

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



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

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

DATE 28 JULY 2022 SIGNATURE

Case Number: 11400/2016

In the matter between:

**DWAYNE VOSLOO**

Applicant

and

**ROAD ACCIDENT FUND**

First Respondent

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**JUDGMENT**

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**BESTER, AJ**

1. This is an action for damages arising from a motor vehicle collision that took place on 5 December 2012 near Mogale City. The plaintiff was a front seat passenger in a motor vehicle with registration number [...] at the time

of the collision. He sustained serious injuries when the motor vehicle collided with another vehicle, the particulars of which are unknown.

2. The question of the defendant's liability was finally resolved on 17 October 2018 following the judgment of Kubushi J which ordered the defendant to pay the plaintiff's proven or agreed damages with costs.
3. The only issue for determination concerns the quantification of his damages as a result of the injuries sustained during the collision.
4. At the commencement of the trial, the plaintiff's counsel made submissions in favour of a separation of the issues of past medical expenses and general damages on the basis that the only issue that required adjudication concerned the question of the plaintiff's loss of past and future earnings. The defendant did not oppose the separation.
5. Turning to the applicable legal principles, our law draws a general distinction between general damages and special damages in cases involving bodily injury.
6. Patrimonial loss actually suffered, such as medical and hospital expenses and past loss of earnings is treated as special damage. Non-patrimonial loss such as pain-and-suffering, loss of amenities, and loss of expectation of life is classified as general damage. Forms of loss that up to the trial hearing remain prospective such as future medical expenses and future loss of earnings are characterised as general damages. The upshot of this is that past loss of earnings is treated as special damages, and future loss

of earnings is treated as general damages (*The Quantum of Damages*, Volume 1: Corbett Fourth Edition, Gauntlett at pages 2 to 4).

7. An award of damages must be able to place the plaintiff, as far as is meaningfully possible, in the position that the plaintiff would have occupied had the wrongful act causing injury not occurred. In cases involving bodily injury, the claim is *sui generis* and the measure of damages requires less an exacting standard of calculation (**Sandler v Wholesale Coal Supplies Limited** 1941 AD 194 at 199).
8. Damages for loss of earning capacity are by their very nature a matter of some speculation since they involve a prediction as to the future. The Court is left to do the best it can to make an estimate, often a very rough one, of the present value of the loss. It can either make a round estimate on the basis of what it considers to be fair and reasonable, or it can make an assessment, by way of mathematical calculations on the basis of assumptions resting on evidence.
9. Both of these methodologies involve a matter of some guesswork to an extent. The remarks of Holmes JA held in **Anthony & Another v Cape Town Municipality** 1967 (4) SA 445 (A) at 451 B – C are particularly instructive in this regard:

“I therefore turn to the assessment of damages. When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss;

see *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (N) at p. 287, and *Turkstra Ltd v Richards* 1926 TPD at 282 *in fin* to p 283.”

10. With this in mind, I turn to the facts.
11. At the time of the collision, the plaintiff who had obtained a grade twelve qualification as well as in-house certificates in aviation security, passenger handling and CPR, was employed at Lanseria International Airport as a check-in clerk. He currently teaches English and mathematics to children in Thailand. He is not married and does not have any children.
12. The plaintiff suffered the following injuries as a result of the collision: fracture, distal phalanx, right ring finger; mild compression fracture, L1; soft tissue injury lower back; open wound, right wrist and hand; scarring and cosmetic disfiguration; post-traumatic stress disorder.
13. Following the collision, he was admitted to the Krugersdorp Hospital where his wounds were cleaned and dressed. He was also sent for a CT scan of his brain and cervical spine as well as X-rays to his chest, left ankle and right hand while he further underwent a surgical debridement of his right hand. He received extensive physiotherapy and was ultimately discharged on 11 December 2012 and had to wear a right hand splint for three and half weeks after the collision.
14. As a result of the collision, the plaintiff sustained deep lacerations of the right hand and has an unsightly scar at the dorsum on the right hand which extends from the level of the wrist joint to the tip of the finger and extends for approximately two and a half centimetres across the dorsum of the

hand. There is also a marked deformity of the nail of the right little finger. His scarring will benefit from surgical revision at a future date.

15. He also has a problem in extending his right little finger and right ring finger. He furthermore experiences pain and discomfort in his right hand during inclement weather.
16. He suffered a loss of forearm function due to the suspected extensor tendon injury and a loss of range of movement on the right elbow and forearm as well as lower back pain.
17. He further suffers from chronic back pain in his right hand, lower back and both ankles. He struggles to walk due to lower back pain and bilateral ankle pain and is unable to participate in his premorbid amenities in the form of gym and experiences pain in his right hand when he plays sport such a golf. He reports traumatic stress coupled with short temperedness and a loss of motivation and self-image while he further suffers from travel anxiety and instances of sleep disturbance.
18. He however returned to work approximately a month after the collision and remained employed as a check-in clerk until 2 April 2014 when he left in order to pursue better employment opportunities elsewhere.
19. While he worked for Samsung and then Vodacom for a while following his resignation from Lanseria International Airport, he secured employment in Thailand as an English teacher in August 2019 from which he earns between R8000.00 and R10 000.00 per month.

20. At the time of the collision he earned an average monthly income of R7 620.03 per month which translates into an annual pre-accident income of R91 440.36.
21. Having regard to the plaintiff's age (he was twenty years old at the time of the accident) and limited qualifications, the plaintiff would in all likelihood have reached a career ceiling at the age of forty five according to Dr Ben Moodie, an expert industrial psychologist on whose evidence the plaintiff relied and would thereafter have only received inflationary increases to his salary until he reached a retirement age of 65.
22. While the collision did not leave the plaintiff unemployable, the combined impact of his physical and psychological difficulties mean that he is functioning at a lower occupational level compared to before the accident and has been left less competitive in the job market than before the collision. The defendant did not seriously dispute this.
23. In then determining his loss of past earnings, it must be emphasised that it is incumbent on a plaintiff to establish by way of evidence that the injuries sustained prevented him from earning a living in the normal way and what the earnings would have been had he not been prevented from doing so (**Anthony v Cape Town Municipality** 1967 (4) SA 445(A)).
24. In this regard, the plaintiff returned to work on 7 January 2013, one month after the accident and received his full remuneration during his time of absence (CaseLines 00-29) and although he worked with some difficulty for three months as a result in that he could not lift heavy luggage, this

improved over time. He later became a sales consultant at Vodacom and had no difficulty in performing his duties (CaseLines 001-18) after having resigned on 3 April 2014 by virtue of the fact that he was offered a better job opportunity (CaseLines 007-7).

25. The claim for past loss of income in the sum of R600 000.00 therefore does not have merit in my view in that it has not been established that the plaintiff was unable to earn an income as a result of the collision.
26. With reference to his future loss of earnings, the first step is to determine the plaintiff's present value of future income but for his disability (1). This requires a determination of the period for which the plaintiff would normally have continued to work and earn a living but for the collision as well as what the plaintiff's average future annual earnings would have been had there not been a disability.
27. This is followed by determining the present value of the plaintiff's estimated future income having regard to the disability created by the collision (2) whereafter the latter (i.e - 2) is subtracted from the (1) and adjusted having regard to all relevant factors and contingencies (**Corbett The Quantum of Damages** Vol 1 Fourth Edition, page 48).
28. Turning to the first leg of the enquiry, the actuarial evidence presented by the plaintiff showed a capital loss of R6 516 800 as representing the present value of his future income but for the collision (CaseLines 002-186) with the present value of the plaintiff's estimated future income having

regard to the disability created by the collision estimated to be R4 644 400.00 which leaves a difference of R1 872 400.00.

29. During argument a considerable amount of time was dedicated to the appropriate contingencies that must be taken into account.
30. The plaintiff's counsel was requested to prepare two draft orders, applying various contingency deductions. The first draft order (A) was in accordance with the submissions made in the plaintiff's heads of argument. The second draft order (B) is in accordance with submissions made during oral argument.
31. Counsel for the plaintiff submitted that 15% represents the accepted norm for "normal contingencies"<sup>1</sup> and accepted that provision for contingencies falls squarely within the subjective discretion of the court as to what is reasonable and fair (**Shield Insurance Co Ltd v Hall 1976 4 SA 431 (A) 444; Pringle v Administrator, Tvl 1990 2 SA 379 (W) 397-398**).
32. In **Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A)** Nicholas JA stated as follows at 116 G – 117 A:

*"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" ..... 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*

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<sup>1</sup> Robert J Koch *The Quantum Yearbook 2021 at 118*



*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."*

33. In **Nicholson v Road Accident Fund** (07/11453) [2012] ZAGPJHC 137 (30 March 2012) WEPENER, J referred with approval to **Goodall v Precedent Insurance** 1978 (1) SA 389 (W) and stated that it has become customary to deduct 0.5% per annum as a contingency for the remainder of a person's working life, and that he could see no reason why it should not be done in this matter.
34. The difficulty with applying contingencies was appreciated by Margo J in **Goodwill v President Insurance Co Ltd** 1978(1) SA 389 W at 392H:
- "In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art of science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office".*
35. Contingency deductions are further adjusted upward or downward depending upon the nature of the underlying assumptions. The more liberal the underlying assumptions, the higher the contingency deductions will be, and the more conservative the underlying assumptions, the lower the contingency will be.

36. The plaintiff has a Grade 12 qualification (with additional in-house training at Lanseria International Airport). During his relatively short working career he was eligible for promotion and earned on par with Paterson A2 – Annual guaranteed package of R 93 400. He would have progressed to Paterson B4/B5 at the age of 45 years. He was 20 years old at the time – leaving a career span of 45 years.
37. The plaintiff will in all likelihood now reach his career ceiling at around the aged of 45 – 50, earning 1 Paterson Level lower than what he would have done but for the accident (B3/B4). He is still able to function but will experience a delay in reaching his career plateau. He will reach it at the age of 45- 50 (hence the reference to 47,5 years: par 4.3 July 2039 of the report of **Munro**.<sup>2</sup>
38. For purposes of the first draft order, the counsel for the plaintiff submitted that because of the young age of the plaintiff at the time, a pre-accident future deduction of 22,5% is fair (considering the ½ % per annum principle as set out in the Goodall-matter *supra*). With a career span of 45 years (if 65 is taken as retirement age – he was 20 at the time) and a ½ % per annum is applied, the future uninjured deduction is 22,5% with the result that the loss should be R 1 683 330 as constituting the sum for future loss of earnings.
39. During oral argument, counsel for the plaintiff submitted that a fairer approach would be to apply a higher contingency deduction in the total pre-accident scenario (inclusive of past and future loss) and to apply a 5%

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<sup>2</sup> Case Lines 002-185 Munroe Report.

differential spread on the post-accident scenario (inclusive of past and future loss).

40. She brought to the attention of the Court additional factors that had to be taken into account such as the Covid-19 pandemic which would have had an impact on the plaintiff's income in 2020 as well as the favourable postulation by the industrial psychologist of the plaintiff's pre-morbid career path as well as the combined effect of his diagnosis with Scheuermann's disease (not accident related) and the L1 compression fracture (accident related).
41. Having regard to the above, counsel for the plaintiff submitted that higher contingency should be applied in the form of a 25% contingency deduction for the uninjured scenario with a 5% differential spread, i.e 30% in the injured scenario.
42. When approached on this basis the claim for future loss of earnings must be calculated as follows:
  - 42.1. R6 516 800 minus 25% in the sum of R1 629 200 = R4 887 600;
  - 42.2. R4 644 400 minus 30% in the sum of R1 393 320 = R3 251 080;
  - 42.3. R4 887 600 minus R3 251 080 = R1 636 520.00.
43. I am in agreement with counsel for the plaintiff that a higher contingency is justified having regard to the Covid-19 pandemic which would have had an impact on the plaintiff's income in 2020 as well as the favourable

postulation by the industrial psychologist of the plaintiff's pre-morbid career path taken together with the impact of his diagnosis with Scheuermann's disease. His relative young age is also relevant in this regard.

44. I therefore find that the sum of R1 636 520.00 is appropriate.

45. In view of the aforesaid conclusion, the plaintiff was substantially successful and is entitled to his costs.

I therefore make an order in the following terms:

1. The issues of past medical expenses (paragraph 10.1 of the particulars of claim) and general damages (paragraph 10.6 in the particulars of claim) are separated from the other issues in terms of Rule 33(4) and postponed *sine die* for later determination.
2. The plaintiff's claim for past loss of earnings is dismissed.
3. The defendant is ordered to pay the plaintiff a capital amount of R1 636 520 (One million six hundred and thirty six thousand five hundred and twenty rand) in respect of his claim for future loss of earnings, which amount shall be paid into the trust account of the plaintiff's attorney, Podbielski Mhlambi Incorporated, whose trust account details are as follows:

ACCOUNT NAME: **PODBIELSKI MAHLAMBI**

BANK NAME: [...]

ACCOUNT TYPE: [...]

BRANCH CODE: [...]

ACCOUNT NUMBER: [...]

REFERENCE: [...]

4. The capital amount shall be paid into the abovementioned trust account of Podbielski Mahlambi Incorporated within 180 (One Hundred and Eighty) days from the date of this order.
5. Should the defendant fail to make payment of the capital amount within 180 (One Hundred and Eighty) days from the date hereof, the defendant will be liable for interest on the amount due to the Plaintiff at the prescribed rate per annum, from the 181<sup>st</sup> day from the date of this order to the date of final payment.
6. The defendant shall capture the payment of the capital amount onto its "Registered Not Yet Paid" / (RNYP) list by no later than 30 (Thirty) days from the date of this court Order being granted.
7. The defendant is ordered to pay the plaintiff's costs of suit of instructing and correspondent attorneys up to date, in respect of quantum, on the party and party High Court scale for, and which costs will include the costs of making the order of Court, and which costs will further include (but not be limited to):
  - 7.1. The costs of attending to the examinations and obtaining the medico-legal reports, addendum reports, RAF4 forms, as well as the qualifying fees, preparation fees, and costs relating to the signing of the confirmatory affidavits to proceed on default, of the following experts:
    - 7.1.1. Dr VM Close (Orthopedic Surgeon);

- 7.1.2. Ms Gail Vlok (Occupational Therapist);
  - 7.1.3. Dr H Swanepoel (Clinical Neuropsychologist);
  - 7.1.4. Dr Berkowitz (Plastic Surgeon);
  - 7.1.5. Dr Weitz (Ophthalmologist);
  - 7.1.6. Mr B Moodie (Industrial Psychologist); and
  - 7.1.7. Munro Actuaries (Actuary).
- 7.2. The reasonable taxable costs of transportation at AA rate and accommodation of the Plaintiff to attend the medico-legal examinations.
- 7.3. The costs of Advocate Maryke van Rooyen, senior-junior counsel briefed for trial, including but not limited to: the trial day fee for 2 November 2021; preparation for trial; drafting heads of argument; drafting of practice note and pre-trial minutes; drafting of court order.
- 7.4. The costs of the instructing and correspondent attorneys, which includes reasonable travelling costs at the AA rate, costs for preparing for pre-trial conferences, and costs for actual attendances to pre-trial conferences, pre-trial Agenda's, and pre-trial minutes, all costs for preparing for trial and attendance to trial on 2 November 2021.
- 7.5. The costs relating to the compliance of all Practice Directives issued, including costs pertaining to judicial case management and Interlocutory trial court proceedings and uploading of all documents to Case Lines.
8. Should the defendant fail to pay the plaintiff's party and party costs as taxed or agreed with 14 (Fourteen) days from the date of taxation,

alternatively date of settlement of such costs, the defendant shall be liable to pay interest at the prescribed rate per annum on such costs as from and including the date of taxation, alternatively the date of settlement of such costs up to and including the date of final payment thereof.

9. The plaintiff shall, in the event that the parties are not in agreement as to the costs referred to above, serve the notice of taxation on the defendant's attorneys or on the defendant (where no attorney is on record for the defendant) and shall allow the defendant 14 (Fourteen) court days to make payment of the taxed costs.
10. There is no Contingency Fee Agreement.

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**BESTER AJ**

**CASE NUMBER:** 11400/2016

**FOR THE APPLICANT/APPELLANT/PLAINTIFF:**

Advocate Maryke van Rooyen (082 897 1260)

**INSTRUCTED BY:** PODBIELSKI MAHLAMBI

**FOR THE RESPONDENT/DEFENDANT:**

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Claims Handler: Mr K Molepo ([kgomotsomo@raf.co.za](mailto:kgomotsomo@raf.co.za))

**INSTRUCTED BY:** THE STATE ATTORNEY

**DATE OF JUDGMENT:** 28 JULY 2022