IN THE HIGH COURT OF SOUTH AFRICA,
LOCAL GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

28 September 2020 .....
DATE SIGNATURE

CASE NO: 26116/2011

In the matter between:

V, M Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

MIA, J

[1] This is an action in which the plaintiff issued summons against the defendant, the Road Accident Fund(RAF) as the statutory insurer in terms of the Road Accident Fund Act 56 of 1996, for general damages, medical and hospital expenses and loss of earnings sustained as a

result of the collision. The plaintiff claims the sum of R 6 242 678.35. On 24 October 2014, the issue of merits was settled 100% in favour of the plaintiff. In terms of rule 33(4), the issue of quantum was separated from the merits, and postponed *sine die* for later determination. Thus only the issue of quantum proceeded before me.

[2] The matter was set down for 12 February 2020. The parties attempted to settle the matter on the first day given the unavailability of judges but were not able to. The case came before me on 13 February 2020. The plaintiff testified, and the parties requested the matter be postponed for further evidence. Due to the national lockdown commencing 26 March 2020, following the regulations issued in terms of section 27(2) of the Disaster Management Act 2002, the matter could not proceed as envisaged. The matter proceeded on 2 and 3 July 2020 with the expert witnesses giving testimony virtually through Microsoft Teams following the Practice Directive issued by the Judge President.

[3] To discharge the onus resting on him, the plaintiff's evidence was led. His evidence was followed by Dr Versfeld, the orthopaedic surgeon and Ms Barbara Donaldson, the industrial psychologist. He testified that he was born on […] April 1963 and was 57 years old. He qualified as a construction plant mechanic with the South African Railways Agency. He resigned from the railway agency and took up a position as a quality control inspector at A S Transmissions and Steering in Boksburg. Later he resigned from this position as well to accept a better opportunity offered to him at Ring Rollers, based in Springs. He began as a quality control inspector and worked his way to the position of Heat Treatment Superintendent.

[4] The plaintiff recalled that he sustained an injury previously whilst he was an apprentice. He had also had an accident whilst riding his motorcycle. On that occasion, he recalled that his left leg hit the motor vehicle when he passed the vehicle, and this resulted in a fracture. He

did not institute a claim against the RAF in that instance. He also recalled injuring his leg when he assisted his brother in law whilst they were taking down a tennis court fence. The injury regarding the present claim occurred after those injuries. It was on a Sunday, […] April 2007, his birthday. He had been called to work. He went in and worked for an hour and a half. He then returned to his home in Brakpan. On his way home, the collision occurred. He was driving a 1000 CC Suzuki motorbike. He only recalled the moment of impact and then lost consciousness. He woke up on the centre island where he landed. The vehicle involved in the accident drove away. There was a witness to the accident. He was taken to Parklands clinic in Springs and admitted for treatment.

[5] The main issue for determination is the quantum of damages. Specifically, the general damages, past medical expenses and the future loss of earnings with the appropriate contingency deduction to be applied having regard to the post morbid scenario after having regard to the experts' reports filed by the plaintiff and defendant and the joint minutes of the experts. This court is also required to determine the costs of suit.

[6] The plaintiff testified as a result of the collision he sustained four fractured ribs, his foot was injured, and his toe was fractured. He also injured his shoulder ligament. He was hospitalised for three weeks. His arm was in a brace, and his foot was in a cast. He received anti-inflammatory and pain relief medication and received physiotherapy in hospital and for some time after being discharged from hospital. At the time of the collision, he was employed at Ringrollers Heavy Forging and Rolling as a supervisor. He was office-based, i.e. ensuring that work completed was packed and moved out for delivery. It was paper-based as opposed to heavy lifting. He was able to return to work after a month and was able to continue with his work. He was however retrenched in 2014 after working with the company since 1987, i.e. for twenty-seven years. He took a voluntary retrenchment package as he

believed his position was earmarked and the company would retrench him in the next round of retrenchments which was scheduled to occur in the ensuing months.

[7] Upon accepting the retrenchment package, he went in search of other positions. He experienced difficulty finding a position in the area or close to his residence. When his partner was also retrenched, they combined their packages and opened up a business repairing motorcycles. This business operated for four years after which they closed as it was no longer viable commercially. During the time he repaired motorcycles, he experienced challenges because he worked with pain and discomfort. Ideally, he required assistance working on the motorcycles due to the injuries he had sustained but could not afford to employ an assistant. After the business closed down, he found employment at the company where he is currently employed. He is employed as a mechanic and maintains forklifts.

[8] To maintain the forklifts, he is required to work overhead with his hands lifted above his head and shoulders extended. The work is more physically taxing than the work he was employed to do at DCD Ringrollers. He is physically tired and in pain after a day of work and experiences pins and needles in his hands. He takes pain killers to relieve the pain, and he requires medication to sleep.

[9] The parties agreed that the joint minute of the orthopaedic surgeons, Dr Versfeld, for the plaintiff, and Dr Swart, for RAF should be admitted. In the report, the experts disagree on the need for major medical treatment in the future for the plaintiff. Dr Versfeld noted that the plaintiff suffered a brachial plexus injury with weakness of abduction of his left shoulder. He noted decreased sensation over the thumb, index and middle fingers of his left hand. There was also weakness of his pinch grip and fifth finger pinch grip. There was a weakness of dorsiflexion of his left wrist and weakness of extension and flexion of

his left elbow. Dr Versfeld further found decreased sensation over the outer aspect of the left forearm. In his view, this represented a significant permanent impairment. Dr Versfeld testified that the plaintiff was limited in the work that he can do. After he accepted the retrenchment package, he was limited in the work he could do due to the injury to his left shoulder. For this reason, he opined, the plaintiff should be considered unfit for his usual position as a supervisor which was the level of work he had reached and therefore, he qualified for the Narrative test.

[10] Dr Swart, for the defendant, noted that the plaintiff complained that his wrists were stiff and sore, he, however, found that they were normal and required no treatment. He found that the plaintiff had a mild bilateral loss of muscle mass. This resulted in a bilateral decrease in movement of 25% in all directions. The bilaterals were tender to the supraspinatus insertion. Dr Swart agreed that there were rib fractures. He was of the view that the plaintiff's injury was worsened due to the 2009 injury. He believed that conservative treatment should be considered for the left foot injury. Dr Swartz was also of the view that there was no loss of work capacity as a result of the accident, consequently there was no need for early retirement and therefore no loss of income. In his view, the plaintiff did not qualify for the Narrative test.

[11] The joint minute of the industrial psychologists was also admitted by agreement. Ms. Barabara Donaldson, an industrial psychologist, testified for the plaintiff. Mr Tshepo Tsiu also an industrial psychologist testified for the defendant. Ms Donaldson noted that the plaintiff's gross income before the accident and his retrenchment was last R254 528.00 per annum. He also enjoyed the benefits of medical aid and pension whilst working as a supervisor. She agreed with Mr Tsiu that the plaintiff had reached the ceiling once he became a supervisor. She noted that the plaintiff took a voluntary retrenchment package. His

brother, who did not take the package, is still employed at the company.

[12] Mr. Tsiu noted that the plaintiff's loss of income was economy-related due to the company's retrenchment process and his decision to participate in the voluntary retrenchment. He expressed the view that the loss of income could not be attributed only to the accident as the plaintiff would have accepted the retrenchment package in any event. He did, however, concede after discovering that Frankwen Forge (Pty) Ltd appointed the plaintiff that he would have pursued his options as a supervisor had the accident not occurred. If he had done so, he would then have been a desirable candidate with many years of experience. He could have secured a favourable position similar to the position he held as a supervisor. Mr Tsiu testified, however, that there were opportunities for employment available to the plaintiff, but they were not all available where he found himself in Springs. Employment opportunities required relocation or travel away from the plaintiff's home.

[13] The joint minute of the occupational therapists was admitted by agreement between the parties. They agree on the accident-related injuries as indicated in the records and medical experts' reports. Furthermore, they agreed that the plaintiff presented with the ability to execute work demands in the sedentary to light category of work with partial compliance to the medium category of work. He was not deemed to be suited to work demands with a full range of medium, heavy and very heavy category of work. He was also not viewed as an equal competitor on the open labour market in this nature of employment. The experts agreed that his current job would need to be within the light category of work with increased reliance on an assistant for more strenuous lifting demands. It was evident to the experts that he could comply with his current work demands, which he reported was in the light category of work, but this was due to him being

accommodated with extra support. His employer and work colleagues were supportive due to his physical limitations. The experts agreed that if he lost his current employment, he would experience challenges in securing alternative employment due to his physical limitations, especially as much as his work history relied on manual labour type positions. They agreed furthermore that his scope of possible future occupations had been severely restricted, as he was now more reliant on manual labour type positions than before the accident based on his qualification. The occupational therapists as per their Joint minute were in total agreement on all aspects and no disagreements were noted between them.

[14] In *RAF v Kerridge* [2019] 1 All SA 92 SCA at para 25, the court stated that:

> "Indeed, a physical disability which impacts on the capacity to an income does not, on its own, reduce the patrimony of an injured person. There must be proof that the reduction in the income earning capacity will result in actual loss of income. However, where loss of income has been established but proof of the quantum thereof cannot be produced in the usual manner, the courts have shunned the non-suiting of a claimant and have preferred to make the best of the evidence tendered to give effect to the finding of proved reduction in loss of income earning capacity. As long as almost a century ago, in *Herman v Shapiro* the court said the following:
>
> > "Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages."

[15] In *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at 587 A-B, the Court in addressing the assessment of compensation and a trial judge's discretion stated:

> "The court necessarily exercises a wide discretion when it assesses the quantum of the damages due to loss of earning capacity and has a

> large discretion to award what it considers right. Courts have adopted the approach that to assist in such a calculation, an actuarial computation exercise is a good basis for establishing the quantum of damages. Even then, the trial court has a wide discretion to award what it believes is just"

[16] Ms Pather, appearing for the plaintiff submitted that there was agreement on substantial issues between the experts and referred to the case of *Glen Marc Bee v The Road Accident Fund* 2018 (4) SA 366 (SCA) which she argued found application, where the Court held:

> "Where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement "unless it does so clearly and, at the very latest, at the outset of the trial." "In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-trial conference." A litigant cannot be expected to adduce evidence on the agreed matters. Unless the trial court itself were for any reason dissatisfied with the agreement and alerted the parties to the need to adduce evidence on the agreed material, the trial court would, I think, be bound, and certainly entitled, to accept the matters agreed by the experts."

[17] Ms Pather further submitted that past awards in comparable cases were a useful to guide in the determination of general damages. The process of comparison need not entail a meticulous examination of awards and should not interfere with the court's broad discretion. She referred to *Protea Assurance v Lamb* 1971 (1) SA 530 (A) p535H – 536A and *De Jongh v Du Pisane NO (OBO JG Rabe)* 2004 (5) 103 (SCA) which held that the tendency to increase awards is only one factor to be taken into account. The amounts awarded in previous awards must be adjusted to provide for the erosion of the value of money. She referred to three cases by way of comparison to award general damages. The first case *Thwala v Road Accident Fund* 2011 (6D4) QOD 1 (GNP): The plaintiff sustained an arm fracture and a blow to the right side of the head with an open wound that was sutured; a

blow to the right ear, also with an open wound that was sutured; abrasions on the forehead and nose; an unspecified injury to the right shoulder; a blow on the right knee with an open wound that was sutured. Plaintiff has lost substantial power in the left hand. The award in current day value was R 418 000.00. In *G B v Road Accident Fund* 2017 (7B4) QOD 31 (ECP): Plaintiff suffered a severe degloving injury of the scalp, fractures of both mandibles were treated using an internal fixation. There was a contusion of the brachial plexus of the right shoulder from which the plaintiff recovered, but there was also a possible rotator cuff injury of the same shoulder with a 30% possibility of requiring treatment in future. The award in current-day value was R551 000.00. In *Mlalandle v Road Accident Fund* 2011 (6J2) QOD 90 (ECP): The plaintiff sustained a fractured right clavicle, a fracture of the blade of the right scapula, multiple bruises, brachial paralysis in her right hand and fracture of three ribs. She developed contractures of the ligaments of the metacarpophalangeal joints of the right hand and unable to flex fingers. The award in current-day value was R516 000.00

[18] Ms Smit, appearing for the defendant, argued that the plaintiff did not suffer past loss of earnings as a result of the accident, but rather because he was retrenched during 2014. She continued that both industrial psychologists agreed that he was in a compromised position due to his age. This was exacerbated by the fact that he was a white male in his fifties and that employment opportunities were limited in the geographical area where he is currently situated. She argued that the plaintiff testified himself that he was not aware of any complaints about his work performance from his employer. The plaintiff testified that he was accommodated with additional assistance to do the heavy lifting. She argued that this was also to be seen in the context of his evidence under cross-examination that he is in a supervisory position in the current position. He does not do the heavy lifting of the engines but fixes parts, and after it is reassembled, he makes sure that all the nuts and bolts are correctly tightened. He did not work in an above shoulder

position all the time, but only for short periods to do the checks. The plaintiff also said under examination in chief that he experienced pain in his leg when he stood for long periods and then under cross-examination, he said he had to sit due to his back pain.

[19] She argued that the plaintiff applied for numerous positions as a supervisor similar to his position at Ringrollers, but it was only when he applied for a job as a diesel mechanic, that he managed to find work. He sustained numerous injuries over the years, and Dr. Versfeld did not have sight of the post-2008 accident medical records up to the date of consulting with the plaintiff in 2014. For this reason, the plaintiff could not prove a claim for past loss of earnings. Therefore, she requested the court to dismiss the claim for past loss of earnings as the plaintiff was working continually from the date of the accident until his retrenchment in 2014. He elected to start his own business as opposed to seeking employment as a diesel mechanic for which he was qualified.

[20] In respect of future loss of earnings, Ms Smit argued that due to the plaintiff's age, race and geographical situation, which was confirmed by the experts he could not obtain similar employment as he had in 2014. He was, however, a qualified diesel mechanic, and once he applied for that position, he managed to secure it. It was common cause she argued that he experienced discomfort when working with his arms above his head. However, she continued, this discomfort, did not render him incapable of working at all. This was also confirmed by Mr. V himself, who affirmed that there were duties that he could perform given his technical knowledge. Therefore, she submitted the plaintiff only suffered the loss of earning capacity, which should be compensated by way of a contingency differential.

[21] Furthermore, the experts agreed that provision should be made for conservative treatment and surgery, during which periods the plaintiff might suffer a loss of earnings. She submitted that it would therefore be reasonable to consider that in determining the contingency differential. She proposed a 20% differential as being reasonable. She sought an order from the court which used a calculation based on the plaintiff's current earnings, as a diesel mechanic, which amounts to approximately R366 741.17 p.a as per his pay slip dated 1 January 2020 with inflationary increases until age 65.

Future loss of earnings			
	Pre-accident	Post-accident	
	R3 654 968	R 3 654 968	
Less contingency	10%	30%	
	R3 289 471.00	R2 558 477.00	
Total nett loss			R730 994.00

[22] On the issue of general damages, Ms Smit referred to the matter of *Gattoo v Road Accident Fund* (61778/2009) [2012] ZAGPPHC 24 (15 February 2012): the plaintiff was a female hawker with rib fractures and soft tissue injuries to the neck and back. The court awarded R75 000.00 in general damages (current value R 119 538.00). In *Mlatsheni v Road Accident Fund* (418/2005) [2007] ZAECHC 108; 2009 (2) SA 401 (E) (6 December 2007): the plaintiff was a 49-year-old man. He sustained three injuries in the accident, namely a dislocation of the left shoulder complicated by a tear of the rotator cuff tendon, a sprained right wrist and two broken teeth. The most serious of his injuries, and the injury that still plagues him, was the injury to his left shoulder. He underwent surgery to repair the rotator cuff tendon. The plaintiff's left arm was immobilised in a sling for some six weeks. Since the accident, the range of movement of the left shoulder has never been more than 75 percent. "The court awarded general damages in

the amount of R140 000.00(current value R 298 610.00). She argued that the plaintiff's injuries were somewhat more severe than the abovementioned case as he also had fractured ribs, bruises to his knees and a left foot injury. He will need follow-up treatment but is still able to work with discomfort. He also did not go for follow-up treatment on his shoulder. She submitted, therefore that an amount of R350 000.00 was fair and reasonable. She advanced that the court should thus order future loss of earnings in the amount of R 730 994.00; general damages in the amount of R 350 000.00 and past medical expenses was accepted at R 23 640.53. An undertaking for future medical expenses in terms of section 17(4)(a) would be limited to the treatment of the shoulder and rib injury.

[23] In considering the damages, I have had regard to the different cases that both counsel have placed before me. Two cases are instructive on these facts in respect of the general damages i.e. *Thwala* and *Mlatsheni*. The plaintiff falls squarely in the type of awards granted. An average of the values has been used to achieve the desired amount rounded off to R385 000.00 for general damages. This amount, in my view, is reasonable and fair.

[24] On the question of past medical expenses, the defendant has conceded the amount as well as the undertaking in terms of section 17(4)(a) of the Road Accident Fund Act for future medical expenses.

[25] I move now to the question of loss of earnings. It is trite that contingencies of whatever nature generally serve as a control mechanism to adjust the loss to the circumstances of the individual case to ensure justice and fairness to the parties. The question of the contingency deductions to be applied, to the calculation of the quantum of a future amount involving loss of earning capacity, is often tricky[1]. The court has a broad discretion based on a consideration of all the relevant facts and circumstances. I agree with the submissions made by counsel for the defendant that the plaintiff did not suffer past loss of

[1] Hall v RAF 2013 (6J2) QOD 126 (SGJ)

earnings as a result of the injury sustained in the accident. The plaintiff's calculation seeks to compensate the plaintiff for past loss of earnings and in this it is not helpful.

[26] Moreover, concerning the future loss of earnings, the plaintiff did not lose income because of the accident *per se*. He accepted a voluntary retrenchment package hoping to find similar work. He was unable to find comparable work because of a combination factors including his race, age, injury and reduced capacity and unwillingness to relocate. It is this reduced capacity that must be compensated. In my view, a contingency deduction must be applied to compensate for the future loss. I have used ten percent for pre-accident loss and an amount of thirty percent for post-accident loss of earnings. The result is a future loss of earnings in the amount of R730 994.00, general damages in the amount of R385 000, past medical expenses in the amount of R 23 640.53 which all amount to a total of R 1 139 634,53.

[27] I turn to the question of costs. Counsel both argued that costs should follow the outcome. The usual costs order is applicable as there are no reasons why costs should not follow the cause.

[28] Given the reasons above, I grant the following order.

ORDER

1. The defendant shall pay the sum of R 1 139 634,53 to the plaintiff into the plaintiff's attorney's account payable by direct transfer into the trust account of:

    Munro, Flowers and Vermaak Trust Account

    Nedbank

    Branch: Business North Rand

    Account: 1469 036 657

    Branch Number: 146 905

2. The defendant shall provide an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 ("the undertaking"), to compensate the Plaintiff/ M V for 100% (one hundred percent) of the costs relating to the future accommodation of the Plaintiff/ M V in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the Plaintiff/ M V after the costs have been incurred and on proof thereof and arising from the collision which occurred on 27 April 2007.

3. Defendant shall make payment of the plaintiff's taxed or agreed party and party costs on the High court scale, which costs shall include the following:

    3.1 the costs of counsel on the high court scale, which shall include the costs of preparation for trial and appearance for 12, 13 February 2020, 2 and 3 July 2020;

    3.2 the reasonable taxable costs of obtaining all medico-legal and actuarial reports and joint expert minutes from the plaintiff's experts which were furnished to the defendant;

    3.3 the reasonable taxable preparation and reservation fees for 12, 13 February 2020 and 2,3 July 2020, if any of the following experts:

        3.3.1 Dr Versfeld (Orthopaedic Surgeon)

        3.3.2 Mrs Donaldson (Industrial Psychologist)

        3.3.3 G Whitaker- (Actuary)

    3.4 The above costs will also be paid into the aforementioned account.

    4. The following provisions will apply to the aforementioned taxed or agreed costs:

4.1 the plaintiff shall serve the notice of taxation of the defendant.

4.2 the plaintiff shall allow the defendant sixty court days to make payment of the taxed costs from the date of this order or the date of taxation whichever is earlier.

4.3 should payment not be effected timeously, the plaintiff will be entitled to recover interest at the rate of 8.75% on the taxed or agreed costs from the date of the allocator to date of final payment.

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S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant	:	Adv. N Pather
Instructed by	:	Munro, Flowers & Vermaak
On behalf of the respondent	:	Adv. A Smit
Instructed by	:	Pule Incorporated
Date of hearing	:	13 February 2020, 2,3 July 2020
Date of judgment	:	28 September 2020