IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No: 4842/2020

In the matter between:

PIETER PRINSLOO	**Plaintiff**
and	
ROAD ACCIDENT FUND	**Defendant**

BEFORE:	**CHESIWE, J**
HEARD ON:	**31 JANUARY, 1 FEBRUARY & 15 FEBRUARY 2023**
DELIVERED ON:	**This judgment was handed electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 13h00 on 19 May 2023.**

[1] The Plaintiff, a 25 year old male has instituted a claim for damages against the Defendant as a result of a collision that occurred on 20 April 2018. At the

time of the collision, the insured driver collided head on with the Plaintiff's motor cycle.

[2] The Plaintiff sustained multiple injuries namely, pulmonary conclusions, right humerus fracture, right open radius and ulna fracture with dislocation of the right wrist, right femur fracture, traumatic amputation of the right small toe, right transverse process fracture of L3 – L5, soft tissue injury of the perineum, laceration of the scrotum and left groin area, bruises and laceration on head face, left knee and lower leg, complete plexus C5 – T1 with severe neuropathic pain.

[3] Due to the injuries sustained, the Plaintiff lodged a claim on 14 December 2020.[1] The issue of the merits and liability was settled on 30 January 2019 in favour of the Plaintiff at 90/10 percentage. On 31 January 2023, the issue of future medical expenses as well as the claim for general damages was settled.

POSTPONEMENT

[4] On the day of the trial, that is 31 January 2023, the Defendant made an application from the bar for a postponement on the basis that the Plaintiff be allowed to undergo a medical procedure as proposed by Dr Russel P Raath (Plaintiff's Specialist – Anaesthesiologist/Pain Management Practitioner)

[5] Counsel on behalf of the Defendant Ms Gouws, in oral submission contended that the Plaintiff be re-evaluated in order to determine the Plaintiff's future income capacity and whether the Plaintiff can agree to the suggested pain management procedure.

[6] Counsel on behalf of the Plaintiff Adv. Cilliers opposed the application and contended that the procedure itself is risky and there are no guarantees that the Plaintiff will not experience any pain in the future. Counsel quoted from Dr Raath's report as follows:

> *"2. So, we implant a Spiral Cord Stimulator, which is an electrode that is implanted in the epidural space, very high up, right up to the C2 and with*

[1] (See return of service on the defendant, page 3 of Bundle 1 - Pleadings)

> *electrical stimulation from a device, almost like a pacemaker, which is planted like a pacemaker. We can actually block some of the pain impulses coming from the inflamed dorsal horn of the spine and prevent them reaching the brain where pain is felt and localised. The device with the drip therapy is reasonably effective and will relieve the patient's pain."*
>
> *I will not be so pretentious or arrogant to say that we will make the patient pain free, but will definitely make his pain …*

[7] I pause to mention that, I requested Adv. Cilliers to take instructions, whether the Plaintiff was willing to undergo the pain management treatment by Dr Raath. Court then adjourned for a few minutes to make the determination. When court resumed, Adv. Cilliers informed the Court that the Plaintiff is not emotionally and physically ready to undergo the said treatment. Counsel placed on record that the treatment has a high risk of infections and that the device is battery operated and depended on WiFi and it is for these reasons that the Plaintiff is not willing to take the risk.

[8] Ms Gouws conceded that it will not be necessary to postpone the matter if the Plaintiff was not willing to undergo the pain management treatment.

[9] The application for postponement was therefore dismissed with costs reserved. Indeed, it is correct that the Plaintiff cannot be forced to undergo treatment he feels is risky. This Court cannot force or order the Plaintiff to undergo any treatment.

[10] The parties by agreement accepted the various expert reports of the Plaintiff as well as the two expert reports for the Defendant. The joint minutes of the Industrial Psychologists and the Occupational Therapists were also accepted by agreement, including the actuarial report of Mr Ashwin de Koker.[2]

EVIDENCE

[11] The trial proceeded only with the evidence of Mr. BPG Maritz, the Industrial Psychologist of the Plaintiff and he testified that the Plaintiff was an

[2] (Bundle 3, pages 566 – 572)

apprentice before the accident and was permanently employed as a qualified mechanic. Maritz confirmed that he and Dr T Kalanko (Industrial Psychologist for the Defendant) had considered all the available medico-legal reports and came to the conclusion that the Plaintiff is unemployable in the open labour market following the injuries the Plaintiff sustained. Furthermore, that the Plaintiff based on his injuries, is highly improbable that he will be able to earn any form of income in the future.

[12] Under cross-examination, Mr. Maritz confirmed that the Plaintiff is unemployable when having regard to all reports including the report of the Orthopaedic Surgeon Dr LF Oelofse, who cannot determine the Plaintiff's employability. On the question of gainful employment, Mr. Maritz explained that the Plaintiff may be able to generate an income to sustain a living, but in the Plaintiff's case, it will not be probable due to his injuries. Mr. Maritz mentioned that a sympathetic employer may employ the Plaintiff, but this will involve continuous sick leave, and the Plaintiff will not make it in a working environment for the job he is qualified in. That was the Plaintiff's case and the Defendant closed its case without calling any witnesses.

ISSUE FOR DETERMINATION

[13] The issue for determination is the Plaintiff's claim for loss of past earnings and earning capacity moreover the future and the applicable contingency.

[14] Adv. Cilliers in oral closing argument, submitted that the issue raised by the Defendant in the heads of argument regarding gainful employment of R 2 000-00, was put to Mr. Maritz and had no basis. That the joint minutes of the Industrial Psychologist concluded that the plaintiff is unemployable. Counsel submitted that the Industrial Psychologists agreed on the future income. The joint minutes were accepted by the Defendant and no dispute was raised by the Defendant and further submitted that the applicable contingencies for past loss of income be 5% and 20 % for the injured scenario of future loss.

[15] Ms Gouws submitted that the Court should request a recalculation for the past morbid, based on the amputation that the Plaintiff is not wholly unemployable. She said the Plaintiff is unemployable due to the injury on the right arm and that the Plaintiff elected to reject the report of Dr Raath on the pain management, further that the Plaintiff refuses to take the advice of Dr Raath. Ms Gouws mentioned that the procedure is not experimental and is for the benefit of the Plaintiff. Ms Gouws submitted further that Mr. Maritz did not take into consideration that the Plaintiff was able to do light duty with a minimum wage of R2 000-00 and it is for this reason that the actuarial is to update its report taking into account the minimum wage post morbid scenario. Ms Gouws indicated that contingencies pre morbid be a deduction of 20% and in respect of future loss of income a contingency of 55% be applicable.

PLAINTIFF'S EXPERT REPORTS

[16] On day two (2) of the trial (1 February 2023), the Defendant accepted the Plaintiff's expert reports, including the joint minutes of the Occupational Therapists and the Industrial Psychologists.

[17] The Plaintiff's expert, Dr Oelofse [3] stated in his report as follows:

> *"14 EMPLOYMENT*
>
> *14.1 Sick Leave*
>
> *… . The patient must be accommodated in a STRICT light duty /neck and back-friendly environment with IMMEDIATE EFFECT as determined by an Occupational Therapist.*
>
> *14.2 … . I believe that his multiple, serious orthopaedic injuries had a severe impact on the patient's amenities of life, productivity and working ability, and will continue to do so in the future.*

[3](Bundle 3, pages 27 – 90 of the Plaintiff's Notice in terms of Rule 36(9)(b))

Critical factors that might play a role in the patient's future working environment can be the following.

Injuries:

- *Permanent deficits from his multiple orthopaedic injuries will remain, especially the injury of his right arm.*
- *It is highly unlike that his productivity will increase with successful treatment of his right arm injury as he will most likely regain very little function even with successful treatment.*
- *It is my opinion that the patient has developed Chronic Pain Syndrome, resulting from his neck, back and right arm injuries.*

  Studies on chronic pain agree that this, very resistant syndrome, also hurts productivity.

  The patient will most probability have chronic pain (at least 75%) for the rest of his life with periodic flare-ups that will necessitate treatment, medication and sick leave. This can happen 2 (two) to 4 (four) times per year;
- *Even with successful treatment, he will most probably always have chronic pain.*
- *As the degeneration in his right wrist and knee progresses, as well as with the development of spondylosis in his neck and back, this will contribute to his state of chronic pain for the rest of his life.*

[18] Stephen Ferreira-Texeira (Clinical Psychologist [4], opined as follow:

8.4.3 Occupationally

(c)(iv) His overall mood and PTSD symptoms may result in him being less motivated and driven overall. This, in turn, may hamper his employment opportunities and render him vulnerable in any employment situation.

[19] Dr Raath in his report (216 – 237),[5] concluded as follows:

[4] (Bundle 3, pages 164 of the Plaintiff's Notice in terms of Rule 36(9)(b))
[5] (Bundle 3, pages 227 of the Plaintiff's Notice in terms of Rule 36(9)(b))

"This patient is disabled, almost completely by pain. … My conclusion, therefore, it is that this patient is extremely disabled by pain."

[20] Narischa Doorasamy (Occupational Therapist) [6], opined that:

"2.4 Work history

b. At the time of the accident, the client was employed by A.C.D as a Panel Beating Apprentice. Following the accident, the client reports that he was off work for one and a half years whilst in recovery from the accident-related deficits. …

c. He is unemployed at present.

8.2 Residual Work Capacity

m. The accident-related injuries, specifically the brachial plexus injury has rendered him an unfair, unfavourable and significantly compromised candidate for employment at a very young age and resulted in him remaining unemployed and virtually unemployable.

[21] Mr Maritz (Industrial Psychologist) [7], states as follows:

13.3 Post – morbid earning capacity;

13.3.19 Best case scenario, the plaintiff will most likely remain in his current position, and it is not expected that he will secure any other gainful employment, and can therefore be rendered unemployable.

13.3.20 Therefore it is understandable that Mr Prinsloo will sustain a loss of future income because of the accident."

DEFENDANT'S EXPERT REPORTS

[22] Success Moagi (Occupational Therapist)[8] opined:

"20.13 Due to right hand and right upper limb impairment, Mr Prinsloo is not suitable for work sample requiring bilateral hand function, inclusive of bilateral working above shoulder, as well as bilateral or unilateral (with

[6] (Bundle 3, pages 414 – 454 of the Plaintiff's Notice in terms of Rule 36(9)(b))
[7](Bundle 3, page 455 – 475 of the Plaintiff's Notice in terms of Rule 36(9)(b))
[8] (Bundle 3, page 484 – 511 of the Plaintiff's Notice in terms of Rule 36(9)(b))

right dominant hand) manual/ load handling. Thus, he will not be suitable for any occupation requiring use of right dominant hand.

20.27 Therefore the writer opines that, Mr Prinsloo's occupational prognosis is poor as is negatively affected by his residual functional capacity."

[23] Tshepo Kalanko (Industrial Psychologist) [9], opined that:

"[41] … It is thus accepted that from now on, he will demand on the empathy of prospective employers who would need to accommodate his physical shortfalls emanating from the injuries sustained in the accident under discussion. It can thus be construed that his physical agility has been impacted on, thus, from a physical perspective, the claimant will not be able to perform in is pre-accident physical capacity.

[43] …Such occupation (sic) are mainly in sheltered employment meaning his employment in competent open labour market is comprised.

[48] …It is anticipated that he will likely remain unemployed for the remainder of his life."

[24] All the experts, including the experts of the Defendant concluded that the Plaintiff is unemployable based on the pain his experience. Even though Ms Gouws proposed that the pain could easily be managed if the Plaintiff undergoes the suggested treatment by Dr Raath. The Court has to take into consideration that the Plaintiff cannot be compelled to undergo treatment that he is not comfortable with. Dr Raath indicated that even if the Plaintiff undergoes this treatment, it would not totally remove the pain, but it will only make the pain bearable.

JOINT MINUTES

[25] Ms Gouws submitted that she does not dispute the joint minutes, but that there be new joint minutes based on the oral evidence of Mr Maritz.

[26] The joint minutes of the occupational therapists [10], agreed that *"the loss of upper limb function, chronic pain experience and sexual dysfunction and loss*

[9] (Bundle 3, page 512 – 541 of the Plaintiff's Notice in terms of Rule 36(9)(b))
[10] (Bundle 3, page 551 of the Joint Minutes (Occupational Therapists))

of his role as a young worker has drastically affected his psychological sate. He has been rendered profoundly compromised due to the resulting disability and permanent impairment to his level of function."

[27] The Occupational Therapist at paragraph 7.2.16 goes further as follows:

> *"The client has a poor prognosis as noted by Drs (sic) Oelofse (orthopaedic surgeon) and is at risk of further deterioration of the right wrist and right knee and surgery may likely be necessary… Due to the client's inability to use the right upper limbs and the probability that his impairment will remain permanent, even with intervention, (my emphasis), his future work prospects are severely compromised and he has been rendered virtually unemployable."*

[28] The joint minutes of the Industrial Psychologists [11], the following is noted at 3.4. 2:

> *"We agreed that the plaintiff will experience difficulties securing employment in the open labour market due to the challenges, pains and discomfort - resulting from the accident related. It is further noted that due to the injuries and the sequalae thereof, he may not be able to compete on par with his healthier uninjured counter parts for employment in the open labour market. As such, he will likely suffer from prolonged periods of unemployment. It is also anticipated that he may remain unemployed for the remainder of his life."*

[29] Ms Gouws, submitted that she does not dispute the joint minutes, however the court ought to consider these joint minutes. However, before the trial commenced, Ms Gouws accepted the joint minutes which are inclusive of the Defendant's occupational therapists and industrial psychologist.

[30] The issue of the joint minutes as stated in **Bee v Road Accident Fund** [12], as follows:

> *". … the joint minutes will correctly be understood as limiting the issue on which evidence is needed. If a litigant for any reason does not wish to be bound by the limitation, fair warning must be given. In the absence of*

[11] (Bundle 3, page 545, bundle 3 (Industrial Psychologists' Joint Minutes between Mr. BPG Maritz (BM) and Mr T Kalanko (TK) in the matter of Mr P Prinsloo 09 September 2022)
[12] 2018 (4) SA 366 (SCA) at para [66]

repudiation (i.e. fair warning), the other litigant is entitled to run the case on the basis that the matters agreed between the experts are not an issue."

[31] Pertaining application for a postponement by the Defendant's legal representative, it was confirmed on record that there was no challenge against the joint minutes. In **Bee *supra***, the Court is clear that there must be fair warning if the litigant is repudiating the joint minutes. In this instance Ms Gouws accepted the joint minutes, but explained that she is not repudiating, but only questioned the evidenced of Dr Maritz on the possibility of gainful employment. Therefore, aligning myself with what the court said in **BEE *supra***, the parties are bound by the joint minutes as agreed between the experts. The Defendant is not allowed to go beyond the agreed joint minutes. (See also **HAL obo MML v MEC for Health Free State 2022 (3) SA 571 (SCA)**) There is therefore no reason for this Court to depart from the joint minutes of the experts as agreed between them.

[32] The principles which pertains to the weight and/or value to be placed on the joint minutes of the expert witnesses or agreement entered into by the parties are noted in **Thomas v BD Sarens (Pty) Ltd** [13], as follows:

"Where the experts called by opposing litigants meet and reach agreements about facts or about opinions, those agreements bind both litigants to the extent of such agreements. No litigant may repudiate an agreement to which its expert is a party, unless it does so clearly, and at the very latest, at the outset of the trial. It is self-evident that to do so at a late stage is undesirable because it may provoke delay, but that is a practical aspect not touching on any principle. It is conceivable that very exceptional circumstances might exist that allow a litigant to repudiate an opinion later that this moment, such as fraudulent collision, or misconduct by the expert…"

[33] Joint minutes of industrial psychologists [14], is noted as follows:

"2.3.1 We agree that Mr Prinsloo is reportedly secured his first employment tenure in 2016 as an Apprentice (Mechanic and Panel Beater) at Peter's Auto. Thereafter, in February 2018, Mr Prinsloo secured a

[13] (2007/6636) [2012] ZAGPJHC 161 (12 September 2012 at para [11])

[14] (Bundle 3, page 545, bundle 3 (Industrial Psychologists' Joint Minutes between Mr. BPG Maritz (BM) and Mr T Kalanko (TK) in the matter of Mr P Prinsloo 09 September 2022)

better opportunity as an Apprentice (Mechanic and Panel Beater) at ACD, in which capacity he was employed at the time of the accident.

2.3.2 We note that Mr Prinsloo was involved in an accident on 20th April 2018, while he was employed as an Apprentice (Mechanic and Panel Beater) at ACD.

2.3.3 We note that Mr Prinsloo was earning a Basic Salary of R8 000.00 per month, amounting to R96 000-00 per annum (according to the ACD Termination Contract).

2.4.3 TK notes that, according to Koch (2022), the Upper Quartile for Artisans is R404 000-00 per annum. Additionally, according to the PayScale, the average Late-Career Automotive Service Technician\ Mechanic Salary in South Africa is R417 000.00 per annum. Therefore, to assist the court, TK proposes that the average amount of the different Ultimate Levels noted by TK and BM (which is R446, 227.00) be used. These earnings fall between the Lower Quartile and Median Range of Paterson Level C1 (Total Annual Packages).

2.4.4 We agree that the average between the two should be used."

[34] The Court takes cognisance of the fact that the reports of the industrial psychologists, including their joint minutes are important to the actuarial calculations as these calculations are based on the accepted scenario of the employment income, employment prospects, education training and experience. In this regard the industrial psychologists have agreed on the pre-accident income figures as well as the exact income figures, but for the accident. Therefore, the actuarial report was accepted based on the scenario put forward by the industrial psychologists.

[35] The actuarial report by GW Jacobson Consulting [15], the following is confirmed:

[15] Page 566 to 572 dated 15 September 2022 of the Plaintiff's Notice in terms of Rule 36(9)(b)

"1. The reports the industrial psychologist, Mr. Maritz and Mr Kalanko as well as their joint minute dated 9 September 2022 have been taken into consideration;

2. The calculations of Mr. Prinsloo's loss of income were calculated as at 1 October 2022;

3. In respect of past loss earnings a 5% contingency deduction has been applied in respect of the value of income, but for the incident as well as the value of income having regard to the accident.

4. In respect of the future loss of earning capacity, it is indicated that a 20% contingency figure was applied in respect of value of income, but for the accident and that nothing has been applied in the value of income having regard to the accident since the industrial psychologists reject no future income in the injured scenario.

5. The Plaintiff's past loss of income was calculated at R629 242-00. A 5% contingency deduction of R31 462-00 was deducted leaving a balance of R597 781-00.

6. A post injury income of R74 095-00 is also projected to which a 5% contingency deduction of R3 705-00 was made. The nett past loss of earnings has been calculated at R527 391-00."

[36] The actuarial report of GW Jacobson Actuaries concluded that:

"5.1 Calculation of Loss

Mr Prinsloo's loss is the difference between the value of his income, but for the accident and the value of his income having regard to the accident: In calculating his loss, his expectation of life is taken into account.

5.2 Hazards of Life

A deduction should be made for unforeseen contingencies such as sickness, unemployment, errors in the estimation of further earnings and life expectancy, earlier retirement and general hazards of life."

[37] Adv. Cilliers submitted that the contingency that was applied by the actuarial of 20% deduction is actually in favour of the Defendant. Counsel submitted that the Court should apply the usual 5% and 15% contingency and further opposed the request by Ms Gouws for a recalculation and submitting that this would be unfair as the actuarial report was not disputed by the Defendant.

[38] Ms Gouws submitted that the Plaintiff's Industrial Psychologist conceded that there was a possible post-morbid income of an amount of R 2000-00 and that was left out in the calculation as it was not deemed to be "gainful". Counsel further submitted a pre-morbid contingency deduction of 20% for past loss of income and 55% in respect of future loss of income.

[39] In the well-known and often quoted judgment of Nicholas JA in **Southern Insurance Association Ltd v Bailey NO** [16], the following was stated:

> *"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'."* ***(See Holmes JA in Legal Insurance Company Ltd v Boles 1963 (1) SA 608 (A) at 614F)***

[40] One of the elements on exercising that discretion is by giving a discount for contingencies or the changes of circumstance in life. These include, but are not limited to expectations of life, extended periods of unemployment incapacity due to illness and general economic conditions. Thus the amount of any discount may vary depending upon the circumstance of the case and upon the trial Judge's impression of the case.[17]

[41] In **Du Toit obo Dikeni v Road Accident Fund [18], Daffue, J considered at [45] and [46] the view of Pickering J** in **Bonesse v Road Accident Fund 2014 JDR 0303 (ECP)** and as follows:

> *"… It has become customary for the court to apply a so-called sliding scale to contingencies, i.e. 25% for a child, 20% for youth and 10% in the middle age. It would appear that although contingency factors which have been applied in*

[16] 1984 (1) SA 98 AD
[17] (See Van der Plaats v South African Mutual Fire and General Insurance Co Ltd 1980 (3) SA 105 (A))
[18] 2016 (1) SA 367 (FB),

cases involving youths and/or children range from 15% to 40%, the courts have generally been inclined to apply a contingency figure of 20% in respect of youthful plaintiffs in their teen years."

[42] It is trite that contingencies, whether negative or positive are an important control mechanism to adjust the loss suffered by the Plaintiff in order to achieve equity and fairness to the parties. There is no hard and fast rule regarding contingencies. Bearing in mind and taking into consideration what the Court said in **Pitt v Economic Insurance Co Ltd 1957 (3) SA (N),** following is noted:

"The court must take care to see that its award is fair to both sides. It must give just compensation to the Plaintiff, but must not pour out largesse from the horn of plenty at the Defendant's expense."

CONCLUSION

[43] The picture painted from the Plaintiff's experts report, undoubtedly suggests that he is unlikely to be employed in the future due to the brachial plexus injury and the sequalae thereof. To minimise the pain the Plaintiff is experiencing, Dr Raath opined that spinal cord stimulator if inserted, would minimise the pain, however the Plaintiff does not agree with undergoing this treatment. Counsel submitted that the Plaintiff does not want to undergo treatment. Dr Raath in his report [19], stated as follow:

"I will not be so pretentious to say that we will make the patient pain free, but we will definitely make his pain liveable and will most probably be able to get him off the pain medication."

[44] The Court accepts that the Plaintiff does not want to take the suggested treatment, but the question is, if there is a medical method available and tested, would a person suffering from such severe pain not want to take the treatment to make his/her life liveable? Dr Raath's report indicated that the

[19](Exhibit K, page 226 of Bundle C)

procedure can *"improve and should be improved to get the Plaintiff off and keep him off the pain medication as long as possible*." [20]

[45] The Plaintiff elected not to testify during the proceedings. Adv. Cilliers submitted that is was not necessary for the Plaintiff to testify as the Defendant had accepted all the expert reports of the Plaintiff. Ms Gouws submitted that the Court is to draw a negative inference from the Plaintiff's failure to testify. I am inclined to agree with Ms Gouws. A Plaintiff who testifies gives the Court an opportunity to make an informed observation. The Court would have been in a position to have clarity and certainty as would be evidenced and the Plaintiff would have been put through cross-examination which would have an effect on the applicable contingency deductions to be applied.

[46] Taking into consideration the seriousness of the injuries and that the Plaintiff is incapable of employment as per the occupational therapists' reports, improvement in the Plaintiff's condition could be achieved through further counselling and management of the brachial plexus injury which causes the chronic pain.

[47] According to Corbett, in The Quantum of Damages in Bodily and Fatal Injury case Vol 1, general principle at 51 to 52, the following factors for contingency are to be applied in any given case:

1. *The possibility of errors in the estimation of the injured party's life expectancy.*

2. *The likelihood of illness and unemployment which would have occurred in any event or which may in fact occur.*

3. *Inflation or deflation in the value of money;*

4. *Tax alterations on the costs of living allowance and accidents;*

5. *Other contingencies which would have affected the Plaintiff's own capacity in any event.*

[20] (Exhibit K, page 227 of Bundle C)

[48] There is no doubt that the country's unemployment rate is extremely high and the Plaintiff will have to compete with his peers in the same labour market. The occupational therapists agreed in the joint minutes that assessment findings indicating that the Plaintiff is suited to sedentary aspects of light load handling on an occasional basis, even though there is loss of upper limb functionality with the chronic pain that has affected his psychological state.[21]

[49] Taking into consideration the various experts reports, in my view, there is a possibility that the Plaintiff may post-morbid after receiving counselling be recuperated to such an extent that he may do some sedentary work. This is further noted as follows by the occupational therapists:

> *"We agree the client will be limited to sedentary work demands provided that the position does not require bilateral hand function, weight handling overhead work and manual dexterity tasks."*[22]

[50] I therefore conclude that the contingencies applicable should be fair and just for both parties. In view of what the Court said in **Pitt v Economic *supra***, 5% ought to be applicable contingency for past loss of income. In respect of loss of future earning capacity, a fair percentage to both parties would be 25% contingencies. The 55% contingency proposed by the Defendant, in my view is simply too extreme.

[50] The Court has taken into consideration there being a possibility that the Plaintiff's chronic pain and emotional behavioural challenges can be minimised with the necessary treatment and counselling. Thus the calculation would be as follows:

a) Past loss of earnings at contingency deduction of 5% of R629 243.00 (R629 243.00 - R597 780 = R31 463.00)

b) Future loss of earnings at a contingency deduction of 25% of R7 665 384.00 = (R7 665 384.00 – R1 916 346.00 = R5 749 038.00);

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[21] Exhibit B para 7.2.10 page 560 of Bundle C.

[22] Exhibit B para 7.2.18, page 561 of Bundle C.

c) Total = R597 780.00 + R5 749 038.00 = R6 346 818.00

[51] Accordingly, it is ordered as follows:

1. The Defendant is ordered to pay an apportionment of 90% in favour of the Plaintiff.

2. The Defendant is ordered to pay the Plaintiff an amount of R597 780.00 in respect of his claim for past loss of earnings, within 180 days from date hereof.

3. The Defendant is ordered to pay the Plaintiff an amount of R5 749 038.00 in respect of the Plaintiff's future loss of income.

4. The Defendant is to pay the Plaintiff's costs up to and including 15 February 2023, including Counsel's fees as taxed or agreed.

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CHESIWE, J

On behalf of the Applicant:	Adv. HJ Cilliers
Instructed by:	A Wolmarans Inc.
	BLOEMFONTEIN
On behalf of the Respondent:	Ms J Gouws
Instructed by:	The State Attorney C/o Road Accident Fund
	BLOEMFONTEIN