Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No.: 457/2019
Date Heard: 19 January 2023
Date Delivered: 12 May 2023

In the matter between:

NICOLAAS CONLEY MIENIE Plaintiff

v

ROAD ACCIDENT FUND Defendant

JUDGMENT

Tlaletsi JP

[1] The plaintiff instituted an action against the defendant, the Road Accident Fund, claiming damages arising from the injuries he sustained as a result of a motor vehicle accident that took place on 27 October 2017. He was a pedestrian.

[2] The defendant conceded liability for the plaintiff's proven damages in the action. On 10 November 2022 Sieberhagen AJ ordered inter alia, that the defendant pay to the plaintiff the sum of R1 500 00-00 in respect of general damages and provide the plaintiff with a statutory undertaking in respect of the future medical and related expenses. The order further recorded that the claim relating to loss of earnings/earning capacity was postponed for future determination. These proceedings, therefore, relate to the determination of the plaintiff's loss of earnings and or earning capacity.

[3] The parties' experts (industrial psychologists) prepared a joint minute in which they inter alia agree on the plaintiff's probable pre-accident career and earnings. They further agree that due to his injuries, he has been rendered unemployable.

[4] Since the accident happened during the course and scope of the plaintiff's employment, he consequently lodged a claim with the Compensation Fund[1]. The Compensation Commissioner[2] accepted his claim and made a final award for compensation in the amount of R2 783 932.94 as reflected in the award dated 17 June 2022.

[1]The claim was lodged in terms of section 22 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.
[2]Now: 'Director-General'.

[5] The plaintiff is now required to prove the amount of loss of earnings the defendant must pay considering the Compensation Commissioner's award. Although the parties are *ad idem* that the amount paid by the Compensation Commissioner must be deducted from the amount to be awarded to the plaintiff, they differ as to the final computation of the damages.

[6] At the heart of the parties' dispute lies the application of section 36 of the Compensation for Occupational Injuries and Diseases Act (COIDA). Section 36 of COIDA provides that:

"Recovery of damages and compensation paid from third parties

(1). If an Occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section referred to as the "third party") being liable for damages in respect of such injury or disease-

(a) the employee may claim compensation in terms of this Act and may also institute action for damages in a court of law against the third party; and

(b) the Director-General or the employer by whom compensation is payable may institute action in a court of law against the third party for the recovery of compensation that he is obliged to pay in terms of this Act.

(2). In awarding damages in an action referred to in subsection (1)(a) the court shall have regard to the compensation paid in terms of this Act.

(3). In an action referred to in subsection (1)(b) the amount recoverable shall not exceed the amount of damages, if any, which in the opinion of the court would have been awarded to the employee but for this Act.

(4). *For the purposes of this section compensation includes the cost of medical aid already incurred and any amount paid or payable in terms of section 28, 54(2) or 72(2) and, in the case of a pension, the capitalized value as determined by the Director-General of the pension, irrespective of whether a lump sum is at any time paid in lieu of the whole or a portion of such pension in terms of section 52 or 60, and periodical payments or allowances, as the case may be." (*emphasis added)

[7] It is apparent from section 36 that an injured person may claim compensation from the Compensation Fund and also institute proceedings in court to claim damages against a third party, in this case, the Road Accident Fund. In such a case the court is obliged to have regard to the compensation paid in terms of COIDA in awarding damages. It will be apparent in the course of this judgment that the controversy in this case is whether the actuarial principles applied by the Compensation Commissioner in calculating the pension payable to the plaintiff can be used in determining the award of damages to be made by the court.

[8] The plaintiff tendered the evidence of Mr Willem Hendrik Boshoff. His qualifications as an actuary and an expert in the field are not disputed. He testified that during 2020 he was instructed to do a computation of the plaintiff's loss of earnings. He prepared an actuarial report based on the data supplied by the plaintiff, the generally accepted actuarial methods employed and assumptions made. In his report dated 3 March 2020, he calculated the capital value of loss of earnings as follows:

[9] **Capital Value of Loss of Earnings**

Uninjured Earnings	**Injured Earnings**	**Loss of Earnings**
Past	R 449 800	R 38 100	
Less contingencies	*5%*		
	R 422 310	R 38 100	R 389 210
Future	R 3 080 800	-	
Less *contingencies*	*10%*		
	R 2 772 720	R -	R 2 772 720
	TOTAL LOSS OF EARNINGS		**R 3 161 930**

[10] Mr Boshoff testified that a few months later, he received further instructions from the plaintiff's attorneys to revise his computation. The instruction was that he should consider using the actuarial basis and reverse engineered from the annuity multipliers recently used by the Compensation Director-General. He mentioned that for his report of 3 March 2020, he based his calculations on the Compensation Fund capitalisation factors that had been in place at the time. However, he was surprised by the final award by the Compensation Fund which differed substantially from his actuarial calculations. He suspected that the Compensation Commissioner may have used capitalisation factors that were different from what they normally used.

[11] To illustrate the difference, Mr Boshoff testified that up until 2021, the capitalisation factor for a 42-year-old male person had been 15.41. Suddenly

that factor changed to 25.68 which is about 67% increase in the factor. This change was to the actuarial profession surprising and unusual. The profession contacted the Compensation Fund to clarify the position. After some delays, the Compensation Fund ultimately provided them with the actuarial basis for the new factors. The significant change related to the new mortality, interest assumptions and other factors. These were totally incompatible to the ones they historically used.

[12] He testified that if the actuaries were to use the historical capitalisation factors they had been using, the result would be prejudicial to the defendant and the claimant. According to Mr Boshoff, the only way to mitigate against any prejudice would be to use the same actuarial basis used by the Compensation Commissioner.

[13] Mr Boshoff computed his final loss of earnings as follows:

Capital Value of Loss of Earnings

Uninjured Earnings	**Injured Earnings**	**Loss of Earnings**
Past	R 1 061 400	R 66 000
Less contingencies	*5%*	
	R 1 008 330	R 66 000 R 942 330
Future	R 3 740 800	-
Less *contingencies*	*10%*	
	R 3 366 720	R - R 3 366 720
	TOTAL LOSS OF EARNINGS	**R 4 309 050**

[14] It is apparent from this computation that the capital value of loss of earnings arrived at based on the new capitalisation factors provided by the Compensation Fund amounted to R4 309 050.00. This figure differed from the previous one of R3 161 930.00.

[15] It is common cause that an amount of R2 783 932.94 representing the determination by the Compensation Fund was paid to the plaintiff. This amount should in terms of section 36 of the COIDA be deducted from the plaintiff's proven loss of earning damages. In addition, the parties agree that an amount of R474 705.00 representing part-payment made to the plaintiff by the defendant must also be deducted from the payment due to the plaintiff.

[16] Ms Rabie, who is appearing on behalf of the defendant contended that what section 36 of COIDA envisages is that the computation basis used by the Compensation Commissioner should not be used to determine the plaintiff's loss of earnings. She submitted that the plaintiff's damages should be determined separately and independent of the Compensation Commissioner's determination. She argued that the plaintiff's approach blurs the distinction between compensation and damages. As authority for her contention, Ms Rabie relied on the decision of the Supreme Court of Appeal in *Road Accident Fund v Maphiri*.[3]

[3]2004(2) SA 258 SCA.

[17] In *Maphiri* the Supreme Court of Appeal considered the method of computation of the damages recoverable by an employee from a third party under section 36 of COIDA where the total compensation payable was to be apportioned between the Compensation Commissioner and the third party and where the Compensation Commissioner had already paid compensation to the plaintiff in terms of the Act. Harms JA (as he then was) held inter alia that:

> *"[7] The first and axiomatic principle, therefore, is that the object of the Act is to provide 'compensation' for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment. 'Compensation' is not the same as 'damages', a distinction drawn clearly by s 36. There may be a complete overlap, as in the case of hospital and medical expenses (although for the general purposes of the Act medical costs are not regarded as 'compensation'). There may also be a partial overlap, as in the case of loss of income (as a head of damages) and compensation for disablement under the Act. But then there may be no congruent relief, such as in the case of general damages for pain and suffering, which are claimable under the lex Aquilia, and for which there is no corresponding head of compensation in the Act.*
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> *[8] The second point, which tends to be overlooked, is that the Act is not for the benefit of third parties, such as the RAF, who are liable in delict; it is for the benefit of the employee and the employer, and 'premiums' have to be paid for this 'insurance'. This means that the starting point of any litigation under s 36 is a determination of the third party's liability. Some cases have referred to it as 'common-law liability', a concept that gave the Court below some trouble. All it means is 'delictual liability' and what the Courts have attempted to do by using the phrase was to distinguish between 'compensation' and 'damages'. Once this is understood, an apportionment of damages under the Apportionment of Damages Act 34 of 1956 does not give rise to any problems or to another method of calculation. In this case the starting point is then the RAF's liability for 50% of the plaintiff's damages which is R51 166,33.*

[9] The converse point has often been made and that is that s 36 does not increase the liability of a third party. Consequently, the full amount of its liability (in this case 50% of the plaintiff's loss) has to be divided between the employee and the Commissioner. The division of the RAF's liability appears to be the nub of the appeal and that is why the RAF contends that the total of the Commissioner's award should be deducted from its liability".

[18] The learned Judge of Appeal held further that:

> "[12] The section requires a court to deduct ('have regard to') the 'compensation' to which the employee 'is entitled' under the Act - not part of the compensation or certain heads of compensation only - in determining the employee's entitlement *vis-à-vis* the third party. This is made abundantly clear by ss (4), which defines by way of extension the meaning of 'compensation' for purposes of the section. That 'compensation' must be deducted from the award of 'damages' ('skadevergoeding' has always been the Afrikaans rendition), and not from certain heads of damages".

[19] The decision in *Maphiri* does not support Ms Rabie's argument. The court in that case did not deal with the question whether the plaintiff could use the same capitalisation factors used by the Compensation Commissioner to determine the plaintiff's loss of earnings. Nowhere does the decision suggests that an actuary should not rely on the capitalisation factors used by the Compensation Commissioner. In that case, the Supreme Court of Appeal rejected the 'like for like' principle where the respondant in that case contended that compensation must be deducted against certain heads of damages and not against the general damages.

[20] Mr Boshoff gave reasons why he used the Compensation Commissioner's capitalisation factors. He reasoned that failure to use the same or similar factors would prejudice the defendant and the claimant. The only way to

mitigate against any prejudice would be to use the same actuarial basis used by the Compensation Commissioner. The defendant did not tender any evidence to controvert Mr Boshoff's evidence. The advantage of using the same capitalisation used by the Compensation Commissioner makes sense. There can be no reasonable explanation as to why different capitalisation factors should be used for the same purpose, which is the computation of loss of earnings for one person. Fairness and consistency will be guaranteed if the same capitalisation factors are used. The defendant's contention is therefore without merit and falls to be rejected.

[21] The result is that the plaintiff's loss of earning capacity is determined to be R 4 309 050.00. From this total, an amount of R 2 783 932.94 representing payment made by the Compensation Fund should be deducted. Also, to be deducted is an amount of R474 705.00 being part-payment made by the defendant to the plaintiff. The balance due to the plaintiff is therefore an amount of R 1 050 412.06.

[22] What remains is the issue of costs. The general rule in awarding costs is that costs follow the result. The parties submitted that the general rule should apply. I requested each party to submit a note on the ultimate loss of earning capacity according to their respective submissions. The intention was to compare their respective calculations with what the court would have determined based on my finding on the point in dispute.

[23] Mr Roux submitted a proposed draft order to be made an order of the court. The proposed draft does not contain the requested calculation as directed.

Instead, it provides inter alia itemised costs to be paid by the defendant. The items relate to fees, travelling and accommodation costs incurred in respect of the plaintiff's attorneys (local and correspondent attorneys) and senior counsel to attend the trial on 19 January 2023; senior counsel's fees for preparation and trial including the drafting of submissions; the fees, travelling and accommodation costs incurred by the actuary to attend court; and expenses attached to the procurement of the medico-legal and other reports.

[24] What the plaintiff wants this Court to do is to make items that should be included in the bill of costs an order of the court. The issues contained in the proposed draft order were at no stage during the course of the trial addressed. I can therefore not express any opinion on them. Save to mention that these are matters that would ordinarily be considered by the Taxing Master when taxing the bill. Incorporating them in the order of this Court would be inappropriate as it would amount to an unwarranted encroachment on the Taxing Master's discretionary powers. It is open to the plaintiff to institute review proceedings if dissatisfied with the decision of the Taxing Master if any of the items is disallowed during the taxing of the bills[4]. What the plaintiff is entitled to is costs on party and party scale including the qualifying fees for the expert witness(es). It is not necessary to specify "*for the sake of clarity, but not limited*", what entails party and party costs.

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[4]See: *The Road Accident Fund v Taylor and other matters* (1136-1140/2021) [2023] ZASCA 64 (8 May 2023) para 51.

[25] I do not see the wisdom of including in the order proposed terms such as *"the plaintiff shall, in the event that the costs are not agreed, serve the notice of Taxation on the Defendant's attorney of record*". The procedure for the recovery and taxation of costs is already provided by the Uniform Rules of the court. There is no need, in my view to provide for them in the order. The parties are free to follow whatever procedures they deem fit as they wish.

[26] In the result, the following order is made.

1. The defendant is ordered to pay the plaintiff the sum of R1 050 412,06 and costs of suit, which shall exclude the costs already awarded by Sieberhagen AJ on 10 November 2022.
2. Interest on the amount of R1 050 412,06 from the date of this order until the date of payment on the applicable scale.

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L P TLALETSI
JUDGE PRESIDENT

On behalf of the Plaintiff:	**Adv. Roux**
	Engelsman Magabane Inc.
On behalf of the Defendant:	**Ms. B. Rabie**
	State Attorney, Kimberley