

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN**  
**REPUBLIC OF SOUTH AFRICA**

**CASE NO.: 7332/2006**

**In the matter between**

**DARRYL NAICKER**

**PLAINTIFF**

and

**ROAD ACCIDENT FUND**

**DEFENDANT**

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**JUDGMENT**

**Delivered on: 9 November 2010**

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**SISHI J**

**Introduction**

1. The plaintiff's claim against the defendant is for damages which he suffered as a consequence of injuries which he sustained on 29 October 2002 when a collision occurred between motor vehicles bearing registration letters and numbers ND91320P and ND60662/470725 and motor vehicle ND537640 (truck tractor and trailer respectively). The plaintiff was a pedestrian at the time of the said collision.
2. The trial in this matter dealt with the issue of quantum only, the issue of liability having been already determined on the basis that whatever damages the plaintiff is able to prove is to be awarded 100%.

**Background**

3. As a result of the aforesaid collision the plaintiff was injured and sustained

bilateral amputation above the knee and his stumps are short.

4. In terms of the amended Particulars of Claims, the plaintiff claims the following:

a) Past hospital and medical expenses	R 46 000-00
b) Estimated future medical expenses	R1 680 000-00
c) Past loss of income	R 377 835-00
d) Future loss of income	R3 978 797-00
e) General damages inclusive of shock, pain and suffering, disfigurement, disability and the loss of the enjoyment of life	R1 500 000-00
f) The cost of:-	
i) Modification of the Plaintiff's residence	R 100 000-00
ii) The cost of repairs to the access to Plaintiff's residence by tarring	R 15 000-00
iii) Modification of a motor vehicle to suit Plaintiff's present condition	R 6 500-00
iv) Nursing and health care aids	R 20 000-00
v) The cost of a care giver as claimed in paragraph 9(c) below	<u>R1 500 000-00</u>
Total	R9 224 132-00

5. At the commencement of the proceedings Mr Kissoon-Singh SC for the plaintiff advised the Court that the plaintiff is no longer pursuing the past hospital and

medical expenses in the amount of R46 000-00, and that the plaintiff is abandoning that claim. This claim is set out in paragraph 4(a) above. Furthermore that paragraph 4(b) above, estimated future medical expenses, and paragraph 4(f) the costs of modification the repairs etc in subparagraph 4(f)(i) to (v) inclusive above, would be covered by an undertaking as agreed to by the defendant.

6. Then that leaves for determination by Court the heads of damages as claimed under paragraph 4(c), (d) and (e) above, that is, past loss of income, future loss of income and general damages.
7. The parties agreed that for past loss and for future loss of earnings, the Court may be required to give the guidelines to the actuary for the purposes of calculating those damages.
8. The plaintiff was born on 6 November 1982. It is common cause that he lost his legs in an accident in October 2002. He was 20 years of age at the time. He obtained a Senior Certificate on the standard grade at the end of 2000. In 2001 he commenced employment with Excellent Freight, where he was employed at the time of the accident on the 29<sup>th</sup> of October 2002.
9. Some three to four months after the accident he worked for the same employer where he remained in employment until March 2006, when he resigned. He is

presently unemployed.

10. Mr Nelson Pillay who at all times was the general manager of Excellent Freight testified on behalf the plaintiff and his evidence can be summarized as follows:-

- The plaintiff was a good worker and had received a promotion some six months after he commenced work. His responsibilities at work had increased and he was a person who was quick to learn and eager to please. At the time of the accident he was earning approximately R2 500-00 per month. In consequence of the accident, the plaintiff was unable to perform all his duties and Excellent Freight employed Mr Goodman Zulu, basically in the position in which the plaintiff was in prior to his amputation. The plaintiff, however, remained in employment, doing other work, adapting where possible. Mr Zulu has now been promoted to the post of Importer Controller at the salary of R12 000-00 per month. In addition, there was a very good prospect that Mr Zulu will be promoted to Import Manager as the current Import Manager was about to leave at the end of March 2010.
- Mr Pillay stated that in his opinion, the plaintiff would have probably received the promotion that Mr Zulu obtained (Mr Zulu would not have been employed by Excellent Freight if the plaintiff had not been injured) and that he would probably be the Manager in due course.

11. As a result of the accident, the plaintiff sustained a bilateral above knee amputations and his stumps are short. Although he received prostheses for both

legs, he tried to utilise same for about two years and eventually ceased trying through difficulties. This is evident from Dr Domingo who expressed the opinion that it was extremely difficult for persons with above knee amputations to utilise prostheses. Such persons, in his opinion, prefer to use wheelchairs as they are speedy and less cumbersome.

12. The plaintiff utilises the wheelchair and, where the wheelchair cannot travel he has improvised by utilising his hands and, his buttocks to obtain mobility by propelling himself forwards or backwards. He is able to clamber up on furniture. Although he is self sufficient in his daily hygiene, it is obvious that he has considerable difficulties in doing so. Added to this is the indignity to which he has to suffer.

13. The occupational therapist Collene Kisten confirmed the difficulties with mobility and explained the difficulties, in particular with the use of prostheses.

14. Whilst the report of Orthotist / Prosthetist Kruger (which report was admitted by consent) suggest that by the use of prostheses the plaintiff would be able to ambulate, it is obvious, if regard is heard to the expert report of Mr Kruger, that such ambulation is rudimentary and, as a matter of probability would really be resorted to by persons in the position of the plaintiff.

15. At best for the plaintiff, he might achieve a level two ambulation with the use of the prostheses. Mr Kruger in his report has classified the amputees into four or

five classification levels, namely, level 0, level 1, level 2, level, 3 and level 4. Mr Kruger in his report is of the opinion that the plaintiff if he has these two prostheses fitted would be a level 1 and possibly a level 2 with the right motivation, and never go beyond level 2. Mr Kruger has in his report described level 1 as follows:-

*“The amputee has the ability or potential to use prostheses for transfers, ambulation on the level surfaces at fixed cadence. Typical of the limited and unlimited.”*

16. What Mr Kruger is stating is that the plaintiff can walk around basically inside the house or possibly inside an office. Stiff legged but again battling to get up, battling to sit down and forever unstable on the feet because he has got two prostheses not one. If he manages to get to level 2 which, Mr Kruger has described as follows:-

*“The amputee has ability or potential for ambulation with the ability to traverse low levels and environmental barriers such as curbs, stairs or uneven surfaces. Typical of the limited community ambulatory.”*

17. In this regard it was submitted that while the seems to be a few stairs, the plaintiff is not going to be able to come up and down the flights of stairs with prostheses with any ease at all. When that is a pothole in the road he is going to have a great difficulty.

18. Bearing in mind that the plaintiff lost his legs at the age of 20 and that his life expectancy according to Dr Domingo, the Orthopaedic Surgeon, is not affected, one can assume that he has been and will be disabled for a period of 50 to 60 years going from a young man with disability through middle age into old age. Dr Domingo outlined the difficulties that the Plaintiff will experience from the age of 45 upwards, where he will be a candidate for tendinitis.
19. It has been submitted that the loss of amenities of life suffered by the plaintiff are immeasurable. In the prime of his life he has lost both his legs. He thus cannot participate in the previous past hobbies, soccer, dancing, fishing and the like, nor will he be able to participate in a number of occupations in past time which able bodied persons take for granted. Every movement executed by the Plaintiff is fraught with difficulties. He cannot even make himself a cup of tea or a simple meal and in those areas he is totally dependent on third parties. He is also at risk from personal safety point of view being disabled. His personal living circumstances have been graphically placed before the Court in the form of a series of photographs, and it is obvious from the photographs that he is living in very trying circumstances which an able bodied person could easily cope with but which he cannot, he cannot enter his home through the front door.

### **Assessment of General Damages**

20. Dr Domingo in his report states that the plaintiff would have been in severe pain persisting for a week or two, gradually diminishing thereafter after over a period

of further six weeks. He now has minimal pain, occasional severe spasms and occasional fathom pain.

21. Mr Kissoon-Singh submitted that Dr Domingo further states that the plaintiff has a gross disfigurement due to his amputations. As far as his impairment as a loss, loss of use, or derangement of any part, organ system or organ function, he has a 64% whole impairment. He is severely disabled from all activities of daily living. To all intent purposes he is wheelchair bound and will be so for the rest of his life. He submits that prostheses are clearly not an answer.
22. He then referred to a case of ***Bovungana v Road Accident Fund 2009 (5E2) QOD51 (EC)*** and submitted that **Froneman J** on 27 February 2009 considered a plaintiff with similar injuries to that of the plaintiff *in casu* and awarded general damages in the sum of R750 000-00. The current value of that judgment is R799 000-00. He submitted that the perusal of the salient facts in that case show that the amputations there were below the knee on one leg and above the knee on the other. The plaintiff in this case has worse amputations in that both are above the knee, with short stumps.
23. He submitted that at paragraphs 25 of the judgment (page E2-62) the learned Judge dealt with awards in comparable cases and logically explained why he had awarded the sum of R750 000-00. The plaintiff in that matter started working in the building trade in 1993, which was some 16 years before the judgment and, by



extrapolation, would have made the plaintiff in that matter, approximately 10 years older than the plaintiff in the present case, with resultant disability having to be endured a shorter period of time. It was then submitted that in this case of the plaintiff, the award should be slightly higher than in the matter of ***Bovungana v Road Accident Fund, supra***, and that a suitable award in general damages ought to be in the region of between R900 000-00 and R1 million.

24. Mr Kissoon-Singh also referred to the case of ***Ehlers v South African Railway and Harbours 1959 (QOD250E)*** award of R14 000-00, current value R875 000-00. He submitted that although the plaintiff in ***Ehlers case*** was a young girl of about 7 years of age, there is a difference and that is at the age of 7 it is much easier to adjust to the loss of two legs than the plaintiff in the present matter who was 20 years old when he lost his two legs. He was already working and he was already used to using his legs to do whatever he had to do. He had a lifestyle which he developed and then he lost his legs in the prime of his life.
25. Mr Kissoon-Singh also referred to the cases of ***van Deventer v Premier of Gauteng 2004 (5QOD) E2-1 (T)***; ***Gallant v Road Accident Fund 2004 (5QLB) E229 (AF)***, he admitted that there are really no helpful cases which deal with bilateral amputations although there are several cases dealing with single leg amputations, these include the above two cases. In each of these cases the plaintiffs were awarded R300 000-00 for general damages which at current value translate to R444 000-00. Bearing in mind these were for single amputations and

it is obvious for a double amputee there would be more disability and will sustain considerably more damages.

26. These two cases referred to above are indeed not particularly helpful as each deal with a single leg amputation.

27. Mr Naidoo for the Defendant referred to the same paragraph referred to by counsel for the plaintiff dealing with pain and suffering in Dr Domingo's report. He then submitted that if one looks at the **Bovungana case** when dealing with pain, it says:

*"Medical opinion is that he suffered severe degree of pain and discomfort for a period of 16 weeks after the accident. And will suffer slight to moderate pain and discomfort for the rest of his life. Thereafter he attended hospital as an outpatient."*

28. He then submitted that for a period of 16 weeks as opposed to severe pain for week or two gradually diminishing thereafter over period of a further six weeks and he now has minimal pain, whereas here there is a talk of moderate pain, slight to moderate pain. He then submitted that when one looks at the medical conditions of the plaintiff in **Bovungana case** it would appear that there were more complications and there was more severe pain. He then submitted that the **Bovungana** decision does not fit on all fours with the plaintiff's position.

29. Counsel for the defendant also referred to the case of **Ndlovu v Swaziland Royal Insurance Company decided in 1989 (2) of Corbett at pages E2-1**

there was a double amputation in this case that it was an above knee as well. Then he stayed for four months in different hospitals, there were a number of operations performed. There was considerable pain and one stump still probably to be subjected to further surgery in order to facilitate the wearing of prosthesis. And by the time of the trial the plaintiff had not been able to stand or walk, and even after fitting the prosthesis he was best able to walk only a few ungainly paces with the assistance of crutches. He would be subjected to a working life in a sedentary position, if available. Mr Naidoo then submitted that here a Court in 1989 awarded general damages and the loss of amenities of life totalling to €80 000-00 which converts to one for one in today's figures, it converts using Court's updates, it converts to R395 000-00.

30. Counsel for the defendant submitted that if one looks at that case and the facts of ***Bovungana case***, in ***Bovungana*** the complications there were more severe and the Plaintiff in this case is able to work which improve his dignity and improves his self-worth. He submitted that a fair compensation for general damages should be R600 000-00. He submitted that the plaintiff's suggestion of R900 000-00 to R1 million is excessive in the circumstances. In respect of paragraph 7 (a) to (f) of the Particulars of Claim, he submitted that the defendant has no qualms if the Court grants an undertaking in terms of section 17 (4)(a) of the Act.
31. As indicated above the important difference between the two cases, the ***Bovungana case*** and the present case is that in the ***Bovungana case*** the

amputations there were below the knee on one leg and above the knee on the other. The plaintiff in this case has worse amputations in that both are above the knee with short stumps. The difficulties experienced by a person with above the knee amputations and the advantages of below the knee amputations have been highlighted above. In my view, in this regard the plaintiff in the present case with both amputations above the knee is in a worst off position than in ***Bovungana case***.

32. The case of ***Ndlovu v Swaziland Royal Insurance Company*** referred to by counsel for the defendant is not particularly helpful considering the above, and in my view in this present case the plaintiff's award should be slightly higher than that of ***Bovungana v Road Accident Fund supra***. I am therefore of the view that a suitable award of damages in the present case should be in the region of R950 000-00.

### **Assessment of Special Damages or Loss of Earnings**

#### **Past Loss of Earnings**

33. These are those sustained from the date of accident to date of trial. It is common cause that after the accident the plaintiff worked until March 2006. From the time that he met the accident in 2002 to 2006 he suffered no past loss of income. It is common cause he suffered a loss of income from April 2006 until the date of trial 5 March 2010.

34. It is common cause that whilst the plaintiff had been unemployed he had been receiving disability benefits. The Department of Labour has been approached and has furnished the figures as to the disability benefits that the plaintiff had received. These benefits were received in terms of the Compensation for Occupational Injuries and Diseases Act. The schedule of the disability benefits received by the plaintiff which includes the dates, the amount and the lump sum received is set out below:

**SCHEDULE**

23/09/04	to	18/04/05	-	R1 151,04
18/04/05	to	23/06/05	-	R1 206,29
23/06/05	to	25/07/05	-	R1 205,29
25/07/05	to	23/06/06	-	R4 283,70
25/05/06	to	23/06/06	-	R4 455,04
23/06/06	to	25/05/07	-	R4 369,37
25/05/07	to	23/05/08	-	R4 517,93
23/05/08	to	25/06/08	-	R5 653,91
25/06/08	to	25/07/08	-	R4 208,72
25/07/08	to	24/07/09	-	R4 793,53
24/07/09			-	R5 081,13 (current)

**Lump Sum Payment**

03/09/04	-	R12 091,20
08/06/05	-	R57 004,72
12/04/07	-	R 8 887,30

In terms of the Actuarial report dated 22 October 2010, the total amount of these disability benefits is R342 181,00.

35. This schedule sets out the different periods of time when disability benefits were actually given to the plaintiff and the amounts that were given. The defendant is in agreement with this schedule and has accepted that these figures are correct as to what value disability benefit was received month by month.
36. The actuaries in calculating the past loss of earnings were instructed to deduct from earnings the value of the disability as per schedule.
37. The Industrial Psychologists from both sides have provided a combined minute dated 4 March 2010 wherein they agreed on a number of issues. It is appropriate to set out the combine minute verbatim.

*"This is a Joint Minute by the Industrial Psychologists, Ms K Plaatjies and Ms S Bobat.*

*The purpose is to provide the Court with a Joint agreement with regard to loss of earnings in the matter between Mr D Naiker and the Road Accident Fund.*

*The Industrial Psychologists agree the following:*

- 1) *Based on the evidence provided and the assessment findings, Mr D Naicker would have progressed, pre-accident, from an entry-level Clerk to a Controller and finally to the*

*level of a Manager until normal retirement age.*

2) *The general progression through the job levels is as follows:*

*Entry-level Clerk: R4 568.72 – R6 620 over 3 – 4 years;*

*Controller: R9 966.07 – R13 583 over 4 – 5 years;*

*Manager: R17 305 – R19 098*

*Inflationary increases apply thereafter until normal retirement age of 65.*

3) *Post accident we agree that Mr Naicker can work at a significantly reduced level.*

4) *He should earn in the range of R6 500 – R9 000 with normal inflationary increases until normal retirement age.”*

Ms S Bobat

Ms K Plaatjies

Date: 4 March 2010

38. According to the Industrial Psychologist’s combined minute, they have agreed on a reasonable remuneration for a person in the position of the plaintiff that it would be a sum between R6 500-00 to R9 000-00 per month, subject to normal increments. It is assumed that these are inflationary increments.

39. The evidence of Mr Pillay was that had the plaintiff been employed in the job he was doing at the time of his resignation, he would be earning approximately R6

000-00 per month. It is thus that he has suffered a past loss of earnings being the difference between the salary that he would have obtained had he been employed and the value of his disability grant. Both parties have agreed on a 5% contingency that should be applied to the difference and his true past loss of earnings would be capable of computation. This information was forwarded to the actuaries for the purposes of calculating the past loss of earnings.

40. The Defendant's scenario on the past loss of earnings has been submitted as follows:

**Past Loss**

40.1 No loss from date of accident (October 2002 to March 2006)

40.2 "Loss of earning March 2006 to March 2010

Salary R2 500-00 – inflation linked to March 2010

Less R 5040-00 from the Workmen's Compensation Commissioner"

41. The Defendant's scenario in this regard is unrealistic. I do not even find it necessary to send this scenario to the actuaries for the purposes of calculation.
42. It is common cause between the parties that the plaintiff's retirement age would have been 65 years.

As to the net loss of past earnings, I refer to the table below as prepared by actuaries in their report dated 22 October 2010.

**Future Loss of Earnings/Earning Capacity**



43. The future loss of earnings should be calculated by deducting the value of earnings that he could now achieve (as a double amputee) from the value of earning that he ought to have been able to achieve had he not suffered amputation.
44. The Industrial Psychologists have in their joined report agreed as follows:
- An uninjured person would have entered the industry as an entry level clerk at salary of R4 568-72 to R6 620-00 and would have been employed at that capacity for some three to four years.
  - Such a person would thereafter have received promotion to be a controller to a salary of R9 966-07 to R13 583-00 and would have been employed in that capacity to some four to five years.
  - Thereafter a further promotion would have resulted in that person employed as a manager at a salary of between R17 305-00 and R19 098-00, where he would have continued until retirement age of 65. Inflationary increases to the salary would have to be taken into account.
45. The earnings agreed upon by the Industrial Psychologists for persons in the injured conditions would be:
- Between R6 500-00 and R9 000-00 per month with normal inflationary increase until retirement age.

46. The foregoing agreement between the Industrial Psychologists appears persuasive given the evidence the factual evidence of salaries presented to Court by Mr Pillay who is employer in the industry. He testified that the Import Controller in his company is currently employed at a salary of R12 000-00 and that the manager is employed at a salary of R18 000-00 the latter with the use of the company vehicle.
47. The net past loss of earnings has been calculated by the actuaries in the amount of R45 404.00.
48. The defendant presented the following scenario:

**“Future Loss of Income**

**Pre-accident**

The scenario postulated in paragraph 2 of the Joint Minutes of the Industrial Psychologists should be utilised for the plaintiff's work progression.

2007 – March 2010 - 2012 – R9 966-07 per month to R13 583-00 per month.

**Contingency**

Normal contingency of 15% should be applied.

**Post Accident**

Plaintiff's progression as per paragraph 2 of the Joint Minutes is as follows:-

2007 – 2012 - R9 966-07 per month to R13 583-00 per month

2013 – 2017 - R17 305-00 per month to R19 098-00 per month

2018 - 2045 - R19 098-00 per month to inflationary increases

- i) The plaintiff would earn an income of R9 000-00 with normal inflationary increases.
- ii) The plaintiff will incur extra travel expenses in respect of parking, petrol,

maintenance and replacement of the motor vehicle. An amount of R2 000-00 should be provided for these expenses.

- iii) The plaintiff's income will accordingly be reduced to R7 000-00.
- iv) The plaintiff also receives a monthly payment from the Worker's Compensation Commissioner, the sum of R5 040-00. This amount must be taken into reckoning together with inflationary increases.

**Contingency**

Contingency of 30% should be provided for.

**Retirement Age**

A retirement age of 65 should be provided in both scenarios.”

49. With regard to the evidence tendered, the Court accepts the figures as provided for on behalf of the plaintiff and has directed that the loss be calculated in accordance therewith by the actuaries.

50. The following factual assumptions for the purposes of calculating the plaintiff's future earning capacity or loss of income have been forwarded to the actuaries and the actuaries have calculated the said income based on those assumptions.

50.1 The factual assumptions for the purposes of calculating the plaintiff's past loss of earnings is as follows:

In paragraph 4, of the joint minute, the Industrial Psychologists have agreed that in a post accident scenario, the plaintiff should be earning in the region of R6 500,00 to R9 000,00 per month with normal inflationary increases until normal retirement age.

50.2 The Actuaries are directed taking into consideration the information referred to above to calculate the plaintiff's past loss of income from April 2006 to date, taking into consideration the disability benefits for each month, and the lump sums referred to in the schedule.

50.3 Once the Actuaries get the difference, they are then directed to apply 5% contingency.

**Future Loss of Earnings/Earning Capacity**

50.4 The award is the amount of the total value of the plaintiff's income uninjured (determined in terms of paragraph 5 hereof) less the amount determined in respect of his income and earning potential in his injured state (in terms of paragraphs 6 & 7 hereof).

**(a) Plaintiff's Career Progression and Remuneration in Uninjured Condition**

The factual assumptions for the purposes of calculating the plaintiff's future earning capacity had he not sustained the injuries are as follows:-

50.5 In paragraph 1 of the joint minute, the Industrial Psychologists have agreed that based on the evidence provided, the assessment findings, Mr

D Naicker would have progressed, pre-accident, from an entry-high level clerk to a controller and finally to the level of a manager until normal retirement age. In paragraph 2 of the joint minute, the Industrial Psychologists have agreed that the general progression through the job levels is as follows:

- Entry-level clerk : R4 568,72 – R6 620,00 over 3 to 4 years;
- Controller : R9 966,07 – R13 583,00 over 4 to 5 years;
- Manager : R17 305,00 – R19 908,00.

Inflationary increases, apply thereafter until normal retirement age of 65.

50.6 The Actuaries are directed to work on the four (4) years rather than on the 5 years for the Controller.

50.7 The Actuaries are directed to work with the averages in respect of each of the three job levels referred to in 5.1 above.

50.8 Inflationary increases to the salaries would have to be taken into account. The retirement age still being 65 years.

50.9 Once the Actuaries have done the calculation, they are directed to apply a contingency of 12.5%.

**(b) Plaintiff's Income in Injured Condition**

The factual assumptions for the purposes of calculating the plaintiff's future earning capacity in his injured state are as follows:

50.10 In this regard, the Actuaries are referred to paragraphs 3 and 4 of the joint minute of the Industrial Psychologists. The calculation should be based on the average earnings of between R6 500,00 and R9 000,00.

50.11 These earnings should be calculated with normal inflationary increases until normal retirement age of 65 years.

50.12 A contingency of 40% is to be applied to the resultant amount.

The contingencies provided for in the spate of growth pre-accident and post-accident are, in my view, fair and reasonable in the circumstances. The following is the summary of the contingency deductions in the calculation of the results:.

	<b><u>Contingency</u></b>
Past earnings	5%
Pre-morbid future	12.5%
Post-morbid future	40%

51. In terms of the Actuarial report dated 22 October 2010, the results of earnings calculation is as follows

**Results of Loss of Earnings Calculation**

	<b><u>Pre-morbid Earnings</u></b>	<b><u>Post-morbid Earnings</u></b>	<b><u>Loss</u></b>
PAST EARNINGS	554,176	146,191	407,985
Less: Contingencies	5% ( 27,709)	5% (7,310)	(R20,399)
Past Disability Benefits	0	R342,181	(R 342,181)
Net Past	R 526,467	R481,063	R45,404
Future	R4,057,346	R1,909,601	R2,147,746
Less: Contingencies	12.5% (R507,168)	40% (R763,840)	R256,672
Net Future	<b>R3,550,178</b>	<b>R1,145,760</b>	<b>R2,404,418</b>
<b>TOTAL</b>	<b>R4,076,645</b>	<b>R1,626,824</b>	<b>R2,449,822</b>

52. The net future loss of income/earning capacity has been calculated in the amount of R2 449,822.00. I am of the view that these calculations are fair and reasonable in the circumstances of this case. There is no reason to interfere with these calculations. I accept these calculations as a true reflection of the damages suffered by the plaintiff under this head of damages.

**Costs**

53. On the issue of costs counsel for the plaintiff submitted that this matter was of a sufficient complexity and damages sustained by the plaintiff are sufficiently high to have warranted the plaintiff taking the precautions of utilising the services of two Counsel for the trial. It was submitted that it must be noted that the plaintiff only employed the services of two counsels for the trial on quantum. Until then

he was represented by an attorney and one counsel only.

54. He submitted that the test for determining whether such costs should be allowed is set out in the case of ***Koekemoer v Parity Insurance Company Ltd and Another 1964 (4) SA 138 (T)*** at page 144F – 145A as follows:

*“The enquiry in any specific case is whether, in all the circumstances, the expenses incurred of more than one counsel were necessary or proper for the attainment of justice or for defending the rights of the parties, and where not incurred through precaution, negligence or mistake...”*

55. It was a wise and reasonable precaution to employ more than one counsel, the costs incurred in doing so are allowable as between party and party but they are not allowable if such employment was merely luxurious. If such employment was merely luxurious among the relevant considerations are:

- a) The volume of evidence (oral or written) dealt with by counsel or which he or could have reasonably have expected to be called upon to deal with;
- b) The complexity of the facts or the law relevant to the case;
- c) The presence or absence of scientific or technical problems and their difficulty if they are present;
- d) Any difficulties or obscurities in the relevant legal principles or their application to the facts of the case; and



- e) The importance of the matter in issue, in so far as their importance may have added to the burden of responsibility undertaken by counsel.”

(See also: ***Motaung v Makubela and Another 1975 (1) SA 618 at 631***

***Grobbelaar v Havenga 1964 (3) SA 522 at 530*** )

56. On the issue of costs, Counsel for the defendant submitted that the defendant is not prepared to pay both Counsel, the junior counsel and the senior counsel. He submitted that the junior counsel was more competent to deal with this matter. He submitted that the fees of one counsel should be awarded.
57. Applying the principles as set out in the case of ***Koekemoer v Parity Insurance Company Ltd and Another supra***, I am satisfied that it was reasonable and necessary for the plaintiff to employ two counsel in the circumstances of this case. There is no reason why the costs should not follow the result in this case.
58. Accordingly, I make the following order:
1. The defendant is ordered to pay the plaintiff the following sums as and for damages:
- |     |  |                      |
|-----|--|----------------------|
| 1.1 | General Damages                        | R950 000,00          |
| 1.2 | Past loss of Income                    | R45 404,00           |
| 1.3 | Future loss of income/earning capacity | <u>R2 449,822.00</u> |

**TOTAL**

**R3 445,226.00**

2. The defendant shall pay interest on the aforesaid sum of (R3 445,226.00) at the prescribed legal rate, 14 days after the date of this judgment to date of payment.
3. The defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17 (4)(a) of the Road Accident Fund Act No. 56 of 1996 in respect of the plaintiff's claims as set out in paragraphs 7(f)(i) to (v) inclusive of the Particulars of Claim.
4. The defendant is ordered to pay the costs of suit together with interest thereon at the legal rate 14 days after *allocatur*, such costs to include:
  - i) The qualifying fees of expert witnesses;  
Dr Domingo, Dr Kruger, Ms Collene Kisten, Shaida Bobat, and the actuarial consultants; and/or qualifying expenses, if any, or any other expenses in respect of which rule 36(9)(a) and (b) notices were delivered by the plaintiff.
  - ii) The costs of two counsel where employed.

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**JUDGE T. A. SISHI**

## **Representation**

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