IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- **NOT REPORTABLE**
- **NOT OF INTEREST TO OTHER JUDGES**
- **REVISED**

CASE NUMBER: 98018/2015

7/3/2018

In the matter between:

MALULEKE, EMMANUEL PLAINTIFF

And

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

VUMA, AJ

BACKGROUND

[1] On 29 November 2017 I heard the trial herein. On 30 November 2017 I reserved Judgment but made an Order which appears on paragraph 40 hereof. I now give a full Judgment in respect thereof.

[2] The plaintiff is a 35 year old male previously employed as a general worker, specifically as a supervisor *cum* plumber . The plaintiff sues the defendant for damages suffered as a result of personal injuries sustained in a

motor vehicle collision that occurred on 11 August 2013 on the N1 South, direction Lethlabile in Gauteng. At the relevant time the plaintiff was a passenger in the motor vehicle with registration numbers [….].

[3] On 21 August 2015 the defendant conceded liability thereby undertaking to pay 100% of the plaintiff's proven or agreed damages, thus the matter proceeded to trial on the issue of quantum only.

[4] At the outset of the proceedings the parties agreed to argue the matter only on the basis of the plaintiff's expert reports and the joint minutes filed by the experts.

THE ISSUES

[5] Following a pre-trial conference held between the parties on 23rd November 2017, the issues left for determination are:

5.1 General damages; and

5.2 Past and Future loss of earnings.

INJURIES AND SEQUELAE

[6] The plaintiff filed the medico-legal reports appearing below herein in which his injuries are detailed:

6.1 Dr E Mennen, an Orthopaedic surgeon;

6.2 Dr A Pauw, a clinical psychologist;

6.3 Ms A Greeff, an Occupational therapist;

6.4 Ms R van Zyl, an Industrial psychologist; and

6.5 Mr C Heymans, an Actuary.

[7] The defendant also filed two medico-legal reports, namely:

7.1 Ms Letta Selamolela, a clinical psychologist; and

7.2 Ms Adelaide Phasha, an Occupational therapist.

[8] From the abovementioned plaintiffs medico-legal reports, the extent of the plaintiffs injuries, treatment and *sequelae* are summarised as follows:

8.1 A right humerus fracture;

8.2 A soft tissue or crush injury;

8.3 A stiff right shoulder;

8.4 A Mild to moderate post-traumatic stress disorder (PTSD); and

8.5 Depression.

[9] The plaintiff was treated at Jubilee Hospital. From there he was transferred to Ga-Rankuwa *I* George Mukhari hospital (although the Industrial psychologist medico-legal report states that he was transferred to Steve Biko hospital) for about a period of almost a month where he received a U-slab and wore a plaster of paris for the humerus fracture which was removed after a week. He had to wear a sling for another three weeks since his arm was still not well. Upon examination it was found that the plaintiffs right shoulder had a decreased range of motion. He was then referred for physiotherapy and asked to follow-up in 2 months' time at his Local clinic.

[10] Over and above the injuries stated in paragraph 8 above, according to Dr Mennen's report the plaintiff confirms the injury to his right arm. Dr Mennen concludes that the plaintiff is suffering a significant lack of range of motion of his right dominant shoulder and pain, which pain and injury result in a functional impairment concerning both the latter's employment as a supervisor in the construction of man- holes and pipes and his sport, which is Karate, which he used to participate in.

[11] For the future, Dr Mennen states that the plaintiff has suffered a significant loss of working capacity due to the lack of range of motion of the right shoulder and also because of the pain he experiences on the very shoulder. He allows for conservative treatment .in the form of continued physiotherapy . Future surgery-wise, although he does not rule it out, Dr Mennen doubts if same will increase the plaintiffs right humerus' range of motion.

[12] In her report, Ms A Greeff, the occupational therapist's opinion is similar to that of Dr Mennen in that both state that the plaintiffs right humerus fracture has negatively affected his general functioning in daily life, inclusive of affecting the

amenity enjoyment and capacity for earning a viable income. She accepts that the plaintiff will probably benefit from physiotherapy and conservative intervention, even on completion of the recommended surgical interventions. She further states that the plaintiff may not benefit from any such recommended surgical intervention. She then recommends that occupationally, the plaintiff will benefit from garden assistance of once a week in summer and twice a month in winter, considering that he experiences pain on inclement weather.

[13] She states that during examination, the plaintiff was not able to meet the required rate set for the open labour market of 87,5% with his executions. She further states that the plaintiff does have the physical capacity to resume occupation within the sedentary to light physical ranges. She admits that although she accepts that the plaintiff does probably have the physical capacity to resume occupation as a supervisor, what remains is that he would still need to be selective in the type of supervisory position that he secures- in that it should not require any physical hands on tasks.

[14] The industrial psychologist, Ms R van Zyl, states that due to dropping out of High School in 2000 after repeating his Grade 11, the odds are stacked against the plaintiff in the labour market, especially when one considers the physical limitations imposed on him by the injuries he sustained following the collision. Furthermore, his lack of formal vocational training also indicates that he would probably only have been able to function in an unskilled/ low-level semi-skilled capacity within the labour market. Ms van Zyl notes that though the plaintiff was previously employed as a plumber, the said job is a skilled occupation. She states that despite his bank statements not clearly indicating the source of the payments, they seem to confirm the plaintiffs reported earnings. In respect of the plaintiffs pre-morbid employability profile, Ms van Zyl states that despite the plaintiff having functioned in the achievement career phase, he had probably reached his career pinnacle and would therefore had migrated through the remaining career stages until normal retirement.

[15] Of much importance is the fact that both parties agreed to use the amounts of R 319 896-00 and R1 428 139-00 in respect the plaintiffs loss *re* both his past and future loss of earnings as a baseline.

SUMBISSIONS *RE* CONTINGENCIES AND PAST AND FUTURE LOSS OF INCOME /EARNING CAPACITY

[16] Mr Maritz for the plaintiff submits that prior to the collision the plaintiff was a general worker, alternating between being a brick layer and a plumber. The plaintiff's highest qualification is a Standard 8 and this fact therefore mean that pre-morbid, he had to rely primarily on his physical abilities to generate income for himself and his family. He submits that the fact that the plaintiff has suffered severe orthopaedic injuries due to the collision means that his physical ability has been to a large degree diminished. It also means that in all probability the plaintiff may never be able to do heavy work and that furthermore, he is now consequently limited to sedentary or light work. He further submits that given the plaintiff's qualification which is coupled with the lack of drive he is experiencing, it is near impossible for the plaintiff to can find such a sedentary or light work. His competitiveness in the labour market has been compromised gravely and further that the psychological *sequelae* due to the injuries the plaintiff sustained are astounding.

[17] He submits that even if the alternative job for the plaintiff could be that of a supervisor as he previously was before the collision, it still will not be viable for the plaintiff given the fact that the said position has some physical requirements to it. He submits that for the past 4 years the plaintiff had not been to find a job due to the *sequalae* of the collision.

[18] Mr Maritz further disagrees with the defendant's counsel's submission that the court must apply a contingency similar to pre and post morbid and not the customary 5% in respect of the plaintiff's past loss of income. He proposes the following as the most equitable and fair percentages to be applied under the circumstances:

18.1 FOR PAST LOSS OF INCOME

Past pre- & post morbid- 5% contingency, that is, R303 901-00

18.2 FUTURE LOSS

Post morbid future loss of income= 50% contingency =R714 069-00
Future post- morbid earnings@ 40% = R571 255
Future loss post-morbid@ 50% reduction =Total loss is R714 069-00

[19] In his submissions, Mr Masombuka for the defendant argues that the timeline in respect of plaintiff's 5 (five) year pre-morbid unemployment periods as recorded in Ms van Zyl's Industrial psychologist's report are somewhat discomforting and directly impact on the differential ultimately to be applied to redress same. He argues that from the Industrial psychologist's report it is recorded that the only period for which the plaintiff was ever employed for an uninterrupted period was in 2013 as a supervisor employed by a Mr JC Morapedi. He argues that same should be interpreted as an indication that the plaintiff was habitually a person of 'unemployed' status despite the collision. He buttresses this submission by referring to the fact that even with regard to the said supervisory position he held just before the collision, the contract thereof would have ended exactly a week after the date of the collision.

[20] The defendant's counsel further raises the issue of the plaintiff not having provided proof regarding his alleged earnings. He further submits that in the orthopaedic surgeon's report it is stated that the plaintiff's supervisory job would have expired a week prior to the collision, arguing that in light thereof it would therefore mean that the presupposition that *'but for the collision the plaintiff would still be employed* naturally falls away. He further submits that the plaintiff's job as a supervisor was on a temporary basis which would have expired as stated above regardless. On this basis the defendant's counsel submits that a 5% past loss pre- morbid and a 10% future loss post-morbid should be applied in respect of the plaintiff's loss of income.

[21] In respect of the future loss of income, Mr Masombuka further submits that post- morbid, the plaintiff in fact suffered no loss since he is in a position to can still do supervisory work, otherwise a compromise of 10% should be applied. He argues that such approach is motivated by the fact that from the experts' reports, it is evident that the plaintiff had not always had a job. Counsel for the defendant further argues that their approach is also motivated by the Actuarial report which,

he submits, is misleading considering that it does not provide for the plaintiff's lengthy periods of unemployment, hence the defendant's application of a higher post-morbid contingency. To this end defendant's counsel proposes a 20% contingency differential and that same be applied as follows:

Pre-morbid- 15% spread
Post -morbid- 35% contingency.

[22] In respect of the above suggestion, she argues that this approach effectively brings us to a 20% contingency differential which is way higher than the ordinary 10% and 20% respectively. He submits that under the circumstances, the above approach is fair and reasonable. He is still of the view that the plaintiff's supervisory job stands him in good stead.

[23] In respect of the **past loss of income,** the defendant's counsel submits that lack of income by the plaintiff or lengthy unemployment periods is nothing new to the latter. He however submits that the defendant will apply a spread of 10% or 15% which brings the payable amount to R31 989-60 and disagrees with the plaintiff's suggestion that a 50% contingency be applied. For **future loss of income** the defendant suggests a 20% spread = R285 627-80

GENERAL DAMAGES

[24] For general damages the plaintiff's counsel submits that an amount of R400 000-00 be awarded whereas the defendant's counsel counters same with an amount of R250 000-00. He refers the court to, *inter alia,* the matter of *Fortuin v Minister of Safety and Security* **(2728/02) [2007] ZAWCHC 3 (25 January 2007)** where the court, in making the award, took into account the fact that the plaintiff lacked motivation following the cause of action, which affected his earning capacity. He submitted that the court should factor these *sequelae* in as appears in the clinical psychologist's report.

[25] Mr Masombuka refers to the 1968 Mesia matter heard in the Orange Free State High Court (OFS) where an award of R1 250-00 was made in *re* general damages, the current value of which is R92 000-00. He further refers to the *Maxula* and *Ndaba* cases, submitting that although the said two cases were applicable in *casu,* the defendant will not apply the principle thereof. The

reference to the *Maxula* matter is rejected by the plaintiffs counsel on the basis that the *Maxula* principle could never be applicable in *casu* since in *Maxula* the plaintiffs earnings were never placed in dispute. As stated above the defendant's counsel counter-offers the plaintiffs claim with an amount of R250 000-00.

THE LAW

[26] It is common cause that matters which cannot otherwise be provided for or cannot be calculated exactly, but which may impact upon the damages claimed, are considered to be contingencies. As was held in the matter of *De Jongh v Gunter 1975 (4) SA 78 (W) 8OF,* such matters are usually provided for by deducting a stated percentage of the amount or specific claims.

[27] In the matter of *Bums v National Employers General Insurance* Co *Ltd 1988 (3) SA 355 (C) 365 ,* it was held that contingencies include any possible relevant future event which might cause damage or a part thereof or which may otherwise influence the extent of the plaintiffs damage.

[28] It was also held in the matter of *AA Mutual Association Ltd v Maqula 1978 (1) SA 389 (W),* that the percentage of the contingency deduction depends upon a number of factors, which factors are usually taken into account over a particular period of time, generally until the retirement age of the plaintiff.

[29] Colman J provided a useful exposition in *Burger v Union National South British Insurance Co 1975 (4)* SA *72 (W)* 75, of the approach to be adopted by the Court:

> *" A related aspect of the technique of assessing damages is this one; it is recognised as* a *proper, in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said on* a *preponderance of probability that they will occur or arise, justice may require that what is called* a *contingency allowance be made for* a *possibility of that kind."*

[30] In the final analysis, what has to prevail is what was held in the matter of *Shield Insurance* Co *Ltd v Ha/11976 4* SA *431 (A) 444,* that the provision for contingencies falls squarely within the subjective discretion of the court as to

what is reasonable and fair.

[31] It is common cause that contingencies of whatever nature generally serve as a control mechanism to adjust the loss to the circumstances of the individual case in order to archive justice and fairness to the parties. As was held in the matter of *Hall v RAF 2013 (6J2) QOD 126 (SGJ),* the question of the contingencies deductions to be applied, as is the calculation of the quantum of a future amount involving, *in casu,* loss of earning capacity, is often difficult. The Court has a wide discretion based on a consideration of all the relevant facts and circumstances.

ANALYSIS

[32] It is my view that the defendant's submissions regarding the plaintiff's future employability prospects are somewhat unrealistic. It is for these reasons that I find contingency deduction suggested by the defendant's counsel not reasonable or fair in respect of both the plaintiff's future loss of earnings, past loss of income and the general damages.

[33] I am of the further view that the fact that post the collision, the plaintiff will henceforth primarily depend on sympathetic employment. I am of the further view that this finding should and can be mitigated by a moderately post-morbid higher contingency deduction, although not of the proportion as suggested by the plaintiff's counsel. This finding is in in view of the fact that the plaintiff would be disadvantaged in an open labour market and thus should weigh in his favour.

[34] Bearing all of the above in mind, I am therefore inclined to agree with Mr Maritz that based on the *sequelae* of the plaintiff's injuries, he moderately higher contingency deduction in respect of the future post-morbid loss of income is reasonable and fair. I am mindful that in applying an appropriate contingency to the plaintiff's post-morbid earnings, his employability prospects need not be established as a probability but as a mere possibility.

[35] In arriving at the award in respect of the plaintiff's past loss of income, it should be noted that I relied on Scenario 2B of Mr Heymans' actuarial report, with the past pre-morbid income stated as R303 901. Taking into account the totality of the facts *in* casu, I am of the view that a 50% reduction thereof is fair and

reasonable under the circumstances. The reason for this view is because the longer and rampant episodes of plaintiffs unemployment should have been provided for in the report by the actuary as correctly submitted by the defendant's counsel.

[36] With regard to the plaintiffs future post-morbid loss of earnings/ earning capacity, it should be noted again that I relied on Scenario 2 of Mr Heymans' actuarial report, where both the future pre-& post- morbid income is stated as R1 428 139. Taking into account the totality of the facts *in* casu, I am of the view that a 55% reduction thereof is fair and reasonable under the circumstances. The reason for this view is because the plaintiffs historical employment overview is such that by the very nature of his education, past and future, there would have been in the future periods when he would have been unemployed, despite this collision. This finding is especially supported by, *inter alia,* the fact that the plaintiff would still have been unemployed a week after the collision since his contract as a supervisor would have come to an end.

[37] I am of the view that the contingency deductions applied will serve both parties equitably by balancing both their interests.

[38] With regard to the general damages, from the case law the court was referred to, I could not find one that was comparable in terms of both the injuries and the awards. Whereas the plaintiff submits that an amount of R400 000-00 would be a reasonable award with the defendant's counsel suggesting an amount R250 000-00, having considered the authorities cited by the parties, the injuries suffered by the plaintiff and the *sequelae* thereof , and the future medical intervention the plaintiff is yet to undergo, I have come to the conclusion that an award in the amount of **R300 000-00 (THREE HUNDRED THOUSAND RAND)** would be appropriate compensation for general damages in the present case.

[39] In the result I find that the plaintiff has proven his claim to the extent as appears in the Order below herein:

[40] **ORDER:**

1. The Merits are settled on the basis that the Defendant shall pay 100% of the Plaintiff's proven or agreed damages.

2. The Defendant shall pay to the Plaintiff the sum of **R300 000-00 (THREE HUNDRED THOUSAND RAND** only) in respect of General Damages.

3. The Defendant shall to the Plaintiff the sum of **R151 950-60 (ONE HUNDRED AND FIFTY ONE THOUSAND NINE HUNDRED AND FIFTY RAND AND SIXTY CENTS).**

4. The Defendant shall pay to the Plaintiff the sum of **R642 662-55 (SIX HUNDRED AND FORTY TWO THOUSAND SIX HUNDRED AND SIXTY TWO RAND AND FIFTY CENTS).**

5. Thus the Defendant shall pay to the Plaintiff the sum total **R1 094 613-15 (ONE MILLION AND NINETY FOUR THOUSAND RAND SIX HUNDRED AND THIRTEEN RAND AND FIFTEEN CENTS)** in respect of General Damages, past and future loss of earnings/ earning capacity.

6. In the event of the aforesaid amount not being paid timeously, the Defendant shall be liable for interest on the amount at the rate of 10.25% per annum, calculated from the 15th calendar day after the date of this Order to date of payment.

7. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 for payment 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 resulting from the injuries sustained by the Plaintiff in the motor vehicle accident that occurred on the 11th August 2013, to compensate the Plaintiff in respect of the said costs after the costs have been incurred and upon proof thereof limited to 100%.

8. The Defendant shall the Plaintiff's taxed or agreed party and party costs on the High Court scale, subject thereto that:

   8.1 In the event that the costs are not agreed:

      8.1.1 The Plaintiff shall serve a notice of taxation on the

Defendant's attorney of record;

8.1.2 The Plaintiff shall allow the Defendant 14 (FOURTEEN) Court days from date of allocator to make payment of the taxed costs.

8.1.3 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10.25% per annu8m on the taxed or agreed costs from the date of the allocator to date of final payment.

8.2 Such costs shall include but not limited to:

8.2.1 The costs incurred in obtaining payment of the amounts mentioned in paragraphs 2 and 5 above;

8.2.2 The costs of and consequent to the employment of Senior- junior Counsel, including counsel's charges in respect of his full day fee for 29 November 2017, as well as reasonable preparation;

8.2.3 The costs of all medico-legal, radiological, actuarial, accident reconstruction, pathologist, and addendum reports obtained by the Plaintiff, as well as such reports furnished to the Defendant and/ or its attorneys, as well as all reports in their possession and all reports contained in the Plaintiffs bundles, including, but not limited *to* the following:

8.2.3.1 Dr E Mennen - Orthopaedic surgeon

8.2.3.2 Dr Annalie Pauw - Clinical psychologist

8.2.3.3 Anneke Greeff - Occupational therapist

8.2.3.4 Renee van Zyl - Industrial psychologist

8.2.3.5 T Doubell- Actuary

8.2.3.6 P Maleka - Interpreter

8.2.4 The reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by

the Taxing Master, of the following experts:

8.2.4.1 Dr E Mennen - Orthopaedic surgeon

8.2.4.2 Dr Annalie Pauw - Clinical psychologist

8.2.4.3 Anneke Greeff - Occupational therapist

8.2.4.4 Renee van Zyl - Industrial psychologist

8.2.4.5 T Doubell- Actuary

8.2.4.6 P Maleka - Interpreter

8.2.5 The reasonable costs incurred by and on behalf of the Plaintiff in, as well as the costs consequent to attending the medico- legal examination of both parties.

8.2.6 The costs consequent to the Plaintiffs trail bundles and witness bundles.

8.2.7 The cost of holding all pre-trail conferences, as well as round table meetings between the legal representatives for both the Plaintiff and the Defendant, including counsel's charges in respect thereof.

8.2.8 The cost of and consequent to compiling all minutes in respect of pre-trial conferences.

8.2.9 The reasonable travelling costs of the Plaintiff, who is hereby declared a necessary witness.

82.10 The reasonable costs for the eyewitnesses present at court, if any.

9. The amounts referred to above will be paid to the Plaintiffs attorneys, Spruyt Incorporated as per the Consent and Instruction, by direct transfer into their trust account, details of which are the following:

Standard Bank

Account number: [….]

Branch code: Hatfield (01 15 45)

REF: SD 1870

10. There is no contingency fee agreement between the Plaintiff and Spruyt Incorporated Attorneys.

L VUMA
Acting Judge of the High Court
Gauteng Division, Pretoria

Heard: 29 November 2017

Judgment delivered: March 2018

Appearances:

For Plaintiff: Adv S.G. Maritz

Instructed by: Spruyt Inc.

For Defendant: Adv A Masombuka
Instructed by: Diale Mogashoa Attorneys