v Road Accident Fund* (48112/2014) [2017] ZAGPPHC 759 (7 November 2017) it was ruled that:

[17] 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).

[18] 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."

7. The dilemma in *Oosthuizen v Road Accident Fund* (2014/04972) [2015] ZAGPJHC 172 (15 July 2015) compares with this case and I align myself with the statements at paragraphs [31] to [33] to cause the same conclusion *in casu*.

31. Bearing this in mind, I am inclined to agree that the plaintiff has suffered a loss of productivity and will need to make adaptations for his short term memory loss and the fact that he has lost fingers on his dominant hand. *I think that a loss of promotional prospects are remote particularly as his employers have stated that his performance has not slowed down in the slightest since being involved in the accident and that both his pre and post accident performance was of an excellent standard and that his promotional prospects have not been hindered by the injuries sustained by him in the accident. On the contrary, he has been promoted despite his injuries and shortcomings. I am, however, mindful that in applying an appropriate contingency to the plaintiff's post-morbid earnings, a loss of promotional prospects need not be established as a probability, but merely as a possibility.* (Accentuation added)

32. Ms. Letzler wished me to discount this evidence as it was unlikely that his employers, who were loyal and accommodating, would state otherwise. But I cannot accept that this is the case. The managers interviewed by, who they must have known, was an industrial psychologist to support the plaintiff's case against the RAF, would have been equally motivated to highlight any difficulties they may have noted with the plaintiff's post accident (sic) performance. *In addition, it was this very fact that the plaintiff's employees were sympathetic to him and he was a long term highly regarded employee that she sought to discount the usual premorbid contingencies applied to his earnings. The plaintiff cannot have it both ways and thus the fact that the plaintiff's employment was secure, would equally be applicable to the contingency deduction for both his pre morbid and post morbid earnings and thus there would be no differential arising herefrom.* (Accentuation added)

33. However, I am mindful that there is a remote chance that the plaintiff may not experience as sympathetic and loyal employers in the remote possibility that he were (sic) to lose his position at Nedbank. I have no doubt, however, that the plaintiff's skills and capabilities would hold him in good stead with any future employer.

CONCLUSION

- [16] From the telephone discussions between the Industrial Psychologist and the National Manager of the employer of the plaintiff on 11 June 2020 and 11 August 2020, Mr Coetzee is still regarded to be an effective employee that has a 100% chance of being promoted and that they are even willing to accommodate him pass his retirement age of 60 to 65 years.
- [17] The *viva voce* evidence of the plaintiff on 1 September 2021 and the opinions of the experts do however indicate that there is a strong probability of a decline in his output and abilities to perform in his current post.
- [18] Advocate Bornman, for the defendant, highlighted the fact that the accident caused only 50% of the medical *sequalae* due to an existing condition before the accident that the plaintiff was not aware of. The argument was countered by Advocate Sander in that she submitted that the accident triggered the further degeneration of the spinal injury. The plaintiff must receive the benefit of the doubt on this issue

when his *viva voce* description of his physical impairments due to the injuries is regarded. The experts supported his evidence on this aspect.

[19] The parties are *ad idem* that the Court may exercise its discretion relating to the contingencies in line with the actuary's report and the relevant amount to be used for the calculation of post-morbid future loss of earnings should be R5,223,719.00.

[20] The plaintiff claims a 5%, 5%, 10%, 30% contingencies calculation formula as on 18 August 2021.

	Loss of Income Mr. L Coetzee		
	Actuarial Certificate		
	Had the accident not happened	Now that the accident has happened	Difference: Loss
Past earnings	R1,166,968.00	R1,159,804.00	
LESS: Contingency deductions (5% / 5%)	R58,348.00	R57,990.00	
Total loss of past earnings	R1,108,620.00	R1,101,814.00	R6,806.00
Future earnings	R5,223,719.00	R5,223,719.00	
LESS: Contingency deductions (10% / 30%)	R522,372.00	R1,567,116.00	
Total loss of earnings	R4,701,347.00	R3,656,603.00	R1,044,744.00
			R1,051,550.00

[21] Counsel for the defendant submitted that there is no reason why the normal contingencies should not be applied. She does however concede that early retirement would indicate an anticipated loss of earnings and therefor suggests a contingency deduction of 25% to be fair for the post-morbid future loss of earning calculations. In conclusion the defendant submits a 5%, 0%, 15% and 25% calculation formula.

	Loss of Income C Bornman		
	Attorney for the Defendant		
	Had the accident not happened	Now that the accident has happened	Difference: Loss
Past earnings	R1,166,968.00	R1,159,804.00	
LESS: Contingency deductions (5% / 0%)	R58,348.00	R0.00	
Total loss of past earnings	R1,108,620.00	R1,159,804.00	-R51,184.00
Future earnings	R5,223,719.00	R5,223,719.00	
LESS: Contingency deductions (15% / 25%)	R783,557.85	R1,305,929.75	

Total loss of earnings	R4,440,161.15	R3,917,789.25	R522,371.90
			R471,187.90

[22] The evidence of the case shows that the pendulum of the stance of the parties sways too far in their perspective directions; the plaintiff is indeed highly regarded by his employer and his prospects as in 2020 seemed very good but for the opinions of the experts and the evidence of the plaintiff that his condition is having a definite effect on his ability to perform and that the Court must deviate from the normal contingencies. Contingencies on the basis of 5%, 0%, 10% and 25,55% as the total loss of future earnings/earning capacity in the resultant amount of R761,368.40 appears to be a fair and equitable amount that will serve both the plight of the plaintiff and the interest of the public.

	Loss of Income Court		
	Had the accident not happened	Now that the accident has happened	Difference: Loss
Past earnings	R1,166,968.00	R1,159,804.00	
LESS: Contingency deductions (5% / 0%)	R58,348.00	R0.00	
Total loss of past earnings	R1,108,620.00	R1,159,804.00	-R51,184.00
Future earnings	R5,223,719.00	R5,223,719.00	
LESS: Contingency deductions (10% / 25,55%)	R522,372.00	R1,334,924.40	
Total loss of earnings	R4,701,347.00	R3,888,794.60	R812,552.40
			R761,368.40

ORDER

[23] After due consideration of the evidence adduced and arguments by Counsel the following order is made:

1.

1.1 The defendant is liable to pay 100% (hundred percent) of the plaintiff's proven or agreed damages;

1.2 The defendant shall pay the plaintiff the sum of R1,111,368.40 (one million one hundred and eleven thousand three hundred and sixty-eight rands and forty cents) in respect of general damages and loss of earning capacity, set out as follows:

GENERAL DAMAGES:	R350 000.00
LOSS OF EARNING CAPACITY:	R761,368.40

TOTAL R1,111,368.40

- 1.3 The defendant shall pay the sum of R1,111,368.40 (one million one hundred and eleven thousand three hundred and sixty-eight rands and forty cents) into the Trust Account of the plaintiff's attorneys with Trust Account details as follows:

ACCOUNT HOLDER: VZLR INC
 BRANCH: ABSA BUSINESS BANK HILLCREST
 BRANCH CODE: 632005
 TYPE OF ACCOUNT: TRUST ACCOUNT
 ACCOUNT NUMBER: 3014-7774

- 1.4 The issue of General Damages and Loss of Earnings are separated from all the other issues in terms of Rule 33(4), with the issue of Past Medical Expenses being postponed to the Pre-Trial roll of 22 November 2021.

2.

- 2.1 The defendant shall furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 in respect of future accommodation of the plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods of a medical and non-medical nature to the plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained in the collision which occurred on 17 August 2016.

3.

The defendant to pay the plaintiff's taxed or agreed party and party cost, which cost shall include, but not be limited to the following:

- 3.1 The fees of Senior Junior Counsel, including preparation and completion of the submission document and day fee of Senior Junior Counsel on 31 August 2021 and 1 & 3 September 2021;
- 3.2 The reasonable taxable preparation and reservation fees of the following experts:

Dr JP Marin	Orthopaedic Surgeon
Ms C Hearne	Clinical Psychologist

Ms A Stroebe	Occupational Therapist
Dr AC Strydom	Industrial Psychologist
Mr J Sauer	Actuary
Dr Naka	General Practitioner

M OPPERMAN, J

APPEARANCES

On behalf of the plaintiff

ADVOCATE I SANDER

VZLR INC.

c/o Du Plooy Attorneys

BLOEMFONTEIN

REF: DU PLOOY/V605

On behalf of the defendant

ADVOCATE C BORNMAN

State Attorney, Bloemfontein

c/o Road Accident Fund, Bloemfontein

REF: 560/12600654/1101/0

(Link: 4077112)