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

Appeal Case Number: A265/2021

GP Case Number: 52899/2017

REPORTABLE: ~~YES~~/NO
OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
REVISED

_____ **Date:** _____

In the matter between:

BECKER ENGELBRECHT Appellant

And

ROAD ACCIDENT FUND Respondent

JUDGMENT

Baloyi-Mere AJ

[1] This is an appeal against the judgment and order by Pick AJ granted on the 21st June 2021 whereby the *court a quo* dismissed the appellant's claim for future loss of income and loss of earning capacity.

Background

[2] Mr Becker Engelbrecht ("the Appellant") instituted action against the Road Accident Fund ("the Respondent") for the damages suffered as a result of the personal injuries that he sustained in a motor vehicle collision that occurred on the 05th December 2015 when the Appellant was 24 years old. The accident occurred on the N1 North between Gariepdam and Bloemfontein in the Free State Province between a 2015 model Ford Ranger TDCI XL motor vehicle with registration letters and number DW […] GP driven by the Appellant and a white Toyota Land Cruiser motor vehicle with registration letters and number DX […] GP driven by a Mr LS Ndlovu.

[3] On 07th August 2020, Makhoba J granted an order, by agreement between the parties, in terms whereof the Respondent was held liable to pay the Appellant 100% of the agreed or proven damages. The Respondent was further ordered to pay R800 000.00 (eight hundred thousand rand) in respect of general damages, and to provide the Appellant with an undertaking in terms of section 17(4)(a) of Act 56 of 1996 (as amended) in respect of future medical expenses. The Appellant's claim for loss of earnings/earning capacity was postponed *sine die.*

[4] Makhoba J, on 07 August 2020 aforesaid also made the following order:

> *“11. In the event that the defendant wishes to file their own expert reports as previously indicated the defendant is ordered to do so on or before 30 November 2020.*
>
> *12. In the event that the defendant files no expert reports as aforesaid, the plaintiff's medico-legal reports are deemed to be admitted and the plaintiff may proceed to argue the matter at trial on their reports.”*

[5] The Respondent failed to file any expert reports despite the opportunity granted by Judge Makhoba to do so. The Appellant’s reports are accordingly admitted.

[6] The Appellant relies on section 15 of the Civil Proceedings Evidence Act 25 of 1965.

Section 15 of the Civil Proceedings Evidence Act 25 of 1965 aforesaid provides as follows:

> *"It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings”.*

[7] It is therefore correct that the Appellant's medico-legal reports are deemed to be admitted.

[8] On the next trial set down for the determination of quantum, there was no appearance on behalf of the Respondent. The trial court directed that the matter would be decided on the papers. The parties were accordingly not afforded an opportunity to appear in the Court a quo nor were the parties afforded an opportunity to respond to any issues that the Court a quo might have had on the papers.

[9] The *court a quo* was called upon to adjudicate the Appellant's claim in respect of future loss of earnings and/or earning capacity and past medical expenses. There is no past loss of earnings/earning capacity, as the Appellant was remunerated for the time he spent off work recuperating after the accident.

[10] The *court a quo* found as follows:

[10.1] The claim for past medical expenses in the amount of R144 396.62 is granted, payable to the Appellant's Discovery Health's Third Party Recovery Department within 120 days from the date hereof;

[10.2] The Plaintiff's claim for past loss of income is dismissed;

[10.3] Plaintiff's claim for loss of earning capacity is dismissed;

[10.4] Future loss of income is awarded to the Plaintiff in the amount of R495 980.00.

[10.5] The Defendant is ordered to pay the Plaintiff's taxed party and party high court cost from 08/08/2020 to date of judgment. The costs so allocated shall be inclusive of the costs of advocates' preparation and the last actuary report, dated 17 July 2021. The order shall exclude costs of the expert witnesses' reports and addendums thereto and the costs for reservation of the trial.

[11] The Appellant appeals the dismissal of the Appellant's claim for loss of earning capacity to the Full Court of this Division, with leave of the *court a quo*, granted on the 03rd September 2021. The Appellant contends that the court a quo erred in finding that the Appellant has not suffered any future loss of earning capacity. The appellant sought that the order of the court a quo be set aside. The appellant is appealing against the specific finding and the order granted by the court a quo in respect of the appellant's claim for future loss of income/earning capacity, as a result of the injuries he sustained in the collision. The appellant is accordingly asking the Appeal Court to find that he has suffered a loss of earnings/earning capacity, and to improve the award significantly.

Evidence before the *Court A Quo*

[12] The Plaintiff was involved in a motor vehicle accident on the N1 North between Gariepdam and Bloemfontein on the 05th December 2015. He was 24 years old at the time.

[13] As stated above, the Appellant did not suffer any past loss of income as he was remunerated for the time he spent off work recuperating after the accident.

[14] Plaintiff has a BCom (General Degree) and was busy with his CIMA qualification in 2017. At the time of the accident he was employed by Advanced Works International (Pty) Ltd, a family business, as a financial clerk earning R264 000 per annum. Around 2017/2018 after the accident, the Appellant left the family business to pursue a more lucrative position with GIS SA.

[15] The plaintiff obtained the following medico-legal reports in support of his claim for future loss of earning capacity: -

[15.1] Dr P Engelbrecht (Orthopaedic Surgeon)

[15.2] Ms Abida Adroos (Occupational Therapist)
[15.3] Mr PG Maritz (Industrial Psychologist)
[15.4] Mr Wim Loots (Actuary).

[16] The Appellant suffered the following injuries as a result of the motor vehicle accident:

[17.1] Fracture of sacrum (S1/S2);

[17.2] Fractures of pelvic;

[17.3] Injury to lumbo-sacral spine L5/S1 with resultant fusion; and

[17.4] A coccyx injury. His coccyx was consequently removed in 2016.

[18] Appellant presently complains of pain in the pelvis, lower back and sacral area. Removal of the internal fixation screw from the S1 joint is foreseen in 15 years from now, 8 weeks sick leave will be required. He is faced with a 20% possibility of further lumbo spine surgery in 20 years from now, in which event 3 months sick leave is foreseen.

Expert Reports

Orthopedic Surgeons

[19] Dr Peters rated the Appellant's whole-body impairment at 15% in January 2017 while Dr Engelbrecht rated same at 20% in January 2020.

[20] Dr Peters diagnosed severe tenderness in the lumba sacral spine. He also finds a decreased power and sensation at S1. Dr Engelbrecht expects Appellant's physical abilities to deteriorate even further with medical treatment. Lifelong conservative treatment is foreseen.

Occupational Therapist

[21] The Occupational Therapist reports that the Appellant's pain was far worse before he underwent the fusion to his back in 2018. The Appellant struggles to sit, stand or walk for prolonged periods of time. During assessment the

Appellant's back movements were limited and painful and she reported spasm over his lower back.

[22] Appellant's work speed was observed to be below open market norm on physical work samples. Appellant is best suited in a corporate environment. His present occupation is best suited, taking his ability and aptitudes into consideration.

[23] The Occupational Therapist reported that Appellant experiences discomfort after sitting for 40 minutes and has to mobilize frequently. This might affect his productivity going forward. Appellant's supervisor however has no complaints regarding his work performance. The Occupational Therapist further remarked that Appellant would benefit from occupational therapy after each surgical procedure. The Appellant was reported to be coping and will most likely continue to cope.

Industrial Psychologist

[24] The first Industrial Psychologist's report was filed on the 24th March 2017 and the addendum thereto was filed on the 13 August 2020. In the first report the Industrial Psychologist indicated that the Plaintiff is best suited to his present form of employment, being that of a financial clerk or manager. The Industrial Psychologist further remarked that the Plaintiff was employed in a well owned and well-established family business and his father was his employer at the time.

[25] In the addendum the Industrial Psychologist reported that the Appellant had left the family business and had taken up a more lucrative position with GSI SA in 2018. The Industrial Psychologist further remarked that the Plaintiff reports discomfort with prolonged static postures, which discomfort is understandable. He further reported that Appellant is an unequal competitor in the open labour market as a result of having to take frequent breaks. Having regard to the report of the other experts, the Industrial Psychologist reported that he foresees the Appellant retiring two years before the time and taking five months unpaid sick leave in future. Mention was also made that the Appellant was studying towards his CIMA qualifications in March 2017.

The Actuary

[26] Two reports were filed by the Actuary. The first report was dated the 06th July 2017 and the second report was dated the 14th June 2020. The final calculations are contained in paragraph 14 of the actuarial report dated the 17th June 2021 at Caselines 076 – 277.

[27] In relation to past medical expenses the court was placed in possession of an affidavit by Discovery Health's Third Party Recoveries. In terms of the affidavit, the past medical expenses covered by Discovery Health amounted to R144 396.62.

[28] The Respondent did not file any expert reports nor did they put any of the Appellant's expert reports or the Appellant's submissions in dispute. In essence, the Respondent last participated in the prosecution of this action in 2020 after Makhoba J granted an order on the 07th August 2020. As stated above, amongst the orders granted was the fact that should the Respondents

fail to file any expert reports then the Appellant's expert report should be deemed admitted. The effect of an admitted undisputed expert report is trite and well known.

[29] It is therefore not in dispute that all the expert reports as filed by Appellant are admitted. It is therefore my considered view that the *court a quo* erred in finding that the Appellant did not suffer loss of future earning capacity based on the following:

> [29.1] That had the Appellant stayed on in the family business, he might have most likely taken over the business from his father at age 40 and he would have become the Managing Director of the business. The court held that it did not make sense that the Appellant should leave a family business with a sympathetic employer in lieu of a better opportunity. Also the finding that now that he Appellant has left his family business the possibility of him becoming a Managing Director at the age of 40 or 45 are slimmer;
>
> [29.2] That the updated actuarial calculations based on the Appellant's higher income of R450 000.00 per annum resulted in the difference in projected loss of income to be in millions of rands. The calculations show that the Appellant will be earning a yearly salary of R1 322 612.00 per annum in 2036 when he is 46 years old and on a D4/5 medium package, which represent middle management level, with a B-degree;
>
> [29.3] The court found that the future loss of earning capacity and future loss of income can only be calculated once proven, and in the

instance the *court a quo* found that the Appellant did not discharge the onus of convincing the court that he has suffered any present or future loss of earning capacity as a result of the injuries he sustained in the motor vehicle accident.

[30] This court in the unreported matter of **Spamer v Road Accident Fund 2018 JDR 0604 (GP)** as per Molopa-Sethosa J at paragraphs 23 – 25 held as follows:

"[23] The conclusions by the experts set out in their reports referred to above, are properly motivated expert opinions which were admitted by the Respondent.

[24] It is a matter of logical reasoning that all the factors mentioned by the experts and summarized in paragraph 17 above, will probably result in future in a reduction of the Appellant's patrimony (earnings) having regard to the injuries, in comparison to what he would have earned, for example, due to less incentive remuneration, delays in promotion and/or career progression, lower career ceiling etc, all as a result of lower productivity. The Appellant's loss may not be calculable according to the method proffered in the matter of ***Prinsloo v Road Accident Fund 2009 SA 406 (SE)*** *referred to in the court a quo's judgment, but it can be quantified applying different contingencies (a higher post-accident contingency) which method is applied on a daily basis in the courts over many years.*

[25] Having regard to the facts emanating from the various expert reports referred to above there is a clear nexus between those facts and the conclusions reached."

[31] **In RAF v Zulu [2011] ZA SCA 223** the court dealt with the approach to expert evidence that has to be adopted by the courts. The court reaffirmed the principle set out in **Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA 1188 (SCA)**:

> *"[36] That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on reasoning. That is the thrust of the decision of the house of lords in the medical negligence of* ***Bolitho v City and Hackney Health Authority [1997] UKHL 46****".*

[32] The court held in **IM v Road Accident Fund 2023 (1) SA 573 (FB)** at paragraph 21 that:

> *"The common thing is that courts must jealously protect their role and powers. Courts are the ultimate arbiters in any court proceedings. The facts that caused the experts opinions in this case are vital. They were supplied by the Plaintiff and corroborated by experts and surrounding evidence. They are logical and sound".*

[33] It is my view that the *court a quo* erred in not permitting the Appellant an opportunity to address the court during the hearing of the matter where the court had reservations on some of the views expressed by the experts. This trumps the trite principles of the *audi alteram partem* rule.

[34] Rule 33(6) of the Uniform Rules of Court grants a court a discretion to decide whether viva voce evidence will be heard or the matter will be decided on paper. Rule 33 is seen as a means of disposing of a case without the necessity of leading

evidence (**Mighty Solution t/a Orlando Service Station v Engine Petroleum Ltd and Another 2016 (1) SA 621 (CC) at p638A**).

[35] Rule 29 of the Uniform Rules of Court, sub-rule 5 postulates that the facts admitted in court are the true facts and that they are admitted seriously for the purpose of shortening the litigation. Although this case was not heard as a stated case in terms of Rule 33, the *court a quo* had a discretion to decide the case on paper especially because the matter was not opposed at that stage given that all the Appellant's expert reports were admitted. However, the court had an obligation, where it found that it did not agree or believe the evidence of the experts and both experts should have been called to give evidence in court.

[36] In the circumstances the Learned Judge a quo erred on a matter of law, by not taking cognizance of the trite evidentiary principle referred to in **AA Mutual Assurance Association v Biddulph and Another 1976 (1) SA 725 AD** at 72H – 735B by not applying those principles correctly or at all.

The test for loss of earnings and approach on appeal

[37] In the Appellate Division case of **President Insurance Co Ltd v Mathews 1992 (1) SA 1** at 5C-E, Smalberger JA had the following to say:

> *"The Plaintiff's action is one for damages based on negligence. Under the lex Aquilia, as developed in our law, he is entitled to be compensated to the extent that his patrimony has been diminished in consequence of such negligence.*

This also takes into account future loss. His damages therefore include any loss of future earnings or future earning capacity he may have suffered. See **Santam Versekerings Maatskappy Bpk v Byleveldt***. 1973 (2) SA 146 (A) at 150A-C. A precise mathematical calculation of such a loss is seldom possible because of the large number of variable factors and imponderables which come into play".*

[38] The approach of an appellate court when dealing with an appeal from a trial court in respect of awards of damages is aptly captured in the Appellate Division case of ***Southern Insurance Association v Bailey NO.*** **1984 (1) SA 98 (A)** at page 109H.

I can do no better than reproduce the whole quotation.

"It is well settled that this court does not interfere with awards of damages made by the trial Court unless there is 'substantial variation' or 'a striking disparity' between the award of the trial court and what this Court considers ought to have been awarded; or the trial Court did not give due effect to all the factors which properly entered into the assessment; or the trial Court made an error in principle, or misdirected itself in a material respect."

See also ***AA Mutual Insurance Association Ltd v Maqula*** **1978(1) SA 805 (A)** at 809B-C*: 'It is settled law that a trial Court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his bodily injuries and their sequelae. It follows that this Court will not in the absence of any misdirection or irregularity, interfere with a trial Court's award of damages unless there is a substantial variation or a striking disparity between the trial Court's award and what this Court considers ought to have been awarded, or unless this Court thinks that no sound basis exists for the award made by the trial Court.'*

[39] The following dictum in **Van der Plaats v South African Mutual Fire and General Insurance Co Limited 1980 (3) SA 105 (A)** at 115 must also be borne in mind, that: '*a decision whether provision should be made for the deduction from the awarded amount of damages of a certain percentage in respect of contingency factors falls within the discretionary powers of the trial Judge and the exercise of such discretion will only be interfered with if it was improper*' by which it was suggested that the trial court should have regard to factors that are duly relevant thereto.

[40] The Learned *Judge a quo* misdirected himself in not finding that based on the undisputed facts in Appellant's expert reports, the Appellant did in fact prove that he will suffer a loss of earning capacity in future.

[41] The Appellant handed up a draft order in terms whereof the Appellant's calculations of the present value of the actual loss of earnings are based on the report of the actuarial calculations by Wim Loot of Wim Loot Actuarial Consulting, dated 17th June 2021; set out [at Caselines page 076-277] as follows:

	Option A (5% differential)	**Option B (10% differential)**	**Option C (15% differential)**	**Option D (20% differential)**	**Option E (25% differential)**
Earnings had accident not occurred	19 884 321	19 884 321	19 884 321	19 884 321	19 884 321
Less Contingencies	2 982 648	2 982 648	2 982 648	2 982 648	2 982 648
	16 901 673	16 901 673	16 901 673	16 901 673	16 901 673
Earnings having regard to accident	13 599 909	13 599 909	13 599 909	13 599 909	13 599 909

Less Contingencies	2 719 982	3 399 977	4 079 973	4 759 968	5 439 964
	10 879 927	6 880 201	9 519 936	8 839 941	8 159 945
Loss of Earnings	**6 021 746**	**6 701 741**	**7 381 737**	**8 061 732**	**8 741 728**
Loss of Earnings (Capped)	**5 982 300**	**6 599 554**	**7 112 229**	**7 529 877**	**7 855 734**

[42] The calculated loss of earnings as presented in this table is capped, and is accepted as correct, especially because the Respondent did not bring any other contra expert opinion that could persuade the court differently. In the premise

[43] When considering the experts' opinions, it is evident that the accident has to some extent had a negative impact on the plaintiff's physical, cognitive and psychological functioning and will continue to do so in future. Resultantly, his employability will always be affected negatively, and for that he has to be compensated as this impact on his earning capacity. I find that the Appellant has proved a loss in future earning capacity.

[44] The appellant contends/opts for Option B of the above Table [i.e. 10% differential], however, his own Industrial Psychologist, Mr B P G Maritz, has stated, that

> "*It is noted that despite the accident the plaintiff received an offer at GIS South Africa in 2018 which is the current reality. Therefore, despite the accident, the plaintiff would still have continued to be employed as a sourcing manager, earning a gross salary of R450,000.00. The plaintiff is currently functioning on a Paterson C5/D1 level in the corporate environment. The plaintiffs pre-morbid postulation is a Paterson D4/D5 level, in addition, it is indicated that further promotional possibilities cannot be excluded.*

Though, it was contended on behalf of the Appellant that it is expected that the plaintiff's physical capabilities will deteriorate, even with effective further medical treatment. According to the experts, as already alluded to above, two years early retirement is indicated.

[45] Regard being had to all the evidence and all factors herein, in my considered view, a 5% contingency differential is reasonable in all the circumstances as it both recognises the seriousness of the appellant's physical, cognitive, and psychological sequelae, and his vulnerability as an employee. It would simultaneously acknowledge the agency that remains with the appellant and his ongoing access to treatment at the RAF's expense.

[46] It is trite that contingency deductions are within the court's discretion and depend upon the judge's impression of the case. See **Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A)** at p113 and Robert Koch: Quantum Yearbook 2011 at p. 104.

[47] In Southern Insurance Association Ltd v Bailey NO, the following was stated:

> *"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, augers 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 a loss."*

Matters that cannot be otherwise provided for or cannot be calculated exactly but that may impact upon damages claimed are considered contingencies and are usually provided for by deducting a stated percentage of the amount or specific claims. See **De John v Gunter 1975 (4) SA 78 (W)** at 80F. Contingencies include any possible relevant future event that might cause damage or a part thereof or which may otherwise influence the extent of the plaintiff's damage. See **Erdmann v**

Santam Insurance Co. Ltd 1985 (3) SA 402 (C) at 404; **Burns v National Employers General Insurance Co Ltd 1988 (3) SA 355** at 365. Further, *"….A court may be entitled to qualify an amount of damages from an estimate of the plaintiff's chances of earning a particular figure. The figure will not be proved on a balance of probability but will be a matter of estimation."* See ***De Klerk v Absa Bank Ltd and Another 2003 (4) SA 315 (SCA)****;* See also ***Goodall v President Insurance Company Ltd 1978 (1) SA 389 (W);*** *and* ***Road Accident Fund v Guedes (611/04) 2006 ZASCA 19 2006 (SCA)****.* "*The deductions are the court's discretion, and there are no fixed rules regarding general contingencies.* "

[48] Taking into consideration all the facts and the totality of the evidence before this court, I am of the view that applying a 5% contingency differential, a fair and adequate compensation for the appellant's future loss of earnings is R5 982 300.00 (five million nine hundred and eighty-two thousand three hundred rand).

[48] As a result, I would uphold the appeal and substitute the court a quo's award accordingly.

[49] I accordingly make the following order:

1. The appeal is upheld with costs on an unopposed basis, such costs to include the costs of two counsel;

2. The order of Pick AJ is set aside and replaced with the following order:

   2.1 The Defendant shall pay the Plaintiff an amount of R5 982 300.00 (five million nine hundred and eighty-two thousand three hundred rand) in; in full and final settlement of Plaintiff's claim for loss of earnings;

2.2 The Defendant shall pay to the Plaintiff the sum of R144 396.62 (one hundred and forty-four thousand three hundred and ninety-six rand and sixty-two cents) in respect of past hospital and medical expenses;

2.3 The amounts mentioned in paragraph 2.1 and 2.1 above is to be paid to the Plaintiff within 180 (one hundred and eighty) days of this order;

2.4 In the event of the aforesaid amounts not being paid within 180 (one hundred and eighty) days aforesaid, interest shall be paid by the defendant on the said amounts at the rate of 10.5% per annum, calculated from the 181st (one hundred and eighty first day) after the date of this order to date of payment;

2.5 The Defendant shall pay the Plaintiff's costs, including the costs of the Plaintiff's experts, whose reports were served on the Defendant.

[…]

EM Baloyi-Mere

Acting Judge of the High Court

I agree, and it is so ordered.

_____

L M MOLOPA-SETHOSA

Judge of the High Court

I agree

_____

L Flatela

Judge of the High Court

Appearances

Counsel for the Appellant:	Adv SG Maritz with Adv JF Van der Merwe
Instructed by:	Gioia Engelbrecht Incorporated
Counsel for the Respondent:	No Appearance [Unopposed]