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

**DATE: 26/6/2019**  
**CASE NO: 2993/2015**

In the matter between:

**KAGISO MOSETLHE**

**PLAINTIFF**

And

**ROAD ACCIDENT FUND**

**RESPONDENT**

**JUDGMENT**

**MAKHOB A J**

- [1] Plaintiff instituted an action against the defendant for damages suffered as the result of injuries sustained in a motor vehicle accident which took place on 17<sup>th</sup> September 2011 on the road between Ganyisa and Tosca, Morokweng, North West Province.
- [2] The merits of the plaintiff's claim have been disposed of by way of an order of this court granted on the 25th October 2017 in terms whereof the defendant was declared to be liable for payment of 100% proven agreed damages. The only issue before court is the determination of the plaintiffs future loss of earnings.
- [3] The parties agreed to hand in the following sets of documents

- 3.1. Plaintiff's reports Exhibit A
- 3.2. Joint minutes between occupational therapists L Rakgoale and S Pretorius Exhibit B
- 3.3. Actuarial reports Exhibits C and C1
- 3.4. Amendment of the further particulars Exhibits D and D 1
- 3.5. Index to plaintiff's expert report
- 3.6. Index to Defendant's expert report.

- [4] In proving his claim for loss of earning plaintiff called the industrial psychologist namely Cornel Schoombee who testified that the plaintiff is currently 35 years old and was 27 years old at the time of the accident. He has passed grade 12 and is employed by Kumba Iron Ore mine. After the accident the plaintiff was on sick leave and received full salary for five months then only a portion of the salary. The witness testified further that in order to determine the Plaintiff's salary from 2012 to 2019 he relied on his salary IRP5's. Plaintiff was a dump truck operator and after the accident was redeployed to general assistant. From 2018 he is now working as operations controller.
- [5] In addition the witness testified that he only spoke to the plaintiffs manager by phone and he did not have a personal interview with him. Had the plaintiff remained working as a dump truck driver he could have had a chance to progress to a supervisor level and retire at the age of 63 years. The witness suggested that normal contingency deductions be applied since the plaintiff is involved in a stable and permanent employment despite the accident's consequences. The plaintiff is seen as a liability and should there be retrenchment he will be the first to be retrenched because he earns more for the kind of work he is doing. There is also the possibility him pf deteriorating rapidly leading to his early retirement.
- [6] The plaintiff was cross-examined and plaintiff closed his case. Defendant did not call any witnesses and closed its case. Both counsels addressed

the court and filed heads of argument.

- [7] The actuarial certificate indicates a future loss of earning capacity in the amount of R4019176.00 which is the award contended for on behalf of the plaintiff. This award is premised on a contingency deduction of 50% of the value of the gross post-morbidity earning capacity calculated by the actuary in the amount of R8821 863.00. The figures have been agreed upon by the parties save for the contingency deduction.
- [8] It was submitted on behalf of the plaintiff that an appropriate contingency adjustment is a deduction of 50% of the value of the plaintiffs calculated post-morbid earnings as set out in the latest actuarial certificate date 30th May 2019 which is exhibit C1 before court. Counsel asked for costs of two counsels due to the nature and seriousness of the case.
- [9] For the defendant it was submitted that the court should apply 25% contingency deduction in the event the court is of the view that 25% is low then 30% contingency deduction will be appropriate. On behalf of the defendant it was argued that the plaintiff has been employed for 8 years since the accident and he is earning double the amount he was earning at the time of the accident and his retirement age is postulated to be at 60 years and not 63 years of age. Moreover there is a possibility of plaintiff being medically boarded.
- [10] In his final submissions counsel for the defendant submitted that the contingency of 50% as requested by the plaintiff is too much and is not supported by the evidence. In addition the evidence of Mr Schoombee in that the plaintiff may lose his employment any time is unfounded.
- [11] That is the totality of the evidence and submissions by the parties before me. Both counsels submitted their heads of arguments.
- [12] In **Van Rij, NO v Employers' Liability Assurance Corporation Ltd, 1964 (4) SA 737 (W)** the plaintiff was a minor who had not yet embarked on a firm career the court allowed 20% for contingencies, see also **De Jong v Gunther and Another 1975 (4) SA 78 (W)** at page 80. In **Prinsloo v Road Accident Fund 2009 (5) SA 406 (SE)** the court was

called upon to adjudicate the plaintiff's claim for loss of earning capacity the court held that in assessing expert evidence, the court had to be satisfied that the expert's opinion had a foundation in logical reasoning.

[13] **In Road Accident Fund v Kerridge 2019 (2) SA 233 (SCA) paragraph 25** the court said "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".

[14] On paragraph 40 to 42 of the same decision the SCA articulates what is loss of future earnings and the application of the contingency deductions. In paragraph 40-42 the court said:

"E [40] Any claim for future loss of earning capacity requires a comparison of what a claimant would have earned had the accident not occurred, with what a claimant is likely to earn thereafter. The loss is the difference between the monetary value of the earning capacity immediately prior to the injury and immediately thereafter. This can never be a matter of exact mathematical calculation and is, of its nature, a highly speculative inquiry. All the court can do is make an estimate which is often a very rough estimate, of the present value of the loss.

[41] Courts have used actuarial calculations in an attempt to estimate the monetary value of the loss. These calculations are obviously dependent on the accuracy of the factual information provided by the various witnesses. In order to address life's unknown future hazard, an actuary will usually suggest that a court should determine the appropriate contingency deduction. Often a claimant, as a result of the injury, has to engage in less lucrative employment. The nature of the risks associated with the two career paths may differ widely. It is therefore appropriate to make different contingency deductions in respect of the pre-morbid and post-morbid scenarios. The future loss will therefore be the shortfall between the

two, once the appropriate contingencies have been applied.

[42] Contingencies are arbitrary and also highly subjective. It can be described no better than the oft-quoted passage in *Goodall v President Insurance* where the court said: ' 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 practiced by ancient prophets and soothsayers, and by authors of a certain type of almanack, is not numbered among the qualifications for judicial office'

[15] The court further reiterated the general rules in regard to contingency deductions as follows in paragraph 44:

[44] Some general rules have been established in regard to contingency deductions, one being the age of a claimant. The younger a claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings they include, inter alia, a downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill health, death and the myriad of events that may occur in one's everyday life: The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen. event impacting on the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in a pre-morbid scenario, generally awarded higher contingencies, the younger the age of the claimant. The court, in *Guedes*, relying on Koch's *Quantum* Yearbook 2004, found the appropriate pre-morbid contingency for a young man of 26 years was 20% which would decrease on a sliding scale as the claimant got older. This, of course, depends on the specific circumstances of each case but is a convenient starting point"

[16] Taking into account the plaintiff's age, physical and mental condition and that he has remained in employment since the accident he is indeed entitled to be compensated for future loss. However considering the evidence of the industrial psychologist there is no credible evidence that the plaintiff will be retrenched in the near future instead his salary has been increased over the years. There is also a likelihood that he may be medically boarded. The court is of the view that the 50% contingency is too high under the circumstance. I am therefore of the view that the just and equitable contingency deductions of the gross-morbidity earnings capacity is 30%.

[17] The court is satisfied that due to the seriousness of the case the costs of two counsels is justified.

[18] The following order is made

1. **CAPITAL:**

The Defendant is ordered to pay to the Plaintiff the amount of R 3297293.6 [Three million two hundred and ninety seven thousand and two hundred and ninety three rands and six cents] (hereinafter referred to as the "Capital") in full and final settlement of delictual damages following injuries the Plaintiff sustained in a motor vehicle accident which occurred on 17 September 2011, which amount is calculated as follows:

CLAIM	AMOUNT
Past and Future Loss of Earnings	R2254804
Past Medical Expenses	R242 489.06

Future Medical Expenses	Section 17(4)(a)	
	Undertaking	
General Damages	R 800 000.00	
<b>Total</b>	<b>R3297293.6</b>	

The Capital is payable by Defendant to Plaintiff on/or before 1 July 2019 by depositing same into Plaintiffs attorneys of record's trust account, the details of which are as follows:

**ACCOUNT HOLDER : MACROBERT INC**

**BANK : STANDARD BANK**

**TYPE OF ACCOUNT : TRUST**

**ACCOUNT NUMBER. : [...]**

**BRANCH : PRETORIA**

**BRANCH CODE : 01-00-45**

**REFERENCE : M BROOKES/2021311**

2. **INTEREST:**

2.1 Subject to paragraph 2.2 below, the Defendant will not be liable for interest on the outstanding capital amount;

2.2 Should the Defendant fail to make payment of the capital amount on/or before 1 July 2019, Defendant will be liable for interest on the amount due to Plaintiff at a rate of 10.25% per annum as from 29

May 2011. 9 to date of final payment.

### 3. **UNDERTAKING :**

The Defendant is ordered to deliver to Plaintiff, within a reasonable time, an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, wherein the Defendant undertakes to pay to Plaintiff 100% of the cost of future accommodation in a hospital or a nursing home or treatment of, or rendering of a service or supplying of goods to Plaintiff pursuant to the injuries he sustained in a motor vehicle accident which occurred on 17 September 2011, after the costs have been incurred and on proof thereof.

### 4. **COSTS:**

The Defendant is ordered to pay the Plaintiffs taxed or agreed party and party costs on High Court Scale, which costs will include, but will not be limited to, the following:

4.1 The costs of all expert. reports, medico-legal reports, addendum medico-legal reports, and combined joint reports,. RAF4 Serious Injury Assessment Report(s) and radiology reports of all experts of whom notice has been given and/or whose reports have been furnished to the Defendant and/or its attorneys and/or whose reports have come to the knowledge of the Defendant and/or its attorneys as well as all reports in their possession and/or contained in the Plaintiffs' bundle of documents. This shall include, but not be limited to, the following experts of whom notice has been given, namely:

4.1.1 Dr Theo J. Enslin - Independent Medical Examiner;

4.1.2 Dr Hans B Enslin - Orthopaedic Surgeon;

4.1.3 Dr Daan de Klerk .. Neurosurgeon;

4.1.4 Dr Franco Colin - Psychiatrist;

4.1.5 Dr JPM Pienaar - Plastic and Reconstruction Surgeon;

4.1.6 SAI Pretorius (Bester Putter) - Occupational Therapist;



- 4.1.7 Maria Genis - Clinical Psychologist;
  - 4.1.8 Cornel Schoombee - Industrial Psychologist;
  - 4.1.9 Kobus Pretorius - Actuary;
  - 4.1.10 Dr HP Ehlers.: Maxillo-Facial and Oral Surgeon;
- 4.2 The full preparation, reservation, qualifying and day fee(s) of the following experts (if any and on proof thereof):
- 4.2.1 Dr Hans B Enslin - Orthopaedic Surgeon;
  - 4.2.2 SAI Pretorius (Bester Putter) - Occupational Therapist;
  - 4.2.3 Cornel Schoombee - Industrial Psychologist;
  - 4.2.4 Dr Daan de Klerk - Neurosurgeon;
- 4.3 The full fees of Plaintiffs senior and junior counsel in respect of preparation, consultations, pre-trial conference(s), heads of argument and a day fee for 29 and 30 May 2019;
- 4.4 The reasonable travelling, subsistence and transportation costs including e-toll fees incurred by and on behalf of the Plaintiff for attending all the medico-legal examinations arranged by Plaintiff and Defendant;
- 4.5 The costs consequent to all of the Plaintiffs trial bundles, expert reports, pleadings and notices, all indexes, document bundles and witness bundles, including the costs of 5 (five) full copies thereof;
- 4.6 The costs of holding all pre-trial conferences, as well as roundtable meetings between the legal representatives for both the Plaintiff and the Defendant, including counsel's charges in respect thereof;
- 4.7 The costs of and consequent to compiling all minutes in respect of pre-trial conferences;
- 4.8 The costs of and consequent to the holding of all expert meetings between the medico-legal experts appointed by the Plaintiff;
- 4.9 The reasonable travelling, subsistence and transportation costs

including e-toll fees incurred by and on behalf of the Plaintiff for attending trial on 29 and 30 May 2019;

4.10 The reasonable taxable costs of one consultation with the client in order to consider the offer of the Defendant, the costs to accept it, have it made an order of court and to procure performance by the Defendant of its obligations in terms hereof;

4.11 The cost incurred in obtaining payment and/or execution of the capital amount mentioned in paragraph 1 above and/or delivery of the undertaking in terms of Section 17(4)(a) of Act 56 of 1996 mentioned in paragraph 3 above;

5. **TAXATION:**

5.1 Plaintiff is ordered to serve the Notice of Taxation of Plaintiffs party and party bill of costs on Defendant's attorneys of record;

5.2 The Defendant is ordered to pay the Plaintiffs taxed and/or agreed party and party costs within **14 (FOURTEEN)** days from the date upon which the accounts are taxed by the Taxing Master and/or agreed between the parties;

5.3 Should the Defendant fail to make payment of the party and party costs within **14 (FOURTEEN)** days after service of the taxed accounts on the Defendant's attorneys of record, Defendant will be liable for interest on the amount due to Plaintiff at a rate of 10.25% per annum as from the date of taxation to date of final payment.

6. **CONTINGENCY FEE AGREEMENTS:**

The Plaintiff and the Plaintiffs attorneys of record did not enter into any contingency fee agreement.

SIGNED AT PRETORIA ON THIS THE 29TH DAY OF MAY  
2019.

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**REGISTRAR**

**ATTORNEY FOR PLAINTIFF**

**: MR M BROOKES**

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**3411510**

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**D.MAKHOB**

**ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA**