Editorial note: Certain information has been redacted from this judgment in compliance with the law.

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 number: 2340/2019

In the matter between:

LETUKA LOUIS RANKHASA Plaintiff

and

ROAD ACCIDENT FUND Defendant

CORAM: VAN ZYL, J

HEARD ON: 2 NOVEMBER 2021

DELIVERED ON: 22 APRIL 2022

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[1] The plaintiff instituted action against the defendant for damages he suffered as a result of a motor vehicle accident which occurred on 1 July 2018 in Odendaalsrus, Free State province, between an unidentified motor vehicle and the plaintiff, who was a pedestrian at the time of the accident. On 20 July 2021 and by agreement between the parties, the following order was issued by Musi, JP:

"1. The defendant is to pay the plaintiff an amount of R400 000.00 … in respect of the plaintiff's claim for general damages, R115 540.76 … in respect of the plaintiff's claim for past medical and hospital expenses and R1 000 000.00 … as an *interim* payment in respect of the plaintiff's claim with link number 4571615 …

2. The defendant is to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision on 1 July 2018, after such costs have been occurred and upon proof thereof;

3. The plaintiff's claim for past and future loss of earnings is postponed to 23 August 2021;

4. The defendant will pay the agreed or taxed party and party High Court costs of the action up to and including the date on which this draft is made an order of Court, including:

   4.1 the costs for the reasonable qualifying fees, if any, of all the plaintiff's experts. Such experts to include, but not limited to Dr Townsend, Dr Scher, Dr Burger, Dr Bodlani, Ms Fletcher, Ms Leibowitz and Mr Loots, as may be agreed or allowed by the Taxing Master; and

   4.2 the plaintiff's attorneys shall serve the notice of taxation on the defendant's attorneys and shall allow the

defendant 7 (SEVEN) court days within which to make payment of such costs."

[2] The matter subsequently served before me on 2 November 2021 on which date, by agreement between the parties, the following order was made:

"1. The following expert reports will be admitted to court as envisaged in terms of rule 38(2):
1.1 Dr Michael Scher – orthopaedic surgeon;
1.2 Sharilee Fletcher – occupational therapist;
1.3 Lee Leibowitz – industrial psychologist;
1.4 Wim Loots – actuary.
2. The only outstanding issue, loss of earnings, to be addressed in heads of argument to be filed as follows:
2.1 Plaintiff's heads of argument to be filed by the 5th of November 2021;
2.2 Defendant's heads of argument to be filed by the 9th of November 2021;
2.3 If necessary, the plaintiff's supplementary heads of argument to be filed by the 12th of November 2021.
3. Judgment reserved."

[3] I am consequently to adjudicate the only remaining issues, being the alleged damages suffered by the plaintiff in respect of his past loss of earnings and his future loss of earnings respectively.

Brief background:

[4] The plaintiff was born on 30 September 1972. His highest level of education is Grade 12. At the time of the accident he

was employed by the Matjhabeng Local Municipality ("Matjhabeng") as an Assistant Cleansing Officer and is currently still so employed. He has been in the employment of Matjhabeng since June 2005.

[5] The plaintiff`s position is graded at post level 9, which consists of 5 notches. He is currently on the maximum notch for the post and further notch progression is considered to be unlikely. Normal retirement age is 65 years.

[6] The relevant figures applicable are not in dispute and I therefore do not deem it necessary to deal with them.

Past loss of earnings:

[7] The plaintiff is claiming damages in the amount of R10 917.00 in respect of his past loss of earnings. The defendant, however, is contending that the plaintiff has not suffered any past loss of income.

[8] In the actuarial report compiled by Mr Wim Loots, dated 4 February 2021, he stated as follows in paragraph 3 thereof:

"**3. Past loss**

The Claimant was reportedly off work from date of accident until 29 October 2018 and could have lost out on overtime and other variable earnings. It seems that he has not earned overtime and standby allowance for 7 and 9 months respectively prior to the accident, although it may have been cyclical. The Claimant received standby allowance for the month of the accident. For **illustration** I assumed he lost out on overtime for the period from date of accident to October 2018 and based the loss on the

average overtime he earned for the 12 months to date of accident (i.e. R3 815.33 per month). I have therefore calculated the past loss, net of tax, to be as follows:

	Loss (R)
Loss from July to October 2018	11 492
Less contingency (5%)	575
Nett Past Loss	**10 917**"

[9] From the report of the industrial psychologist, Ms Lee Leibowitz, it is evident that Ms Botha, Personnel Officer at Matjhabeng, provided her with a payment schedule which reflects the plaintiff`s earnings for the period July 2016 up to and including June 2019. In addition thereto, the industrial psychologist received copies of the plaintiff's payslips for the period December 2019 until October 2020.

[10] Ms Canham, who filed the heads of argument on behalf of the defendant, contended as follows in paragraphs 12 and 13 of the said heads of argument:

"12. It is evident from the payslips that for the period of December 2017 until July 2018, the twelve months preceding the collision, the plaintiff did not work any overtime and only received a standby allowance for July 2018.

13. The defendant submits that there was no past loss suffered by the plaintiff as one could not foresee whether, had the collision not occurred, the plaintiff would have been entitled to overtime and/or a standby allowance."

[11] With regard to paragraph 12 of the defendant's heads of argument, Ms Canham's contentions are only partly correct. Although the plaintiff did not receive any overtime and/or standby allowance for the period December 2017 to June 2018, that period does not constitute "*twelve months preceding the collision*" as alleged in the said heads of argument. When the twelve months preceding the collision is properly considered, it is evident that the plaintiff indeed received overtime for the months July 2017 to November 2017 and also received standby allowance for the months July 2017 to September 2017. However, Ms Canham is indeed correct that for the months December 2017 to July 2018, the plaintiff did not receive any overtime and/or standby allowance except for the standby allowance which he received for July 2018.

[12] With regard to the period subsequent to the end of October 2018 when the plaintiff returned to work, the plaintiff's income for the year following his return to work is not fully reflected. The report only reflects the period November 2018 up to and including June 2019, where after it reflects the period starting December 2019. For the said period of November 2018 to June 2019, after the Plaintiff returned to work, he did receive overtime and standby allowance, except for the months November 2018, February 2019 and April 2019. No information is available for the months July 2019, August 2019, September 2019 and October 2019.

[13] From the available evidence the following is consequently evident:

1. No explanation is provided for the complete absence of payment for overtime and/or standby allowance from December 2017 up to and including June 2018; hence, the 7 months immediately preceding the date of the accident.

2. For the months July 2017 to October 2017 the plaintiff received overtime in respect of every month, but received standby allowance only for July 2017, August 2017 and September 2017.

3. For the applicable time period from the date of accident to the date when the plaintiff returned to work, being July 2018 to October 2018, he only received a standby allowance for July 2018. Considering that the plaintiff was involved in the accident on 1 July 2018, it is not clear why he would have received a standby allowance for July 2018.

4. No information is available with regard to the payment of overtime and/or standby allowance for July 2019 to October 2019. This is an important period for the plaintiff`s purposes, since it may have been used to establish a pattern of payments for the months July to October.

[14] It is trite that in the circumstances of this case the plaintiff bears the *onus* to prove his damages. In view of the aforesaid facts and in the absence of any evidence by the

plaintiff and/or any explanation in the expert reports, the basis of the actuarial calculation regarding the plaintiff`s alleged past loss of earnings, constitutes, in my view, mere speculation. This is actually also evident from the actuary`s words "*for illustration I assumed*" contained in paragraph 3 of this expert report.

[15] I am consequently of the view that the plaintiff did not discharge his *onus* in respect of his claim for damages for past loss of earnings.

Future loss of earnings:

[16] From the heads of argument filed on behalf of the defendant it is evident that the figures and the method of calculation which the plaintiff's actuary used in his calculation of the plaintiff's future loss of earnings are not disputed by the defendant. It is only the percentage of the contingencies in respect of the future pre-accident earnings which is in dispute. I consequently do not consider it necessary to deal with the details thereof.

[17] The actuary calculated the present value of the plaintiff's future loss of earnings as at 1 April 2021 to be R3 100 823.00. This he calculated as follows:

	FUTURE (R)
Earnings had accident not occurred	6 187 802
LESS: contingencies (10%)	618 780
SUB TOTAL	5 569 022
Earnings having regard to accident	2 729 258
LESS: contingencies (20%)	545 852
SUB TOTAL	2 183 406
Loss of Earnings	**3 385 616**
Loss of Earnings (Capped)	**3 100 823**

[18] In her heads of argument Ms Canham referred to the judgment in **AA Mutual Assurance Association Ltd v Maqula,** 1978 (1) SA 805 (A) at 809B in which it was reaffirmed *"that a trial court has a wide discretion to award what it in the particular circumstances considers to be fair and adequate compensation to the injured party for his bodily injuries and their sequelae".* Ms Canham also referred to the matter of **Myburgh v Road Accident Fund** (11131/2019) [2021] ZAGPPHC 202 (7 April 2021) where the court held as follows at paragraph [63]:

> "The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%, dependending upon the facts of the case. …"

[19] Ms Canham thereupon submitted as follows in her heads of argument:

"14. There has been no evidence adduced that the Matjhabeng Local Municipality would not make accommodation for the plaintiff in his circumstances.

…

17. The defendant submits that Municipal employers are considered much more sympathetic employers and will most likely accommodate the plaintiff in a sedentary role as indicated by the experts for the plaintiff; alternatively furnish the plaintiff with options as opposed to having the plaintiff forced into early retirement (i.e. medically boarded). The plaintiff has currently been employed by the Municipality in the position since 6 June 2005 – for approximately sixteen years.

18. The defendant is therefore of the view that the future of the plaintiff at this stage is uncertain as the plaintiff has not fully explored all the options available. The defendant therefore believes the following calculation is a reasonable and fair award to the plaintiff in the circumstances …"

In her subsequent calculation Ms Canham used the same calculation as the actuary for purposes of the plaintiff`s pre-accident future loss of earnings, namely R6 187 802, but she applied a higher contingency deduction in respect thereof, namely 30%. This results in a total of R4 331 461 in respect of the plaintiff's pre-accident future loss of earnings. From this amount Ms Canham deducted the same amount the actuary did in respect of the plaintiff`s post-accident future loss of earnings, namely R2 183 406, resulting in a total future loss of earnings in the amount of R2 148 055, as opposed to the actuary`s (uncapped) total in the amount of R3 385 616.

[20] In the expert report of Dr Michael Scher, an orthopaedic surgeon, dated 18 August 2020, he indicated the *"Injuries Sustained and Treatment to date"* as follows:

> "A right ankle trimalleolar fracture and a non-displaced lower third fibula fracture.
> This would probably be considered as a severe injury.
> Management was surgical by reduction and stabilisation of the ankle."

[21] With regard to the plaintiff's *"Current Clinical Status"* Dr Scher noted, *inter alia,* the following:

- "His complaints/symptoms were right ankle pain aggravated by weight bearing and walking. Walking distance is about 15 minutes. The ankle is stiff and tense to swell during the course of the day.
- … He walked with a right leg limp.
- … Moderate degenerative changes of the ankle joint were evident.
- Clinically the plaintiff demonstrates fairly marked functional and symptomatic disability of the injured ankle. X-rays confirm a malunited joint with moderately advanced secondary degenerative changes."

[22] With regard to the "*Prognosis and Future Treatment"* the orthopaedic surgeon noted, *inter alia,* the following:

- "…
- Looking ahead the damaged ankle will probably manifest with increasing clinical and radiological regression over the short term (3 – 5 years). …
- Increasing ankle disability will probably lead to surgery, most likely and arthrodesis/fusion at about age 54 years. …

- Post ankle fusion relieve of hindfoot pain would be anticipated, but the changed biomechanical forces on the remaining small mobile joints of the midfoot and forefoot will probably lead to premature secondary symptomatic degenerative changes. …
- Weight bearing and walking will probably remain curtailed."

[23] Under the heading *"Employment/Occupation"* Dr Scher opined as follows:

"He has worked for the municipality in the cleaning services section for 15 years. His position is that of supervisor which encompasses administrative and fieldwork, the latter demands that he be active and mobile and would probably considered moderately heavy. Fieldwork would be the bulk of his duties/time and admin the lesser portion. He was off-sick some three months post-injury and since returning to work he is coping. Allowing he is getting by at this stage increasing ankle disability will probably limit him to more sedentary work in the next three years. Allowing he was accommodated, it is unlikely someone in his situation would continue working more than one year post ankle fusion."

[24] Under the heading *"Narrative Report"* Dr Scher stated, *inter alia,* as follows:

"It is probably in the workplace that he will be most significantly affected because of the compromised right ankle. At this stage he appears to be coping. It is unlikely someone in his situation will continue working beyond the mid-fifties. Therefore compensation for projected loss of earnings to retirement age would be a consideration. Expert assessment from an occupational therapist and industrial psychologist may be canvassed with respect to this aspect."

[25] The occupational therapist, Ms Fletcher, concluded, *inter alia,* as follows in her expert report:

> "… the client no longer fully meets the physical demands for his work as a cleaning supervisor, this is possibly the reason for his current employer's concern regarding his work performance.
>
> The client's job requires prolonged standing and walking in order to supervise the various cleaning staff and this is likely to cause pain in the affected ankle. The client would require frequent rest periods during the working day to enable him to cope with the standing and walking requirement which will negatively affect his work speed and overall productivity during the working day.
>
> Should his current employer be willing to continue to accommodate him where necessary I am in agreement with Dr Scher that the client's career would in all likelihood be truncated and it is anticipated that he would not be able to work beyond the age of 55 or following an ankle fusion as his mobility would be restricted even further.
>
> The client's visual perceptual skills are likely to have a negative impact on his ability to seek alternative employment falling into the Light to Sedentary classification as most of these occupations are administrative and office based and require intact visual perceptual skills. Considering that the client would be competing against similarly qualified without any physical or perceptual fall, it is unlikely that the client would be able to find or maintain alternative employment should he lose his current employment."

[26] Lee Leibowitz, the industrial psychologist, indicated in her report that she, *inter alia,* had the expert reports of Dr Scher and Ms Fletcher available at the time of the compilation of her own report. Ms Leibowitz came to the following duly substantiated and important conclusions in her report:

“8.2.7 Having taken cognisance of the experts' collective findings, it is the writer's opinion that Mr Rankhasa has been rendered vulnerable and less competitive as a result of the injuries he sustained in the accident and the sequelae thereof…

8.2.8 Although Mr Rankhasa has returned to his pre-accident position and has managed to remain employed to date, given the above listed factors, it would be fair to acknowledge that he would not be functioning at his pre-accident levels or in line with his uninjured peers, and will ultimately be at a disadvantage in his occupational endeavours.

8.2.9 Whilst the writer anticipates that Mr Rankhasa will likely attempt to remain with his current employer for as long as possible, given expert opinion he faces an uncertain future.

8.2.13 Thus, the cumulative effects of Mr Rankhasa's physical and functional limitations; pain symptoms; neuropsychological and neurocognitive deficits; psychological/psychiatric symptoms; perceptual skills fallout; and persistent headaches would likely detract from his ability to function effectively in any work context and maintain satisfactory levels of performance. If Mr Rankhasa is unable to maintain satisfactory levels of performance his ability to remain with his current employer may be at risk. Moreover, it is noted that Mr Rankhasa's continued employment with his current employer would also depend on whether his employer could/would be able to accommodate him in an alternate sedentary role, and the likelihood thereof is uncertain.

8.2.14 It is additionally noted that Mr Rankhasa may also need to take time off work when experiencing symptomology and when he needs to attend treatment. The surgical procedures

provided for by Dr Scher and mentioned by Dr Townsend are likely to be accompanied by recuperation periods, and these could be lengthy. Any time off work could have implications from an earnings perspective, especially if Rankhasa were to exhaust the paid sick leave days available to him.

8.2.15 In view of the aforementioned, it would be fair to acknowledge that Mr Rankhasa will face increased risks in his occupational endeavours, which could result in a future loss of earnings. However, the full financial implications thereof cannot be accurately predicted at this stage, and should be dealt with by means of a contingency.

8.2.16 Furthermore, Dr Scher and Ms Fletcher indicate that even if Mr Rankhasa is fortunate enough to be accommodated in a sedentary role, he would unlikely be able to continue working beyond the age of 55 . Ms Fletcher does however suggest that Mr Rankhasa may not be able to work once he undergoes the fusion, which Dr Scher indicates will be at about the age of 54.

8.2.17 Although Dr Scher and Ms Fletcher provide for truncation at around age 55 (or even a year earlier as per Ms Fletcher), realistically Mr Rankhasa's career would be at significant risk of being truncated earlier , by the time he reaches his early fifties. It is thus accepted that having regard to the accident, Mr Rankhasa's working span is likely to be truncated prematurely (by at least 10 years), and this will constitute a future loss of earnings. He should be compensated accordingly."

[27] Contingencies discount the vicissitudes of life and it is a method used to arrive at fair and reasonable compensation. The question of contingencies was dealt with in **Southern**

Insurance Association Ltd v Bailey N.O. 1984 (1) SA 98 (A), to which judgment Mr Hendriks, who filed the heads of argument on behalf of the plaintiff, also referred. The following was held at 113G and 116G – 117A of the judgment:

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

…

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' (*per* HOLMES JA in *Legal Assurance Co Ltd v Botes* 1963 (1) SA 608 (A) at 614F). 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 a 'normal' expectation of life; and that he may experience 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 the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114 - 5. 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] Ms Canham contended as follows in paragraph 9 of her heads of argument:

> "It is clear that approximately 40 months post collision the plaintiff is currently still in the position he held at the time of the collision. It is clear from the reports that this is the highest level the plaintiff will be able to reach with his employer and that no progression is possible and although the plaintiff did indicate to the experts that he is experiencing difficulties in performing all his duties he has still managed to continue with such duties plus overtime and standby as evident in the payslips."

[29] Although it is correct that the plaintiff was still managing to perform his duties at the time of his assessment by Dr Scher, being 13 August 2020, and also, I presume, at the date of the trial, is in my view not indicative thereof that he will still be able to do so 3 years from date of Dr Scher's assessment, hence by August 2023. There is also no evidence to gainsay the expert opinion of Dr Scher to the effect that it is unlikely that he would be able to continue working more than 1 year post ankle fusion.

[30] I can also not agree with the statement that the plaintiff "*has still managed to continue with such duties plus overtime and standby as evident in the payslips*". Although the available payslips do reflect that the plaintiff had been receiving overtime and standby allowance up to at least October 2020, there are no payslips available for the period after October 2020.

[31] There is also no evidence which supports the submission on behalf of the defendant that "*Municipal employers are considered much more sympathetic and will most likely accommodate the plaintiff in a sedentary role*". In addition one has to be mindful of the fact that both Ms Fletcher and

Ms Leibowitz opined that considering the visual perceptual skills difficulties experienced by the plaintiff, it would undermine his ability to perform administrative or office-based work, which is generally associated with sedentary positions.

[32] In my view there is consequently no basis upon which I can find that it is fair and reasonable that a 30% contingency be applied as contended on behalf of the defendant.

[33] I am satisfied that the plaintiff made out a proper case with regard to his claim for damages in respect of his future loss of earnings on the basis of the calculations by the actuary, Mr Wim Loots, including the contingencies he applied. The calculation by Mr Loots was however made as at 1 April 2021. It should consequently be updated and re-calculated to reflect the present value of the loss of future earnings as at 22 April 2022.

[34] Furthermore, as indicated earlier, an *interim* payment has already been awarded to the plaintiff in terms of the Court Order dated 20 July 2021. That *interim* payment must consequently be deducted from the total proven amount of damages.

Costs:

[35] There is no reason why the defendant is not to be ordered to pay the costs of the action, which costs are to include the further costs of the actuary, if any, for the aforesaid updated

calculation. However, since the previous Court Order of 20 July 2021 already made provision for costs up to and including the date of that Order, the present Order will only provide for costs as from 21 July 2021.

Order:

[36] The following order is consequently made:

1. The plaintiff`s claim for damages in respect of past loss of earnings, is dismissed.

2. The defendant is liable to the plaintiff for payment of the plaintiff`s future loss of earnings, calculated on the basis of the calculations (including the contingencies and prescribed Capping applied) by Mr Wim Loots in paragraph 13 of his actuarial report, dated 4 February 2021, but updated to a valuation date of 22 April 2022.

3. The defendant is ordered to pay the plaintiff the amount calculated in terms of paragraph 2 of this Order minus R1 000 000.00 (ONE MILLION RAND) (the *interim* payment already made), which amount is payable within 30 (thirty) calendar days from date of filing of the updated calculation by the plaintiff`s attorneys with the defendant`s attorneys.

4. The defendant is ordered to pay the plaintiff`s agreed or taxed party and party costs on the High Court scale, which costs are the costs incurred by the plaintiff since 21 July 2021, including:

4.1 The reasonable qualifying fees, if any, of the plaintiff`s experts, such experts to include, but not be limited to
Dr Michael Scher – orthopaedic surgeon,
Sharilee Fletcher – occupational therapist,
Lee Leibowitz – industrial psychologist, and
Wim Loots – actuary; and

4.2 Specifically the reasonable qualifying fees of the actuary, Mr Wim Loots, in respect of the updated calculation referred to in paragraph 2 of this Order.

5. The agreed or taxed costs shall be payable within 14 (fourteen) days from date of the agreement or the taxation.

6. All payments are to be made directly into the trust account of the plaintiff`s attorneys of record by means of electronic transfer, the details of which are as follows:

Mokoduo Erasmus Davidson Attorneys
First National Bank
Rosebank Branch
Branch Code 253 305
Account Nr […]

_____

C. VAN ZYL, J

On behalf of the plaintiff: Adv. CJ Hendriks
Instructed by:
MED Attorneys
BLOEMFONTEIN

On behalf of the defendant: Ms RD Canham
Instructed by:
State Attorney
BLOEMFONTEIN