

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable
Case no: 2542/2021

In the matter between:

MOKGEBE ANDREAS MBAMBO

PLAINTIFF

And

THE ROAD ACCIDENT FUND

DEFENDANT

Neutral citation: *Mbambo v RAF* (2542/2021) [2025] ZAFSHC 178 (13 June 2025)

Coram: Ntanga AJ

Heard: 31 March 2025

Delivered: 13 June 2025

Summary: Civil procedure – motor vehicle accident claim – quantum of general damages and loss of earnings – defendant liable to compensate plaintiff for general damages and loss of earnings.

ORDER

1 The defendant shall pay to the plaintiff the sum of R986 502.80 within 180 (one hundred and eighty) days hereof, in respect of the plaintiff's claim against the defendant for the following heads of damages:

1.1 Past and future loss of earnings/earning capacity R386 502.80.

1.2 General damages R600 000.00.

- 2 In the event of the aforesaid amount not being paid on 180 days from date of this order, the Defendant shall be liable for interest on the amount at the prevailing interest rate, calculated from the 15th calendar day after the date of this Order to date of payment in line with prevailing legislation.
- 3 The defendant shall furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 for payment of 100% of the costs of future accommodation of the patient in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the patient resulting from a motor vehicle accident on 5 January 2020, to compensate the patient in respect of the said costs after the costs have been incurred and upon proof thereof.
- 4 The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale including costs of counsel on scale B in respect of quantum, up to and including 25 & 26 March 2025, and notwithstanding, and over and above the costs referred to in paragraph 5.2.1 below, subject thereto that:
 - 4.1 In the event that the costs are not agreed:
 - 4.1.1 The plaintiff shall serve a notice of taxation on the defendant's attorney of record;
 - 4.1.2 The plaintiff shall allow the defendant 180 (one hundred and eighty) days from date of allocatur to make payment of the taxed costs; and
 - 4.1.3 Should payment not be effected on 180 (one hundred and eighty) days from date of allocatur, the plaintiff will be entitled to recover interest at the prevailing interest rate on the taxed or agreed costs from 15 (fifteen) days from date of allocatur to date of final payment.
 - 4.2 Such costs shall include, as allowed by the taxing master:
 - 4.2.1 The costs of and consequent to the appointment of counsel, on scale B, including, but not limited to the following: for trial, including, but not limited to counsel's full fee for 25 & 26 March 2025, and the preparation and reasonable attendance fee of counsel for attending:

- 4.2.1.1 to the drafting of the plaintiff's application in terms of rule 38(2), which was granted on 26 of March 2025;
- 4.2.1.2 to the drafting of the plaintiff's heads of argument and reply to defendant's heads of argument.
- 4.2.2 The reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by the Taxing Master, of the below experts:
 - 4.2.2.1 Dr D Hoffmann (Plastic, Reconstructive and Cosmetic Surgeon).
 - 4.2.2.2 Dr LA Oelofse (Orthopaedic Surgeon).
 - 4.2.2.3 Scholtz & Partners Diagnostic Radiologists Inc (Radiologists).
 - 4.2.2.4 Drs Verster & Vennote Inc (Radiologists).
 - 4.2.2.5 Dr R Kahn (Medical Examiner).
 - 4.2.2.6 Ms Hope Magubane (Clinical Psychologist).
 - 4.2.2.7 Lucindy van Zyl (Occupational Therapist).
 - 4.2.2.8 Ms Susan van Jaarsveld (Industrial Psychologist).
 - 4.2.2.9 Mr Ryan Immermann (Actuary).

5 The amounts referred to in paragraphs 2 and 5 will be paid to the plaintiff's attorneys, A Wolmarans Incorporated, by direct transfer into their trust account, details of which are the following:

Name of account holder:	A Wolmarans Inc
Name of bank & branch:	ABSA BANK, Northcliff
Account number:	4[...]
Branch code:	632 005
Type of account:	Cheque (Trust)
Reference:	Ms Van Rooyen/MAT15206

6 The plaintiff's claim for past hospital and medical expenses is separated in terms of rule 33(4) and is postponed *sine die*.

7 The plaintiff is granted leave to enrol the claim for past hospital and medical expenses, for a judicial case management conference/pre-trial, in due course.

JUDGMENT

Ntanga AJ

Introduction

[1] The plaintiff instituted an action against the Road Accident Fund (the defendant) for damages suffered as a result of injuries to which he sustained in a motor vehicle accident which occurred on 5 January 2020, at or near Bothaville, Free State Province involving a motor vehicle with registration number DSY[...], driven by MI Mohlabe, the first insured vehicle, and another motor vehicle with registration number FBJ[...], driven by A Moloi, the second insured driver. The plaintiff avers that he was a passenger in the second insured vehicle.

[2] At commencement of trial, parties indicated that merits have been settled, and the court was called upon to determine quantum. Parties requested that the issue of past hospital and medical expenses be postponed *sine die*. An order separating merits from quantum was already granted on 9 September 2021. The plaintiff moved for an order in terms of rule 38(2) as set out in the notice of motion. There was no objection from the defendant. After due consideration of what is stated above, I then issued an order as follows:

(a) An order granted in terms of rule 38(2) in respect of prayers 1, 2, and 3 of the notice of motion.

(b) Determination of past hospital and medical expenses is postponed *sine die*.

Issues for determination

[3] This court is called upon to determine quantum on: (a) general damages; and (b) loss of earnings and contingencies to be applied.

Background

[4] In his particulars of claim, the plaintiff avers that as a result of the collision he suffered inter alia the following injuries:

(a) left distal humerus fracture with resultant damage to his radial nerve;

(b) laceration of the left fingers; and

(c) emotional shock and trauma resulting in Post Traumatic Stress Disorder.

[5] The plaintiff further averred that, as a result of the injuries, he suffers, inter alia, the following *sequelae*:

(a) pain and discomfort;

(b) loss of amenities of life;

(c) he had to undergo medical treatment and will in the future have to undergo medical treatment; and

(d) he suffered a loss of earnings/earning capacity in the future.

The plaintiff's case

[6] The plaintiff argued that determination of an award for general damages involves appropriate award for damages involves a consideration of the plaintiff's pain and suffering, loss of amenities of life and applicable disabilities. This should have regard to all relevant facts and circumstances relevant to the plaintiff and the nature and extent of his injuries. It was argued that the permanency, severity and impact of the injury sustained on the lifestyle of the plaintiff form part of the consideration.

[7] The plaintiff referred to expert reports submitted to support his case and argued that the court has not been placed in possession of reports that counter his case. It was argued that these reports should be considered by the court. Dr Khan, who compiled a medico-legal report stated that:

'Plaintiff had no injuries prior the accident. He suffered a radial nerve compression injury after the surgery. Plaintiff suffered a left distal humerus fracture that required surgery and damage to his radial nerve upper unnamed part, weakness of hand extension and that he has to wear a wrist support on his left wrist. He has a loss of 35 degrees of left shoulder abduction and 40 degrees loss of external rotation as well as 75 degrees loss of elbow flexion & extension. He has 10 degrees loss of elbow supination, 20 degrees loss of left wrist dorsiflexion, 10 degrees loss of left wrist palmarflexion, 10 degrees loss of wrist ulna deviation, 10 degrees loss of left wrist radial deviation, 10 degrees loss of wrist supination. Plaintiff cannot now lift heavy things which is part of his job as a sheriff when he re-possesses furniture. Plaintiff has a life changing event with a permanent serious impairment of the left upper limb.'

[8] The plaintiff further argued that, according to the orthopaedic surgeon report of Dr Oelofse, he suffered loss of amenities as a result of the injuries sustained in the accident and that, post-accident, he required assistance with some activities. Examples given by Dr Oelofse were performance of home maintenance duties, bathing, carrying and lifting of heavy items like shopping bags. These changes are said to be likely to change his mood and lead to the development of other mental health conditions such as depression. The plaintiff acknowledged that he claimed for an amount of R850 000 for general damages but, upon consulting case law, it was submitted that an amount of R600 000 will be reasonable.

[9] Regarding loss of earnings, no claim was submitted for past loss of earnings, the claim is only for future loss of earnings. The plaintiff argued that he works on a commission basis and that his salary differs from that of a normal working person. The plaintiff submitted that he would have been in a position to work until he turns 65-68 years of age. Post-accident, the plaintiff could not return to work immediately, he came back 15 days after the accident. There is a decline in his activities as he cannot perform duties like he did prior to the accident. He has a limitation in productivity and experiences difficulties in performing his duties. It was argued that a higher contingency must be applied as there is a possibility of him going on early retirement. The plaintiff argued for a higher contingency to be applied as a fair deduction and proposed 35% contingency.

The defendant's case

[10] Regarding general damages, the defendant argued that an amount of R350 000 will be fair and reasonable, taking into account case law that awarded smaller amounts than the amount claimed by the plaintiff.

[11] On contingency, the defendant argued that plaintiff is 60 years old, is still employed and that the remainder of his work career is very short. The longer the work period, the higher is the contingency and submitted that 4% contingency should be considered instead of 35% as proposed by the plaintiff. The defendant argued that the purpose of contingency is to account for the uncertainty and that a higher contingency should not be applied. It was argued that, in terms of the sliding scale that is normally followed, 10% is for the child, 20% for the youth and 20% percent for the middle aged persons and that there is no reason to depart from this normally applied sliding scale. It was argued that a fair and reasonable amount for future loss of earnings will be R96 625.70.

Legal framework and evaluation of evidence

[12] The Road Accident Fund has a statutory duty in terms of the Road Accident Fund Act No 56 of 1996 to compensate a person who suffered injury caused by the negligent driving of the driver, owner or employee of a motor vehicle. In relevant parts, s 17(1) of the Road Accident Fund Act (RAF Act) provides that:

‘Liability of Fund and agents. – (1) The Fund or an agent shall –

...

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee’s duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.’

[13] When legislation was enacted to establish a compensation regime for the injured parties, it was never an intention to impose punishment for the fund. The Road Accident

Fund's liability is to compensate the claimant for bodily injuries sustained from a motor vehicle collision. When making a decision, the court has a duty to determine a fair and reasonable amount for compensation. In *Wells and Another v Shield Insurance Co. Ltd (Wells)*,¹ the court enunciated the test for liability of an insurance company towards the injured third party by stating that:

'Two pre-requisites of liability upon the part of the registered insurance company for loss or damage suffered by a third party as a result of bodily injury are thus laid down. They are (i) that the bodily injury was caused by or arose out of the driving of the insured motor vehicle; and (ii) that the bodily injury was due to the negligence or other unlawful act of the driver of the insured vehicle or the owner thereof or his servant.'

[14] It is common cause that plaintiff suffered injuries in a motor vehicle collision and these injuries have impaired the quality of his life, his earning capacity and his ability to execute his household duties, as well as employment responsibilities. He is not the same person since he suffered injuries from a motor vehicle collision. There is merit for the plaintiff to be compensated for general damages and loss of earnings. This court has to determine what is fair and reasonable compensation for the plaintiff. This should involve calculation of the amounts payable to the plaintiff for both general damages and loss of earnings.

[15] In *Dlamini v The Road Accident Fund*,² the Court stated that:

'As a matter of substantive law, therefore, a Plaintiff must prove his or her damages and the quantum thereof on a balance of probabilities. In particular, there must be evidence that the disability giving rise to the damages impacts detrimentally upon the work or occupation that a Plaintiff would probably have pursued, had it not been for the accident.'

[16] As pointed out, there is no dispute that the plaintiff suffered injuries as a result of the motor vehicle collision, he therefore meets the test for proving damages. This was supported by expert medical reports which are undisputed. I am satisfied that the

¹ *Wells and Another v Shield Insurance Co. Ltd* 1965 (2) SA 865 (C) at 868G-869A; see also *Makola v Road Accident Fund* [2024] ZAMPMBHC 75 and *Maatla v Road Accident Fund* [2015] ZAGPPHC 129.

² *Dlamini v The Road Accident Fund* [2022] ZAGPJHC 657; [2022] 4 All SA 360 (GJ) at para 74.

plaintiff's injuries merit compensation for general damages and loss of earnings. What then follows is determination of quantum as compensation for injuries he sustained.

[17] In *RAF v Kerridge*,³ the Supreme Court of Appeal followed the decision of *Hersman v Shapiro & Co*,⁴ and stated that:

'Indeed, a physical disability which impacts on the capacity to earn an income does not, on its own, reduce the patrimony of an injured person. There must be proof that the reduction in the income earning capacity will result in actual loss of income. However, where loss of income has been established but proof of the quantum thereof cannot be produced in the usual manner, the courts have shunned the non-suiting of a claimant and have preferred to make the best of the evidence rendered to give effect to the finding of proved reduction in loss of income-earning capacity. As long as almost a century ago in *Hersman v Shapiro* the court said the following:

"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages."'

[18] I now consider the claim for general damages suffered by the plaintiff. The court must consider factors and circumstances relevant when making assessment for determination of damages. Upon consideration of relevant factors and circumstances, the court must consider what would be a just compensation for pain and suffering, disfigurement, permanent disability and loss of amenities.⁵ In *Pitt v Economic Insurance Co. Ltd*,⁶ the Court stated that:

'The Court's task in estimating damages is always a difficult one. Basically, one has evidence as to the Plaintiff's affairs, but when, in addition, the future has to be scanned, the Court is virtually called upon to ponder the imponderable . . . the Court must take care to see that its

³ *RAF v Kerridge* [2018] ZASCA 151; [2019] 1 All SA 92 (SCA); 2019 (2) SA 233 (SCA) para 25; see also *Rudman v Road Accident Fund* [2002] ZASCA 129; [2002] 4 All SA 422 (SCA); 2003 (2) SA 234 (SCA).

⁴ *Hersman v Shapiro & Co* 1926 TPD 367.

⁵ See *Protea Assurance Company Ltd v Lamb* [1971] 2 All SA 100 (A).

⁶ *Pitt v Economic Insurance Co. Ltd* 1957 (3) SA 284 (N) at 287D-E; see also *Yani and Others v Minister of Police and Others* [2003] ZAGPJHC 968.

award is fair to both sides – it must give just compensation to the plaintiff, but must not pour our largesse from the horn of plenty at the defendant's expense.'

[19] I have considered the medico-legal report by Dr Khan and the orthopaedic surgeon report of Dr Oelofse. In addition, I also considered submissions made by the plaintiff and defendant. It is trite that the court exercises a discretionary function when making assessment for general damages. In *Road Accident Fund v Marunga* (*Marunga*),⁷ the Court stated that:

'Even though the courts have a wide discretion to determine general damages and even though it cannot be described as an exercise in exactitude, or be arrived at according to known formulae, a trial court should at the very least state the factors and circumstances it considers important in the assessment of damages. It should provide a reasoned basis for arriving at its conclusions.'

[20] In *Marunga*, the claimant had suffered a fracture of the left femur, a soft tissue injury in the chest area and bruises on the forehead, left arm and left knee. On appeal, the awarded amount was reduced to R175 000. The current value of this amount is approximately R609 000.

[21] In *Ngomane v Road Accident Fund*,⁸ the claimant had severe fracture of right humerus and right radius and ulna. The claimant was left with a dysfunctional left arm. He had a weak grip on the right side and he cannot lift and carry heavy things and experienced headaches at times. The court awarded R450 000 in general damages, the current value of which is approximately R600 000.

[22] In *Dlamini v Road Accident Fund*,⁹ which was heard by the Gauteng Division of the High Court, Johannesburg, the court stated:

'The Court's inherent jurisdiction is derived from section 173 of the Constitution. It is a power afforded to the Court to regulate its own process and develop the common law, taking into account the interests of justice. But, there is nothing within that power that permits a court to

⁷ *Road Accident Fund v Marunga* [2003] ZASCA 19; [2003] 2 All SA 148 (SCA); 2003 (5) SA 164 (SCA) para 33.

⁸ *Ngomane v Road Accident Fund* [2017] ZAGPPHC 401.

⁹ *Dlamini v Road Accident Fund* [2022] ZAGPJHC 657; [2022] 4 All SA 360 (GJ) para 58.

deviate from established precedent, save in very limited circumstances. The limited power gives effect to the stare decisis doctrine, a cornerstone of our law that serves to avoid uncertainty, confusion, protect vested rights and legitimate expectations.’

[23] In *Dlamini v Road Accident Fund*,¹⁰ which was heard by Kwazulu-Natal Division of the High Court, Pietermaritzburg, the claimant suffered a fracture of the right humerus at the junction of the middle and distal thirds. After hospitalisation his arm was immobilised with a U-slab. He had an isolated injury to his right humerus with no distal neurovascular deficit. He was noted to have a right radial nerve palsy post-operatively and was fitted with a cock-up splint. Regarding permanent disability, it was reported that he suffered from: (a) pain in the right elbow with strenuous physical activity; (b) stiffness in the elbow, which precludes him from doing certain physical activities; and (c) permanent loss of range of movement in the right elbow joint.¹¹ The claimant was awarded R550 000 in damages.

[24] In *Mahlangu v Road Accident Fund*,¹² the Court stated that:

‘1. The award for general damages remains a compensation, it ameliorates the damage (pain and suffering) resulting from injuries sustained in an accident. It is not intended to be full compensation, if that is possible, and it is not intended to wipe out, if that is possible, the damage.

2. The statutory compensation scheme is in essence compensation by the public at large through the state therefore it cannot have a punitive element in it.

3. The statutory compensation scheme is meant to benefit a broad spectrum of the public. Money in a country like South Africa remains a scarce resource with huge demands on the fiscus. Compensation awards must be considered carefully in a responsible manner.’

[25] I have considered the following factors in determining the amount to be awarded to the plaintiff for general damages:

¹⁰ *Dlamini v Road Accident Fund* [2023] ZAKZPHC 29.

¹¹ See note 5 supra at para 5 and 8.

¹² *Mahlangu v Road Accident Fund* [2015] ZAGPJHC 342 para 23.

(a) The plaintiff is currently 60 years old and was 56 years old at the time of the accident.

(b) The plaintiff suffered a radial nerve compression injury after the surgery, a left distal humerus fracture that required surgery and damage to his radial nerve upper unnamed part, weakness of hand extension and that he has to wear a wrist support on his left wrist.

(c) The plaintiff has a loss of 35 degrees of left shoulder abduction and 40 degrees loss of external rotation as well as 75 degrees loss of elbow flexion & extension. He has 10 degrees loss of elbow supination, 20 degrees loss of left wrist dorsiflexion, 10 degrees loss of left wrist palmarflexion, 10 degrees loss of wrist ulna deviation, 10 degrees loss of left wrist radial deviation, 10 degrees loss of wrist supination.

(d) The plaintiff cannot now lift heavy things which is part of his job as a sheriff when he re-possesses furniture.

(e) The plaintiff has a life changing event with a permanent serious impairment of the left upper limb.

(f) As a result of the injuries, the plaintiff will experience and suffer from pain in future and will experience difficulties in performing daily duties as he did prior to the accident.

[26] Case law that I considered has provided guidance in determining a fair and reasonable compensation to the plaintiff. I have taken into consideration variation of injuries in cases considered. Having considered the injuries sustained by plaintiff and comparative case law, I find that an amount of R600 000 will be reasonable and fair.

[27] I now consider the claim for loss of earnings and earning capacity. The trite principle is that a court has a discretion to determine contingencies applicable after having considered relevant factors and circumstances of the plaintiff. Compensation for future loss of earnings is assessed based on percentage of the value of the loss.¹³ The

¹³ RJ Koch *Damages for Lost Income* (1984) at 31.

purpose of this compensation regime is to consider what the claimant would have earned before sustaining injuries and what the injured person will earn after sustaining injuries. Whilst past loss of earnings represent what the injured person lost from accident to date of finalisation of the matter. Actuaries then make calculations to assist the court in determining the monetary value of what should be awarded for loss of earnings or earning capacity.¹⁴ In *Southern Insurance Association v Bailey NO* (*Southern Insurance Association*),¹⁵ the court stated that:

'Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right" . . . One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than "normal" expectation of life: and that he may experience periods periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon circumstances . . . The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case.'

[28] Robert Koch provides the following guidelines regarding contingencies:

Sliding scale: 0.5 % per year to retirement age, 25% for a child, 20% for youth, 10% for middle aged. Normal contingencies are usually deducted at 5% for past loss and 15% for future loss and this depends on the facts of the case.

[29] In *Goodall v President Insurance Co (Goodall)*,¹⁶ the Court stated that:

'In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and sooth-sayers, and by modern authors of a certain type of almanack, is not numbered among the qualifications for judicial officer.'

[30] In *De Jongh v Gunther and Another*,¹⁷ the court stated that:

¹⁴ See *Ubisi v Road Accident Fund* [2023] ZAMPMBHC 33 para 57.

¹⁵ *Southern Insurance Association v Bailey NO* 1984 (1) SA 98 (A) at 116G-117.

¹⁶ *Goodall v President Insurance Co.* 1978 (1) SA 389 (W) at 392H-393.

'In a case where a plaintiff sues for his own future loss of earnings, it is only contingencies which affect him personally which have to be considered. In his judgment in *Van Rensburg v President Versekerringsmaatskappy* (W.L.D. 21.11.68 quoted in Coberdt and Buchanan, *The Quantum of Damages*, vol II, p. 62 at p.65), Ludorf, J., referred to the fact that it has become almost customary, at any rate in this Division of the Supreme Court, for the Court to make the deduction, for unforeseen circumstances of life, of one-fifth. That is, it is true, a rough and ready approach, but the nature of the problem is such that one can do no better than adopt a rule of thumb of this kind.'

[31] In *De Jongh v Dupisane*,¹⁸ the plaintiff was 35 years old at the time of collision. The court found that contingency deductions are discretionary and confirmed 10% contingency deduction applied by the trial court.

[32] In *Van der Plaats v South African Mutual Fire and General*,¹⁹ the plaintiff was 35 years old at the time of the collision and the court applied 10% contingency deduction.

[33] In *Goodall*, the plaintiff was 46 years old at the time of the collision. After consideration of relevant factors and circumstances of the plaintiff, the court found that contingencies ought to be substantially less than 20% and applied 10% contingency.

[34] The defendant referred this court to the decision of *Duma v Road Accident Fund* (*Duma*),²⁰ where the court, in following the decision of *Goodall*, stated that:

'In *Goodall*, a 10% deduction was applied to a 46 year old plaintiff. If one applies the approach adopted in *Goodall* to a 54 year old, at the trial stage, 7 per cent would be appropriate, fair and reasonable.'

[35] In *Mahlo v Road Accident Fund* (*Mahlo*),²¹ plaintiff was 65 years old at the time of judgment and she received government old age pension grant from the age of 60 years.

¹⁷ *De Jongh v Gunther and Another* 1975 (4) SA 78 (W) at 80F-H.

¹⁸ *De Jongh v Dupisane* [2004] ZASCA 43; [2004] 2 All SA 565 (SCA); 2005 (5) SA 457 (SCA).

¹⁹ *Van der Plaats v South African Mutual Fire and General* 1980 (3) SA 105 (A).

²⁰ *Duma v Road Accident Fund* [2019] ZAKZPHC 17 para 49.

²¹ *Mahlo v Road Accident Fund* [2022] ZAFSHC 194.

The court was satisfied that she will be able to work until the age of 70 years. The court ultimately applied a contingency deduction of 25%.

[36] As already pointed out, in this case, the plaintiff is currently 60 old and was fifty six years old at the time of the accident. The Industrial Psychologist, Ms Susan Van Jaarsveld conducted provided report on assessment of the impact on the plaintiff's present and future employability and type of work that he is able to perform. According to Ms Van Jaarsfield she conducted an analysis of the plaintiff's current level of functioning, his pre-and post-accident income potential, and possible loss of earnings. Ms Van Jaarsfield reported that:

(a) Upon alnalysis of the plaintiff's pre-accident income potential, the fact that he was employed as a deputy sheriff, it can be assumed that he would, in all probability, have been employed as a deputy sheriff for the entirety of his working career until the age of retirement. There is no definite retirement age of a deputy sheriff and, as each deputy sheriff will determine his own retirement age, depending on his health and financial situation, it is dificult to provide an indication of the expected retirement age, but it can be assumed that the plaintiff would have been able to continue with his work until the age of 65-68 years.

(b) Regarding the plaintiff's post-accident income potential, he was not able to return to his work as a deputy sheriff immediately after the accident due to the injuries sustained in the accident. He was on sick leave for 15 days and feorfeited his income during his recuperation period as he works on a commission basis.

(c) The plaintiff resumed with his work as a deputy sheriff, he experiences difficulties to perform his duties and responsibilities as he is no longer able to drive a manual motor vehicle as he experiences difficulties to change gears and as he cannot lift and carry heavy objects. After the accident, he appointed a driver to drive him to various destinations to deliver summons. He pays the driver R2 000 per month, but no proof was provided.

[37] I have already referred to the report of Dr Kahn, who is an occupational medical practitioner, when dealing with general damages. I make the same consideration of the report for purposes of dealing with the claim for loss of earnings.

[38] The actuarial report from G W Jacobson Actuaries state that, based on Ms Van Jaarsveld's opinion, it is assumed that but for the accident, the plaintiff would have continued earning at the indicated level and that annual inflationary increases would have been applicable until retirement. The actuary stated that they had been instructed to assume that the plaintiff would have continued working until retirement age of 68 years. Having regard to Ms Van Jaarsveld's recommendation that the plaintiff's future loss of earnings, as a result of the residual accident, related difficulties should be established by means of a higher post-morbid contingency deduction, to account for the factors as set out and discussed in her report, including possibility of earlier retirement. In their report, the actuaries stated that they were instructed to apply 5% deduction for future loss regarding value but for the accident and 35% regarding value having regard to the accident.

[39] The plaintiff argued that the appropriate determination by this court should be a contingency of 5% pre morbid and 35% post morbid loss of income. This was disputed by the defendant who argued that the plaintiff is currently 60 years of age, with an estimated five to eight years left to age of retirement. The defendant argued that, when applying the sliding scale of 0.5% for year to retirement, the appropriate contingency deduction would be between 2,5% and 4%. It was further argued by the defendant that the contingencies applied by the actuaries was purely on instruction and that no case law was presented to the court to substantiate the high post-morbid deduction of 35%, considering that the plaintiff is estimated to have five to eight years before retirement. The defendant argued that high contingency deductions post-morbidly is only applied where younger plaintiffs were still in the establishment phase of their career, or minor's career is an uncertainty. The defendant argued that the plaintiff deviated from the normal contingencies by not applying pre-morbid contingency deduction or a 10% contingency deduction but instead applied a 5% contingency deduction. The defendant argued that a 10% deduction is more than fair, reasonable and just.

[40] I have considered experts reports which were uncontested, particularly information relating to the plaintiff's employment and earning capacity. The industrial psychologist reported that, whilst the plaintiff resumed his duties as a deputy sheriff, he experiences difficulties to perform his duties and responsibilities as he is no longer able to drive a manual motor vehicle as he experiences difficulties to change gears and as he cannot lift and carry heavy objects. From the report, it appears that there is doubt that the plaintiff will be able to work until normal retirement, given the challenges he experiences post-accident. Should the challenges persist, the plaintiff will be forced to go on early retirement.

[41] I have considered the plaintiff's education history and that his highest level of education is grade 12 and has no post-matric qualification. Given his limited work lifespan and injuries, he sustained, it is unlikely that he will be able to compete in the labour market should he lose his current employment. I have also considered possibility that the plaintiff has less than normal life expectancy may experience periods of unemployment by reason of incapacity due to illness or accident or due to labour unrest or general economic conditions.

[42] The parties seem to be in agreement that 5% contingency should be applied on past loss of earnings. The defendant's counsel argued for 5% contingency on pre-morbid and 35% contingency on post-morbid. The Defendant's counsel submitted a proposed calculation of 5% contingency on pre-morbid and 10% contingency on post morbid. I am not persuaded that 35% contingency on post-morbid earnings should be applied.

[43] I considered calculations by the actuaries and submissions made by the parties. It appears to me that the actuarial calculations were based on instructions, this leaves doubt on whether the contingencies applied were based on independent assessment by the actuaries. The actuaries seem to have deviated from the normal contingencies and there is no explanation provided. The actuaries acknowledge that the contingency deductions made are subjective and that it should be the decision of the court to determine contingency deductions.

[44] Having considered reports of industrial psychologist and actuaries, I am of the view that a lower contingency than the one applied by the actuaries should be applicable. I considered the decisions of *Duma* and *Mahlo supra* as providing guidance on how I should determine applicable contingency taking into account relevant factors and circumstances of the plaintiff.

[45] In the circumstance and in my view, a fair, just and reasonable contingency of 5% contingency pre-morbid be deducted and that contingency of 25% be deducted post-morbid. The calculations should be as follows:

(a) Pre-morbid earnings (had the accident not occurred)

Future loss of earnings R1 932 514

Less 5% contingency R 96 625.70

Total pre-morbid earnings R1 835 888.30

(b) Post-morbid earnings (having regard to the accident)

Future loss of earnings R1 932 514

Less 25% contingency earnings R483 128.50

Total post-morbid earnings R1449 385.50

Net loss: R386 502.80.

Costs

[46] Concerning the costs of this matter, I see no reason that costs should not follow the results. The Defendant should therefore pay the Plaintiff's costs.

Order

[47] In the circumstances, I make the following order:

1 The defendant shall pay to the plaintiff the sum of R986 502.80 within 180 (one hundred and eighty) days hereof, in respect of the plaintiff's claim against the defendant for the following heads of damages:

1.1 Past and future loss of earnings/earning capacity R386 502.80.

1.2 General damages R600 000.00.

- 2 In the event of the aforesaid amount not being paid on 180 days from date of this order, the Defendant shall be liable for interest on the amount at the prevailing interest rate, calculated from the 15th calendar day after the date of this Order to date of payment in line with prevailing legislation.
- 3 The defendant shall furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 for payment of 100% of the costs of future accommodation of the patient in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the patient resulting from a motor vehicle accident on 5 January 2020, to compensate the patient in respect of the said costs after the costs have been incurred and upon proof thereof.
- 4 The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale including costs of counsel on scale B in respect of quantum, up to and including 25 & 26 March 2025, and notwithstanding, and over and above the costs referred to in paragraph 5.2.1 below, subject thereto that:
 - 4.1 In the event that the costs are not agreed:
 - 4.1.1 The plaintiff shall serve a notice of taxation on the defendant's attorney of record;
 - 4.1.2 The plaintiff shall allow the defendant 180 (one hundred and eighty) days from date of allocatur to make payment of the taxed costs; and
 - 4.1.3 Should payment not be effected on 180 (one hundred and eighty) days from date of allocatur, the plaintiff will be entitled to recover interest at the prevailing interest rate on the taxed or agreed costs from 15 (fifteen) days from date of allocatur to date of final payment.
 - 4.2 Such costs shall include, as allowed by the taxing master:
 - 4.2.1 The costs of and consequent to the appointment of counsel, on scale B, including, but not limited to the following: for trial, including, but not limited to counsel's full fee for 25 & 26 March 2025, and the preparation and reasonable attendance fee of counsel for attending:
 - 4.2.1.1 to the drafting of the plaintiff's application in terms of rule 38(2), which was granted on 26 of March 2025;

4.2.1.2 to the drafting of the plaintiff's heads of argument and reply to defendant's heads of argument.

4.2.2 The reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by the Taxing Master, of the below experts:

4.2.2.1 Dr D Hoffmann (Plastic, Reconstructive and Cosmetic Surgeon).

4.2.2.2 Dr LA Oelofse (Orthopaedic Surgeon).

4.2.2.3 Scholtz & Partners Diagnostic Radiologists Inc (Radiologists).

4.2.2.4 Drs Verster & Vennote Inc (Radiologists).

4.2.2.5 Dr R Kahn (Medical Examiner).

4.2.2.6 Ms Hope Magubane (Clinical Psychologist).

4.2.2.7 Lucindy van Zyl (Occupational Therapist).

4.2.2.8 Ms Susan van Jaarsveld (Industrial Psychologist).

4.2.2.9 Mr Ryan Immermann (Actuary).

5 The amounts referred to in paragraphs 2 and 5 will be paid to the plaintiff's attorneys, A Wolmarans Incorporated, by direct transfer into their trust account, details of which are the following:

Name of account holder:	A Wolmarans Inc
Name of bank & branch:	ABSA BANK, Northcliff
Account number:	4[...]
Branch code:	632 005
Type of account:	Cheque (Trust)
Reference:	Ms Van Rooyen/MAT15206

6 The plaintiff's claim for past hospital and medical expenses is separated in terms of rule 33(4) and is postponed *sine die*.

7 The plaintiff is granted leave to enrol the claim for past hospital and medical expenses, for a judicial case management conference/pre-trial, in due course.

NTANGA AJ

Appearances

For the plaintiff: KN Peterson
Instructed by: A Wolmarans Inc., Bloemfontein

For the respondent: C Bornman
Instructed by: State Attorney, Bloemfontein.