Reportable

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case Number: 672/2014P

In the matter between:

NDLELAHLE VICTOR DUMA **Plaintiff**

and

THE ROAD ACCIDENT FUND **Defendant**

ORDER

(a) The pre-morbid contingency is fixed at 7 per cent, and the post-morbid contingency is fixed at 7 per cent;

(b) Costs to be costs in the cause.

JUDGMENT

Delivered on 01 March 2019

Mbatha J

[1] The plaintiff (Duma) was a pedestrian who sustained injuries, when a motor vehicle collided with him at or near Savannah Park, Durban, on 12 June 2012. As a result of the said collision, he suffered a mild head injury with neurocognitive fallout. The Road Accident Fund, as the defendant, has conceded liability of the merits in the plaintiff's favour.

[2] The only issues for determination by this court are as follows: the plaintiff's pre-morbid vocational potential; the contingencies to be applied to his pre-morbid vocational potential; the plaintiff's pre-morbid retirement age; the plaintiff's post-morbid vocational potential; the plaintiff's age, and according to the defendant, whether the court should place reliance on the plaintiff's or defendant's actuarial

reports. Therefore the only issues for determination relate to the plaintiff's past and future loss of earnings.

[3] The plaintiff called Dr Govender, a neurosurgeon, Ms Mtati, a neuropsychologist, Ms Pepu, an industrial psychologist, and Ms Sewraj, an occupational therapist as expert witnesses in support of his case. The expert reports of Dr Govender and Ms Mtati have been admitted by the defendant. The defendant led the evidence of Ms Rahman, an employee of Phambili Road Surfacing Construction (Phambili) who testified as to the nature, status and type of work of the plaintiff at the company. The defendant also called Ms Krishna, an industrial psychologist, in support of its case. The two industrial psychologists also filed a joint minute.

[4] It was the plaintiff's contention that he has no residual earning potential, based on his pre-morbid earning potential, in line with the report filed by Ms Pepu, her evidence, and the joint minute filed with her counterpart, Ms Krishna. Ms Pepu found that the plaintiff would likely have continued working in the capacity of a general worker, earning an average salary of R5 824.87 per month, which would have translated to R68 898.75 per annum; that he would likely have benefited from an annual bonus; that his salary was equivalent to A1, 25th percentile, total package as per Koch, Corporate Earnings 2012; that given his age of 47 at the time of the accident, it seemed unlikely that he would have taken up on the job training opportunities to qualify for progression opportunities in his career; that his salary progression was likely to have been on an annual inflationary basis; and that he would have continued working till the normal retirement age of 65 years.

[5] Ms Pepu concluded that post the accident, it was likely that the plaintiff would remain unemployed until the normal retirement age of 65 years. As a result thereof, a total loss of earnings will be associated with post-morbid potential. It was her evidence that from July 2012 to date, the plaintiff has remained unemployed, was 54 years old, only had a grade eight (8) level of education, had no special skills and his current medical skills are factors that she took into account in arriving to the conclusion that he was unemployable.

[6] Ms Krishna, in the joint minute with Ms Pepu based on their respective reports, found that the plaintiff may have in all likelihood continued as a rakerman in the construction industry with intermittent and natural progression until the retirement age of 65. She was guided by the Bargaining Council for the Civil Engineering Industry (BCCEI) in concluding that he may have been afforded progression as per

negotiated earnings. She opined that post-morbidly, the plaintiff is challenged as he retained physical deficits and subjective reports of headaches and nosebleeds. She noted that although she took into account the medical expert reports of Dr Govender, the plaintiff may still secure employment in a light unskilled work on sympathetic, compassionate, and reasonable accommodation, whilst also managing his medical challenges. She took cognisance of the fact that the epileptic seizures were subjective as they were only mentioned by the plaintiff's wife and son. She surmised that the plaintiff, in the employment of a sympathetic employer, and despite the pain from the head injury, should have a higher contingency applied due to possible periods of unemployment and light category employment. She then set out the table according to the BCCEI (2017) and KOCH (2017), reflecting the pre-morbid earning potential probability.

[7] I turn to the evidence of Ms Sewraj, the occupational therapist called by the plaintiff, who examined the plaintiff in relation to his impairments affecting his visual perceptive skills, which she found to be below average. His mathematical skills were found to be inadequate in terms of speed and ability, which the plaintiff attributed to his inability to see clearly, which occurred after the accident. The plaintiff had complained to her of pain in his left arm and she found his motor integration to be below the standard scale score. The deficiencies had an impact on his ability to carry out general activities which required him to use his left arm. He had difficulty in perform weightlifting activities. This presented problems as his employment required him to do manual labour on roads, using spades, jackhammers and other working instruments. The nature of the work that the plaintiff was engaged in exposed him to the elements like the sun, which exacerbated his nosebleeds and headaches. This had an impact on his productivity, concentration and added to his cognitive fallouts. Ms Sewraj also observed that the plaintiff was more reserved than normal, and learnt that he felt useless as he could not actively participate in work.

[8] In conclusion, she found that due to the plaintiff cognitive fallouts, he was disadvantaged and no longer in a position to secure employment in an open labour market. She also recognised that he was further placed at a disadvantage due to the high rate of unemployment, and the competition with young able bodied persons for employment.

[9] The evidence of Ms Mtati, a neuropsychologist called by the plaintiff, showed that the plaintiff suffered significant neurocognitive deficits which were indicative of a brain injury. She identified that he would have difficulty remembering information

requiring substantial levels of attention and concentration, that his short term memory was impaired and that he functioned at a below average range on SPM post-morbidly. She found that his memory and learning capacity were impaired, and that there was visual impairment which affected his visual scanning and visual attention. The speed within which he processed information was affected to a point that his ability to perform cognitive tasks, automatically and under pressure to remain focussed, was impaired. He presented with limited ability to perform more than one information processing task simultaneously. He did not perform well on tasks that required planning. The plaintiff also presented with depression. She opined that since he presented with cognitive impairments as well as physical and psychological difficulties, many neuro-cognitive deficiencies were likely to persist even though counselling may ameliorate his condition.

[10] Dr Govender, a neurosurgeon called by the plaintiff, testified that the plaintiff had reported to him that he suffered from chronic headaches, poor memory, poor concentration and pain in the left wrist, shoulder and ankle. Dr Govender confirmed that the plaintiff suffered a mild head injury with neurocognitive fallout.

[11] Ms Pepu, the industrial psychiatrist called by the plaintiff, also gave evidence as an expert witness. Her evidence revealed that the plaintiff reported to her that after the accident he suffered from constant headaches, nosebleeds, pain, was struggling to carry heavy objects and was unable to walk for very long distances. She assessed that with a whole person impairment of 15 per cent, there were no employment positions that could be productively occupied by the plaintiff. Besides the high rate of unemployment, the plaintiff was compromised by his age, lack of education and lack of specialised skills to secure employment.

[12] She found that but for the accident, he would have remained employed at Phambili, where he earned R5 900 per month. She opined that it was impossible post the accident, given his age of 47 at the time of the accident, to be considered for any job training. He would only have been entitled to a yearly inflationary increase until he reached the retirement age of 65. Post-morbidly, her findings were that although he returned to work after about two weeks' sick leave, he lost overtime pay, which averaged at R1 000 per month, and thereafter the total loss of earnings from July 2012 to date. Her evidence was that there was no place in the current market for a cushioned job or sympathetic employment. At the age of 54 years, with limited skills, work experience and lack of good education, the prospects of him finding employment were nil.

[13] The defendant called Ms Rahman, who was employed at the human resource department at Phambili during the period of July 2012. She described the capacity in which the plaintiff was employed as rakerman, which was a level higher than that of a general labourer. Basically, his job was to rake the gravel and loose stones on the road. He was paid a fixed monthly basic salary and was entitled to overtime pay. The company used a policy of no-work, no-pay if no doctor's certificate was produced. She confirmed that as of 30 November 2010, the plaintiff's hourly rate was R19.622. This rate was then multiplied by the number of hours worked which translated to his monthly salary. In November 2010 the plaintiff's payslip reflected that he worked 21.67 days, and earned R3 826, which was computed as follows: R19.622 x nine (9) hours per day x 21.67 days. She testified that the deductions which appeared on the payslip were for days not worked by the plaintiff, UIF (Unemployment Insurance Fund) and a living allowance. This left the plaintiff with a nett income of R3 519.

[14] For the period of March 2012, he earned a basic income of R4 132.48, which was inclusive of the annual increase and overtime of R1 382.79, and after deductions, amounted to R4 512.21. For the period of May 2012, he earned a basic salary of R4 132.48, overtime of R1 382.79 and double time. His total earnings for May 2012 were R5 824.87. In June 2012, the plaintiff's basic salary was R4 132.48 and the total earnings were R4 397.99. She confirmed that the plaintiff left Phambili in July 2012.

[15] The industrial psychologist, Ms Krishna, who was an expert witness for the defendant, calculated and placed the plaintiff's salary at R4 132 per month. She made this assessment on the information from the two payslips that were made available to her by the defendant. Her findings were that the plaintiff would have continued to work as a rakerman with intermittent and natural progression until the retirement age of 65. The progression would have been in line with the BCCEI's negotiated rates. She testified that post-morbidly, the plaintiff could still be employed by a sympathetic employer in the unskilled market. She therefore recommended that a higher contingency be applied to his post-morbid earnings.

[16] It is common cause that the plaintiff was 47 years old at the time of the accident, has a grade 8 education, was previously employed as a rakerman by Phambili and that he has been unemployed since 2012. Based on the joint minutes of the industrial psychologists, both parties have obtained actuarial calculations regarding the plaintiff's future loss of earnings and/or earning ability.

[17] The court, in determining a fair and reasonable compensation for loss of income or earning capacity, has a wide discretion which needs to be exercised judicially. In the *Road Accident Fund v Guedes*[1] the court states as follows:

'It is trite that a person is entitled to be compensated to the extent that the person's patrimony has been diminished in consequence of another's negligence. Such damages include loss of future earning capacity (see for example *President Insurance Co Ltd v Mathews).*[2] The calculation of the *quantum* of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature, such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss that is often a very rough estimate (see, for example, *Southern Insurance Association Ltd v Bailey NO)*.[3] The court necessarily exercises a wide discretion when it assesses the *quantum* of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that, in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the *quantum* of damages. Even then, the trial Court has a wide discretion to award what it believes is just (see, for example, the *Bailey* case [4] and *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd).*[5]'

[18] Based largely on the admitted reports of two of the plaintiff's expert witnesses, namely Dr Govender and Ms Mtati, the court accepts that the plaintiff suffered significant neurocognitive deficits indicative of a brain injury. The reports show that prior to the accident, the plaintiff did not suffer from nose bleeds, headaches, pain in the left arm and left leg and had no dizzy spells, and that upon resumption of work he was unable to perform his duties due to the injury which caused him pain and was aggravated by chronic headaches. The findings being thus that had the accident not occurred, the plaintiff would adequately have performed his duties as a rakerman.

[19] It was submitted on behalf of the plaintiff that Dr Govender's and Ms Mtati's reports were admitted by the defendant. This remained the undisputed evidence of the plaintiff as to the nature of his ailments. This was against the background that the defendant challenged the legitimacy of the nature of the injuries and their effect on the plaintiff. The defendant has not furnished this court with evidence to the contrary. I accept the submission made on behalf of the plaintiff that if the defendant had

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[1] *Road Accident Fund v Guedes* 2006 (5) SA 583 SCA at 586H-587B.
[2] *President Insurance Co Ltd v Mathews* 1992 (1) SA 1 (A) at 5C-E.
[3] *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A).
[4] *Southern Insurance Association* fn3 at 116G-117A.
[5] *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114F-115D.

doubt as to the legitimacy of the complaints by the plaintiff, it had ample time and resources to have conducted its own investigations, and to produce counter expert evidence.

[20] It is clear to the court that the plaintiff presented the same complaints to all the expert witnesses that he consulted with, including those of the defendant. Ms Mtati and Dr Govender clearly set out the extent of the neurocognitive injury sustained by the plaintiff. The plaintiff was also assessed by Ms Sewraj, an occupational therapist, whose evidence was that it was very much unlikely that the plaintiff would find employment in the open labour market post-morbidly.

[21] Ms Pepu, as an expert on the employability of the plaintiff, considered Dr Govender's, Ms Sewraj's and Ms Mtati's reports as to whether the plaintiff was employable post-morbidly. Her findings were that due to the injuries that he sustained, his age, and cognitive deficiencies, it was unlikely that he would find any employment post-morbidly.

[22] The defendant, having accepted the reports of Dr Govender and Ms Mtati that the plaintiff suffered from chronic headaches, poor memory and concentration, and pain in the left wrist, shoulder and ankle, then submitted that these complaints were subjective, not confirmed by medical tests, and that the extent of the plaintiff's head injury was not confirmed by an MRI scan as per the recommendations of Dr Govender. This was also stated against the conclusive findings by Dr Govender that the plaintiff suffered a mild head injury with neurocognitive fall out, which findings were accepted by the defendant. It was further submitted on behalf of the defendant that these findings were not confirmed by the plaintiff as he did not testify in the trial. This is an unfair criticism, as the plaintiff had given the same report of complaints to various experts, including those of the defendant. I cannot find why his failure to testify would have made the complaints not subjective as he would have repeated the same complaints. Dr Krishna, an expert witness for the defendant, recorded a severe prognosis of the injuries, including seizures and nose bleeds. Nothing prevented the defendant, in light of the findings by Dr Krishna, with the resources available to it, to have these complaints investigated by various experts. The evidence of Dr Govender, whose report has been accepted by the defendant, is the only medical evidence before this court.

[23] The defendant also challenged the report of Ms Mtati, whose findings had been accepted by it, on the complaints suffered by the plaintiff. The defendant refers to Ms Mtati's report, which classifies his impairment as 'Class 3 – Moderate

impairment – cannot work at all in the same position, can perform less than 20 hours per week in a different position that requires less skill or is qualitatively different ie less stressful'. It is suggested that this meant that post-morbidly he is still capable of employment. This was read in isolation from her findings that her neurocognitive tests showed deficits, in line with a brain injury with the decline in neurocognitive abilities, which she found to be serious impairments as they relate to memory and thinking skills, and that these have an effect on the way the person functions on a daily basis. It is clear from Ms Mtati's findings that the mild head injury suffered by the plaintiff had an effect on his physical, emotional and mental development. I accept that Ms Mtati did not state that he was in a 'vegetative state' but found him incapable of functioning normally in a work place. Ms Mtati, as far as the employability of the plaintiff is concerned, deferred to the opinion of an industrial psychologist. It was not within her expertise to decide whether he was employable or not.

It was suggested that the plaintiff has not availed himself to psychotherapy and physiotherapy, as suggested by the experts who examined him. This is all said against the backdrop of an unemployed person, who has no access to free expert treatment save for a basic health system available to him, and who has no resources for such treatments, which are considered to be secondary treatment. It is in the defendant's expert's report that the plaintiff was collecting analgesics from the hospital, thus he was not merely sitting at home but gave attention to his ailments. This was the only primary healthcare service provided to him.

[24] Ms Sewraj's report and evidence was also challenged on the basis that the reports of pain, nose bleeds and seizures were not corroborated by medical evidence. The fact that Dr Govender recommended that a neurologist should evaluate the complaints of the plaintiff this, does not necessarily mean that such complaints were fictitious. To this court, it shows that a neurosurgeon took this so seriously that he recommended expert evaluation. Ms Sewraj recommended that an Ear Nose and Throat (ENT) specialist as well as a psychiatrist evaluate the plaintiff. These are serous contentions raised by the experts.

[25] Ms Sewraj spoke to the plaintiff in isiZulu. She confirmed that she had done a course in isiZulu to enable her to communicate with clients. She conducted various tests and personally assessed the plaintiff. If the defendant doubted the correctness of any expert reports, it had ample time to refer the plaintiff to all the experts

recommended by either Dr Govender, or Ms Mtati or Ms Sewraj. The defendant has not furnished any counter evidence in rebuttal, save to challenge what should have further been done by the plaintiff.

[26] This court ruled that the reason for the plaintiff leaving his employment should not form part of the trial. The suggestion that Ms Sewraj failed to enquire why the plaintiff left his employment is misplaced as he only consulted with him four years after he left his employment. Occupational therapists use therapeutic means to help injured persons develop, improve, recover, and maintain skills needed for daily living and working and not establish why they left employment. The submission was made on behalf of the defendant that the use of the words 'diminished', 'reduced' and 'disadvantaged' by Ms Sewraj meant that the plaintiff could still be employable. This is outside the domain of Ms Sewraj expertise. Ms Sewraj categorically deferred to the expert opinion of an industrial psychologist in so far as the employability of the plaintiff was concerned. I cannot understand why the defendant has come to the conclusion that to be deemed unemployable, the plaintiff has to be in a 'vegetative state' and that the diminished physical and mental ability to work should be viewed in isolation from other relevant factors.

[27] The defendant challenged the evidence of Ms Pepu, the industrial psychologist, on a number of issues, including:

(a) That she calculated the plaintiff's pre-morbid earnings in line with Koch's Corporate Earnings Survey as opposed to Ms Krishna's calculations which were in line with the BCCEI, as confirmed by Ms Rahman;

(b) That Ms Pepu should not have pegged the plaintiff's pre-morbid earnings within the Koch A1, 25th percentile range, at R5 824 per month, translating to R69 000 per annum, as she only relied on the earnings of May 2012, which did not represent an average of income; the overtime was not fixed and she had assumed that it was productive based; and that she ought to have excluded the 'night on tax' (night work allowance);

It was submitted that the correct calculations are those of the defendant's expert witness, Ms Krishna. Ms Krishna's calculations for pre-morbid loss were based on the basic salary only. It was suggested that this should be accepted as the payslips for the 12 month period were not available;

[28] It was further submitted on behalf of the defendant that a higher than normal contingency should apply to the plaintiff's pre-morbid future earnings, as it transpired

that between 1991 to 1999, 2007 and 1991 to 2012 and 1991 to 1999 the plaintiff had been unemployed and then again in 2007, representing a period of ten years of unemployment; that Ms Pepu's findings were inconsistent with the recommendations of Ms Mtati, who found that the plaintiff still had the capacity to work in a different level, which required less skill and is less stressful; and that Ms Pepu failed to verify the subjective complaints of the plaintiff as there was no reports from a neurologist, and a physiotherapist. It was suggested that the lack of such collateral evidence could not assist Ms Pepu in ter determination of whether the plaintiff was employable or not.

[28] It is trite that an expert witness is a witness for the court. An expert witness is called upon to assist the court in technical and scientific issues. He or she must give an honest opinion, remain impartial, and objective. The evidence given by such a witness should be for the assistance of the court, be relevant, and of probative value. The objectivity of the expert witness is required and the courts frown upon any form of conscious bias where the expert witness adopts the evidence to the needs of a client.[6]

[29] Experts often provide a joint minute, which highlight the issues of concurrence and disputes between the two expert witnesses, as was done in this case. In consideration of the expert industrial psychologist reports and testimonies, I have taken into account the undisputed facts, ie that the plaintiff suffered a mild head injury; it remained uncontested that he had never suffered a head injury before the accident; he did not suffer from any seizures, nose bleeds and headaches; and had no arm or leg injury before the accident. It was also uncontested that he returned to work after the accident; that he struggled to cope with work due to blurry visions, nose bleeds and headaches, which were aggravated by exposure to the elements on the road where he worked as a rakerman. He underperformed, which put him at cross roads with his supervisor, resulting in his dismissal. This court has also taken into account that he had been employed in a permanent position when the accident occurred in 2012; that he would have remained employed until the retirement age of 65 years; and would have been entitled to annual inflationary increments.

[30] This court has to bear in mind that compensation should be to the extent that the plaintiff's patrimony has been diminished as a result of the other party's negligence, and that such damages are to include loss of future earning capacity.[7] I

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[6] *Jacobs & Another v Transnet Ltd t/a Metrorail* 2015 (1) SA 139 (SCA).
[7] *President Insurance Co Ltd* fn2.

have also considered that the calculation of the quantum of a future amount, such as loss of earning capacity, is not a matter of an exact mathematical calculation, and a court can make an estimate of the present value of loss which is often a very rough estimate. The court exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity, and has a large discretion to award what it considers right. Though courts rely on actuarial computations, it still exercises a wide discretion as to what is just.[8] It is trite that the court does not take into consideration irrelevant facts, should not be too generous in making a contingency allowance, and should have a sound basis for the award.

[31] Ms Pepu explained why she assessed the plaintiff's earnings using the Koch Index. She described the plaintiff as falling under a Job Grade 4 which equates to what the BCCEI rates as Paterson A1. The main issue was what the earnings of the plaintiff were. Both experts accepted that the plaintiff's employment was slightly above that of a general labourer. The pre-morbid earnings were calculated by both experts on what they considered to be his monthly pay.

Ms Pepu had access to four payslips, which reflected the basic earnings, Sundays worked, night on tax and overtime. Ms Krishna worked out her calculations on the basis of two payslips, despite the defendant having had access to Ms Rahman, a human resource employee from Phambili. Phambili could also not provide the witnesses with payslips for the 12 month period. Therefore, a just and reasonable approach should be adopted by the court. The court should accept the calculations which do not prejudice the plaintiff. Pre-morbidly it has not been shown that the plaintiff was excluded from overtime, Sunday extra work, night on tax and an annual bonus. This information appears from the four payslips provided by the plaintiff and the evidence of Ms Pepu.

[32] In 2012 when the plaintiff suffered injuries, there was no indication that he would have lost employment, as he was in a permanent position. Ms Pepu explained that he had previously lost employment due to retrenchment and the violence which engulfed the entire country before 1994. As Phambili was a JSE listed company, there is a greater probability that he would have retained employment until retirement age.

[33] Ms Krishna's evidence was not satisfactory: she based her findings on two payslips, and in doing so, she excluded the plaintiff from the benefits that he may have been entitled to, like overtime. She opined that the plaintiff could be employed

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[8] *Road Accident Fund* fn1 at 587B.

as a security guard at a boom gate, serve as a parcel counter attendant, run a tuckshop and that he needed a sympathetic employer to do such work. This was said against the backdrop of the head injury suffered by the plaintiff, which has left him with significant neurocognitive deficits indicative of a brain injury, the chronic ailments, including headaches, dizzy spells and nose bleeds, the advanced age of 54, and the lack of education and skills on the part of the plaintiff. Whereas Ms Pepu, in addition to considering the plaintiff's ailments, took cognisance that the plaintiff can no longer compete in an open labour market with graduates, able bodied persons his age, and that there was no sheltered employment available as advocated by Ms Krishna.

[34] For the purpose of assessment of income, it was apparent that there was no further information available to the experts for the assessment of the monthly benefits due to the plaintiff. However, the four payslips that Ms Pepu relied upon as a source of computation, is the best evidence available and the court must accept it and the conclusions based on it. The court in *Esso Standards SA (Pty) LTD v Katz*[9] held that '. . . .where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based on it.'

I therefore accept the calculations for loss of income as calculated by Ms Pepu in line with the four payslips, which include all the benefits that the plaintiff would have been entitled to.

[35] The undisputed evidence before this court is that the plaintiff suffered a mild head injury with neuro-cognitive fallout and that he would have continued with his employment until retirement. Post-morbidly, the plaintiff has earned no income and the court has to determine his future loss of income.

Contingencies:

[36] It is trite that general contingencies cover a wide range of considerations, which vary from case to case.[10] It has generally been accepted that contingencies of 5 per cent to 15 per cent for past and future loss of income have been accepted as

[9] *Esso Standards SA (Pty) LTD v Katz* 1981 (1) SA 964 (A) at 969F-G.
[10] RH Koch *The Quantum Yearbook* (2015) at 120.

'normal contingencies'.[11] A number of issues are considered when an actuarial assessment is done, including considerations of early death, promotion prospects, and taxes.

[37] The factors which have an impact on the consideration of the calculation of the contingencies include the age of the plaintiff who was 54 at the time of assessment. The defendant maintained that the plaintiff could still be employed by an accommodative employer and that this should qualify for a higher contingency. This is said against the background of the high unemployment rate in South Africa, even in the skilled employment sector, that he would have to compete in a job market with younger abled bodied persons who were even better qualified than him, that he is not trainable in any new skills due to lack of education and the head injury he sustained.

[38] In any claim for future loss of earning capacity, a comparison is required of what Duma would have earned but for the accident, with what he would have likely earned thereafter. As I stated earlier on, this is a subjective or speculative enquiry. The court makes an estimate of the present value of the loss.[12] The calculations made by the actuary are often depended on the factual information provided by various witnesses. Therefore, different contingencies are made in respect of pre-morbid and post-morbid calculations. Contingencies are arbitrary and subjective. In *Goodall v President Insurance Co Ltd*[13] the court stated as follows:

'In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a certain type of almanack, is not numbered among the qualifications for judicial office.' Therefore this gives a court a wide discretion when it determines contingencies.

[39] Factors such as a young age create a 'greater uncertainty in assessing the claimant's likely career path'.[14] A younger person has a longer period over which the vicissitudes of life will operate and greater uncertainty in assessing his career path. However, with regard to the plaintiff, at his age and taking his personal circumstances into account, his future is more determinable in terms of his career path.

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[11] RH Koch *The Quantum Yearbook* (2015) at 120.
[12] *Southern Insurance Association* fn3 at 113G-H .
[13] *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W) at 392H – 393A.
[14] *BEE v Road Accident Fund* 2018 (4) SA 366 (SCA) para 116.

[40] The contingencies provided by the experts need to be considered by the court. This court has taken into account the role of an expert witness. Their opinions should be reliable, as should the facts upon which they rely upon for such information. The facts cannot just be accepted because they are provided by an expert witness; the court should actively evaluate the evidence and not abdicate its responsibility.[15] Expert evidence should be independent and pass the impartiality rule. An expert should not adapt the evidence to meet the client's needs. An expert is there to guide the court and objectivity is required by the expert.

[41] This takes me to the evidence of Ms Krishna, the industrial psychologist. I have had difficulty with the evidence of Ms Krishna whose opinion was that the plaintiff still has residual earning capacity. This was said against the backdrop that since the plaintiff was injured in the accident, at the age of 47, he has remained unemployed. She testified that despite the chronic ailments which occurred as a result of the accident, he can still operate a boom gate and lift parcels in a shop. This was said contrary to the reports filed by Dr Govender, Ms Mtati and Ms Sewraj as to his mental challenges and physical capabilities. Ms Krishna also testified that he can run 'a spaza shop', which is an unlicensed tuckshop run from home. This was stated without any knowledge on whether there is a tuckshop in the vicinity where plaintiff lives, and against the expert evidence that he has difficulty with mathematical calculations.

[42] The defendant, who engaged the services of Ms Krishna, has provided no expert evidence to counter the evidence of Mr Mtati, Ms Sewraj and Dr Govender, whose reports were also accepted by the defendant. There is no evidence before this court which could persuade this court to apply a higher contingency deduction to accommodate any residual earning capacity. Ms Krishna's assessment was totally flawed as the evidence suggests a definite loss of income. She could not convince the court of the reliability of her opinion as she struggled even to interview the plaintiff. It became quite clear that there was a language barrier between the plaintiff and Ms Krishna. The information which she claimed she received telephonically from plaintiff's wife and son, leaves a lot to be desired as she did not use the services of an interpreter. Ms Krishna left the court with an impression that she wanted to be believed to be superior to Ms Pepu, as she alluded to being busy with a PhD, when she has not registered with any institution to pursue her PhD.

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[15] *Twine & Another v Naidoo & Others* [2018] 1 All SA 297 (GJ) para 18.

[43] Under cross-examination, it became apparent that Ms Krishna could not describe to the court what she meant by 'accommodative employment' in the case of the plaintiff. This kind of testimony was given to support the defendant and not to guide the court. I say this because she gave the statistics of the unemployed skilled and unskilled persons in South Africa, whilst professing that the plaintiff could still be employed. She finally conceded that the plaintiff would not find employment. Her lack of professionalism was also questioned during cross-examination when it was pointed out that she did not personally conduct the tests. She admitted having an 'intern' with her whom she later on described as an administrative assistant.

[44] None of the expert reports are suggestive that the plaintiff can find employment in the open market. In the case where the claimant is precluded from permanently earning any income, it is my view that such a claimant should be entitled to recover all such future loss from the defendant. Further income is determined by establishing what the claimant would have earned but for the accident. Income at the date of the accident often serves as the basis for such a calculation, taking into account future increases.

[45] This court has considered that at the time of the accident, the plaintiff was permanently employed and had been so employed since 2010, and there was no likelihood of him losing his employment. His employment record shows periods of unemployment which were due to factors beyond his control, and not due to abscondment or any other unsatisfactory service record. Ms Pepu's opinion was that this did not entitle the defendant to suggest that a higher than normal contingency should apply to his pre-morbid earnings. I agree with her, as the plaintiff had been in employment for a period of over three years, and nothing suggests that he would not have retired at the age of 65 years. Normal contingencies should apply to his pre-morbid earnings.

[46] This court accepts that the plaintiff is incapable of assuming any form of employment due to physical and mental difficulties presented by the plaintiff. There is no evidence that suggests that he would be responsive to treatment that would lead to a complete recovery.

[47] Although the industrial psychologists used different methods of calculations, this court is inclined to accept Ms Pepu's calculations as they are supported by evidence. Ms Pepu's testimony was supported by the sectoral determination for the

civil engineering sector, [16] which indicated that employees in the civil engineering sector, where the plaintiff was employed in, were entitled to an annual bonus. She also showed that the four payslips showed times where the plaintiff was paid for working outside the normal hours as well as overtime, unlike the calculations of Ms Krishna, which 'creamed off' the benefits due to the plaintiff. Ms Pepu's assessments provided the court with a sound factual basis from which she formulated her opinions. She was an impressive witness who proffered 'no comment' answers when a question was tendered to the challenge the credibility or competency of her colleague, Ms Krishna. The court found this remarkable as it showed that she was there to assist the court and not to compete with her colleague.

[48] Ms Pepu's testimony was characterised by a logical consideration of the factual basis provided by her on what the future holds for the plaintiff. In that regard I find her evidence, and line of reasoning, which remained unshaken, to be sound. I accept her evidence in totality. The uncontested evidence of the expert witnesses for the plaintiff indicates that there are no prospects of the plaintiff ever finding employment. Having ruled that the evidence of Ms Krishna was tainted by bias and lacked objectivity, I have considered the calculations by the actuary based on the findings of Ms Pepu, as per Exhibit C.

[49] In *Goodall,* a 10% deduction was applied to a 46 year old plaintiff. If one applies the approach adopted in *Goodall* to a 54 year old, at the trial stage, 7 per cent would be appropriate, fair and reasonable.

[51] The actuarial report, in determining the pre-morbid earnings, took into account that the plaintiff was employed as a general worker at Phambili, and that the average amounts taken from the available payslips were used to estimate his earnings as from the date of employment. The post-morbid earnings of the plaintiff were considered on the basis that he was unemployable, would have retired at 65 years, and that life expectancy was not affected by the accident. The nett discounted rate, income tax deductions, mortality from the date of accident, AIDS, social grants, Compensation for Occupational Injuries and Diseases Act 130 of 1993 benefits, and the Unemployment Insurance Fund Act 63 of 2001 benefits were considered by the actuary.

[53] The basis of the court's determination of the 7 per cent pre-morbid and post-morbid contingency is driven by the following factors: that the plaintiff had no

[16] Sectoral Determination 2: Civil Engineering Sector, South Africa, GN R204, GG22103, 2 March 2001.

adverse health conditions, and to compensate for the total loss of earning capacity as nothing showed that he would not have worked until the age of 65 years.

[54] Accordingly, the following order is made:

(a) The pre-morbid contingency is fixed at 7 per cent and the post-morbid contingency is fixed at 7 per cent;

(b) Costs to be costs in the cause.

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Mbatha J

Date of Hearing:	10 December 2018
Date of Judgment:	01 March 2019

Appearances

For Plaintiff:	Adv RBG Choudree SC Adv ML Bahadur
Instructed by:	PG NAIDOO & ASSOCIATES INC 5A The Ridge Building 8 Torsvale Crescent Umhlanga
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