IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 86803/18

IN THE MATTER BETWEEN:

(1)	**REPORTABLE:** NO
(2)	OF INTEREST TO OTHER JUDGES: [●/N]
(3)	REVISED: [Y/●]
(4)	Signature: _____ Date: 31/12/2023

GONDWE MISHECK PLAINTIFF

AND

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

KHWINANA AJ

INTRODUCTION

[1] The plaintiff, Mr Misheck Gondwe instituted action proceedings in his personal capacity against the defendant for damages in terms of the Road Accident Fund Act 56 of 1996, pursuant to a motor vehicle collision.

[2] The merits have been dealt. The plaintiff applied to have the matter dealt with in terms of Rule 38 of the Uniform Rules of Court. I have acceded to the plaintiff's request.

[3]` The plaintiff has also indicated that he will not pursue the claim for general damages and requests that same be postponed sine die. I am ceased to determine the claim for loss of earnings which is at

of quantum on Past and Future loss of loss of earnings at R 5 900 000.00 and Future medical expenses at R280 000.00 plus costs.

BACKGROUND

[4] The matter was before my brother Davis J on the 23rd February 2023 wherein an order for General damages was made at R 2000 000.00 and part payment of R2000 000.00 in respect of loss of earnings. .

INJURIES SUSTAINED

[5] The Plaintiff submits that he sustained serious injuries:

2.1 Head Injury-subarachnoid hemorrhage - cerebral contusion

2.2 Fracture of the right humerus.

2.3 Fracture of the right scapula.

2.4 Fracture ribs on the right.

[6] In and as a result of the collision, the Patient sustained serious bodily injuries ("the injuries"), consisting of: 6.1 Severe head trauma with diffuse axonal shearing, multiple fractures, permanent neurocognitive compromise, frontal lobe syndrome, left hemiparesis, a dyspraxic left hand and anosmia. 6.2 WPI = 48%

REPORT BY DR KUMBIRAI, AN ORTHOPAEDIC SURGEON

[7] He recorded that the plaintiff sustained the following injuries in a motor vehicle accident: ~ Head injury - Subarachnoid hemorrhage - Cerebral contusion ~ Fracture of the right humerus ~ Fracture of the right scapula

~ Fractured ribs on the right ~ Head injury with brain contusion and skull fracture

[8] He says the plaintiff complains of:

(i) Sequelae of Head injury Slurred speech, Poor concentration, Poor short-term memory.

(ii) Personality changes - He is now short — tempered Painful right arm — this is exacerbated by lifting heavy weights

(iii) Accident-Related Scars: ~ 4 cm x 1 cm tracheotomy scar ~ 2 cm x 0.5 on right side of the chest 1.5x 1 cm scar on the xiphy-sternum

Effect on Employment

[9] He further recorded that the plaintiff reported that he went back to work as a Lodge Manager.

- The lifting of heavy weights exacerbates the pain in the right arm.
- He complains of memory problems.
- As a lodge manager he had to rely on his excellent ability to memorise instructions from his employers, requests by lodge guests and human resources related issues.
- After the accident under investigation, he was unable to do the abovementioned tasks without recording everything in a notebook.
- He tried hard to record everything, but it was impossible and this he believes is one of the reasons he was retrenched.

- As a result, he was unable to generate the reports needed for planning and management.

- He complains of poor short-term memory and poor concentration.

- After the accident he received speech therapy for about three to four months but unfortunately, he still slurs some of his words and this occurs more often when he is tired.

- This is problematic in his line of work where he has to speak to crowd, personnel and management.

- He complains of headaches at least once a week and is medicated with over-the-counter pain tablets.

- He is unable to sleep for more than three hours at a time. He treats the insomnia with Beta sleep 4 tablets in the evening.

He wakes up tired.

- He was able to work 16hour shifts but after his accident he had to take a short nap in the middle of the day.

- He is short tempered, verbally aggressive and impatient. He was unable to get on with his colleagues and his relationships with his family members also suffered.

- He has a painful right arm and is unable to pick up heavy weights. Mr Gondwe finds it hard to bath and dress.

- He is unable to stand for long periods which is a requirement as a lodge manager.

REPORT BY DR. BA OKOLI (NEUROSURGEON)

[10] He records that to determine the extent, severity, and outcome of the injury, the following parameters are considered:

Physical Evidence of Cranial Blow:

He sustained a laceration on the craniofacial areas.

Acute Clinical Evidence of Brain Injury:

He reports that he has no recollection of events after the accident and for 3 weeks at the hospital and even then he has no meaningful recollection of the events of his hospitalization which was for 2 months.

This will imply a period of loss of consciousness including the period of dense post-traumatic amnesia of at least 3 weeks.

He was admitted to the ICU intubated and later had tracheostomy which is usually done for prolonged intubation.

He had a PEG tube for feeding inserted at 3 weeks post motor vehicle accident and this is an indicator of the duration of altered neurological state and consciousness to such a degree that he could not feed orally.

By day 25 post-accident, he was reportedly 'awake, restless and 'restrained'. (This will imply that he still had altered awareness and cognition that he had to be restrained to prevent self-injury or falling off the bed.

RADIOLOGIST EVIDENCE OF BRAIN INJURY:

[11] According to the RAF Form 1, he sustained traumatic subarachnoid hemorrhage and focal brain damage in the form of brain contusion. The duration of altered awareness, loss of consciousness, and dense post-traumatic amnesia are consistent with a Severe Traumatic Brain Injury which has been further complicated by focal brain damage.

NEUROLOGICAL OUTCOME

[12] It is recorded that the Plaintiff:

- He is at maximum medical improvement.
- He has continued to experience ongoing cognitive impairment, speech disorder (disfluencies), mood difficulties, sleep disorder, and subtle weakness of the right limbs.
- These neurological disorders have all stabilized and have become permanent.

REPORT BY DR M.R MUDAU - NEUROLOGIST

[13] It is recorded that according to the RAF Form 1 medical report: - Severe brain injury Facial injuries Fracture Right scapular Fractured right clavicle. Fracture right humerus. pneumothorax. The plaintiff was taken to Steve Biko Hospital by ambulance and was admitted for two weeks in the ICU in a coma, another two in the intensive care unit, and one month in the ward.

[14] An X-ray was done CT scan was done Catheter was inserted - Drips were inserted - A pipe was inserted in the throat - POP was inserted in the right arm - Physio, OT, and speech therapy were attended - Stitched

on the right ribs - Stitched on the face and back - He was given medication on discharged.

[15] Mental and physical impairment Based on available info and current evaluation, the plaintiff sustained a Severe diffuse brain injury. As evidenced by a very low GCS, findings on neuro imagining, and the sequel of the accident. The accident has resulted in moderate cognitive difficulties, change in personality, and post-traumatic headaches. Routine MSE showed poor memory and concentration. The plaintiff sustained multiple musculoskeletal injuries, resulting in moderate physical limitations.

[16] According to Orthopaedic (Dr PT Kumbirai), the plaintiff sustained right humerus fractures, fracture of the right scapular, and fractured ribs, and the injuries have resulted in serious long-term impairment. The plaintiff has a clinical picture of lumbar radiculopathy. According to the clinical psychologist report (Dr Mureriwa).

[17] The accident has resulted in severe cognitive, emotional, and Behavioural problems. The neurocognitive functioning of the patient has dropped to below average. He complains of: - Memory loss - Unable to sleep at night - Speech problems - Severe headaches - Short Tempered - Shortness of breath - Lower back pain - Numbness of right leg

[18] **REPORT BY DR NJABULO MALOLA** –

Speech therapist and Audiologist

He records that the Plaintiff had the following as the Sequelae emanating from the accident injuries

Cognition and memory. \ • The plaintiff's cognition and memory (short and long-term) were assessed informally using a series of tests. • The plaintiff's short-term and Long-term memory were below average levels.

[19] The plaintiff presented with poor attention and concentration. This may have an impact on his daily routines. (c) Stuttering core behaviours. Primary/ core behaviours of stuttering are described as behaviours that characterize a stutter. These may include repetitions, prolongations, blocks etc. During the assessment and analysis of Mr. Gondwe, he presented with core behaviours such as: ~ Repetition of words and phrases ~ Pro-longations ~ Blocks that lasted for seconds. (d) Stuttering secondary behaviours. Secondary behaviours are described as behaviours following a stutter, i.e. Behaviours that include body movements to try and get words out. These may include eye blinks, head nodding and foot tapping. During the assessment and analysis of Mr. Gongwe, he presented with covert/ secondary behaviours such as: - Eye blinking - Poor eye contact - Jaw jerking.

REPORT BY DR FL'MURERIWA- CLINICAL PSYCHOLOGIST

[20] He records that Mr Gondwe the Overall results were very low (Below average) test performance. Most scores were below average. Both verbal and visual memory were below average. Tests of speed were all below average. Injuries sustained have given rise to significant slowing of motor and for cognitive responses. Average estimated pre-accident neurocognitive capacity. Consistent with the severe head injury sustained. Non-brain injury factors Factors which probably contributed

to poor test performance: persistent pain and discomfort, Fatigue and tiredness.

[21] Dr Mureriwa rated Mr Gondwe's WPI as 30%. when combined with the impairment rating of 8% by Dr Kumbirai, for orthopaedic injuries and scarring the final WPI becomes 34%. Dr Mureriwa bases his percentage on the following findings: • "Following the accident Mr Gondwe developed severe cognitive, emotional, and behavioural problems. • His work capacity appears to be significantly impaired and he rates his stress levels as high.

[22] The symptoms and accident consequences listed above are potent sources of long-term psychological disorders, particularly depression. • His neurocognitive functioning appears to have dropped from average to below average. • This means that he will probably not realize the professional, financial, and social potential he would have achieved had he not been involved in this accident."

REPORT BY MR LEFATANE MAKGATO-

OCCUPATIONAL THERAPIST

[23] He recorded that Mr Gondwe retained the residual capacity for ranges of medium physical strength from a purely physical point of view, he is not expected to experience limitations with his occupational performance. He notes that the plaintiff does not demonstrate adequate cognitive and psychological functioning to engage competitively in his pre-accident occupation.

[24] He will struggle to cope with work tasks where one must perform problem-solving or requires higher cognitive skills and mental flexibility. Due to the reported neurocognitive problems the client will be suitable to perform job tasks that require few step instructions with little deviation in work processes.

[25] He also suffered a degree of psychological distress and is still suffering considering her compromised emotional state. It is acceptable that he finds it difficult to form relationships. Due to his irritability and short temper, he is likely to adhere to managing authority or may struggle to seek and maintain employment because of the reported mood problems as well as poor motivation. He was considered valuable in pre-accident occupation considering the residual impairment and his employer might have taken his impairments as an opportunity to retrench him.

[26] Due to the reported neurocognitive problems, he opines the plaintiff will be suitable to perform job tasks that require few step instruction with little deviation in work processes.

REPORT BY R VAN DER WALT -INDUSTRIAL PSYCHOLOGIST

[27] He records that at the time of the plaintiff's retrenchment, Mr Gondwe was earning R22 472.00 per month. In addition, he enjoyed company accommodation which only cost him R 1000.00 per month for a 3-bedroom house. A similar house in Naboomspruit is likely to rent for a least R 4000 per month. He reportedly received tips to the value of about R 7000.00 per month. His total earnings and benefits could therefore be valued at about R 34 000 per month (salary + housing (R4000) + tips).

That is about R 408 000 per annum without a bonus. Has the accident not occurred Mr Gondwe is likely to have continued to receive an income in the range indicated.

[28] Given the expert opinions expressed in the reports above, it is unlikely that Mr Gondwe will be able to secure and maintain a position in the hospitality sector. At the age of 37 years Mr Gondwe has about a potential 23 or 28 years to retirement depending on the retirement age of 60 or 65 years and had the accident not occurred. Mr Gondwe's loss of potential income is thus likely to continue until he reaches retirement age. Mr Gondwe suffered both orthopaedic and neuropsychological injuries, the latter being the more debilitating. It is unlikely that Mr Gondwe will be able to secure any job and secured be able maintain his employment in the long term.

PLAINTIFF'S SUBMISSIONS

[29] From the above opinions by experts, it is without any doubt that the Plaintiff's injuries are both severe and have adversely affected both his daily livelihood and her earning capacity. Whereas he was a healthy person before the accident, now he is both compromised and vulnerable and faces a fragile and uncertain future in terms of his career. Counsel submits a case for compensation on Loss of earnings has been made and therefore will proceed with the determination of the compensation amount below.

CASE LAWS ON THE ISSUE OF LOSS OF EARNINGS

[30] In Southern Insurance Association v Bailey N.O. 1984(1) SA 98 AD at p114 C-D Nicholas JA stated: "In a case where a Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informal guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis.

[31] Based on the above court's remarks, it is important to consider contingencies applied in other matters, which are follows;-

M v Road Accident Fund (26435/2013) [2017] ZAGPPHC 77 (7 March 2017) The Plaintiff sustained a fracture of his C2 vertebra and underwent an operation for a posterior fusion of his C1 and C3 vertebrae. The first vertebra, C1, joins with the base of the skull and supports the head, while the C2 vertebra is the axis, because the head and C1 swivel around it. The two vertebrae facilitate neck movement. The industrial psychologists were of minimal help in their proposals for realistic alternatives for M.'s re-alignment to sedentary employment, a fortiori in the light of the patent fact that his only expertise related to the functions of an electrical technician.

[32] It is hardly likely that he had any potential to perform the administrative or sales functions suggested by them. On the inherent probabilities, his re-alignment would entail the supervision of electricians and the transfer of his undisputed skills. Cognisance should also be taken of his

competence and ability to work hard, even under strained circumstances.

[33] The Plaintiff accepted that he had the potential to generate income until age 55 at a lesser salary, whatever form this re-alignment took. To this end, provision was made for a lesser quantum for future income generation. Based on the totality of the evidence satisfied that M.'s effectiveness in the workplace which is specifically dedicated to electrical technician work in chrome smelting has been compromised by his injury, and by the undisputed orthopaedic that his prospects for securing alternative work in a field in which he has specialized for eighteen years have been deleteriously affected.

[34] Complications would probably emanate from the first fusion operation which he underwent when the accident occurred. The conventional approach to calculating future loss of income is to quantify the capitalized value had the claimant not been injured, and compare this with the capitalized value of income to be received now that the claimant has been injured. The difference between the two values, after adjustments for general contingencies, equates to the loss of future income suffered.

[35] The actuary for M., Johan Sauer ("Sauer") and the actuary for the RAF, Gerard Jacobson ("Jacobson") agree on the value of pre morbid income to retirement age 55 as R10 598 256,00. Post morbid income was calculated at R8 032 950,00 by Jacobson and at R7 827 386,00 by Sauer. Applying a contingency deduction of 7,5% on income but for the accident, Sauer arrived at R9 803 387,00. With a contingency deduction

of 40% of income having regard to the accident, Sauer arrived at R4 696 432,00. Both such deductions are fair and were conceded as such by Counsel for the RAF.

[36] The deduction of 40% accommodates reduced mobility in the market place now that M. has been injured, taken cumulatively with the agreements reached by the occupational therapists and the industrial psychologists. Mokgadi v Road Accident Fund (11565/11) [2014] ZAGPPHC 850 (2 October 2014) In this matter, Plaintiff, in the accident, sustained the following injuries: Head injury with loss of consciousness; major cervical spinal injury with subluxation of the C3/C4 vertebra; significant right shoulder injury; significant lumbar spinal injury; and fracture of the right femur .The complaints are numerous and serious. She often has problems when she breathes. She: has pains on the right side of her neck; right shoulder and upper back; sleeps with difficulty; cramps in her right leg when sitting for a long time; walks with pain in her right leg; has pain in her right hip; has a sore knee in winter; has difficulty in climbing stairs; carries a bag on her right hand with difficulty; has headaches almost every second day; is slower in her movement post-accident; has weak memory and has to wear glasses as her eyes are sometimes blurred.

[37] The parties agreed that 15% contingency deduction be applied to the value of pre-morbid income, and after hearing submissions by both counsels of both parties, the Honorable Justice Msimeki J ordered that contingencies of the 30% post-morbid contingency deduction was fair and should be applied.

[38] In Smith v Road Accident Fund (33463/2008) [2013] ZAGPJHC 302 (13 February 2013) The plaintiff testified that she was a passenger in a bus that was involved in an accident with two motor vehicles on 6 October 2004 in Randburg. The plaintiff was asleep at the time when the bus and motor vehicles collided. She testified that she sustained a whiplash injury to her neck and an injury to her lower back in the 2004 collision. The hospital records and clinical notes show that the plaintiff was treated conservatively with a cervical collar and pain medication for her neck injury. The lower back injury caused the plaintiff to undergo a lumbar spine fusion at L5/S1 during July 2007, about three weeks before the 2007 collision. The plaintiff testified that she was recovering well from the lumbar spine fusion surgery.

[39] She walked without aid within two weeks after the operation and she estimated that she was about 90% pain-free during the week that preceded the 2007 collision. An MRS scan that was taken of the plaintiff's cervical spine on 21 April 2008 shows a 'significant disc herniation' at the C5/C6 level. The plaintiff subsequently received a cervical fusion. She has, in the opinion of Dr Earle, made a good recovery from her neck surgery. In this matter, Honorable Justice P.A. MEYER, with respect to contingencies to be applied made the following ruling; " I consider it appropriate if a 15% contingency, which is higher than the norm, is deducted from the actuarially calculated amount of the plaintiff's loss of past earnings and also of the view that a 25% contingency, which is higher than the norm, should be deducted from the actuarially calculated amount of the plaintiff's loss of future earnings"

[40] In Aphane v RAF (8786/2015) [2017] ZAGPPHC 981 (3 November 2017) The plaintiff's injuries were admitted and they are detailed in, inter alia, the orthopaedic surgeon Dr Kumbirai's report, the occupational therapist Ms B Ngwato's report, the clinical psychologist MEG Kalane's report and the industrial psychologist Mr M.C. Kgosana's report as follows:A mild head injury; A severe back injury; Abdominal pains soft tissue injuries and still experience pains; and also lost two teeth.

[41] Mr. Mosiane, who appeared for the defendant, proceeded on the basis that the plaintiff's expert reports were conflicted in that whereas the occupational report states that after the collision he returned to work two weeks after the accident and was doing three different odd jobs, on the contrary, both the industrial and actuarial reports state that after the accident the plaintiff never returned to work. He argued that to the extent that the occupational report states that the plaintiff returned to work post the accident, that on its own is indicative of the fact that the plaintiff is still employable.

[42] He further submitted that in the light thereof what the court needed to determine is the extent of the plaintiff's loss of earnings capacity and that in this regard the court should apply a 10% pre-morbid and 60% post-morbid contingency deduction in respect of his future loss of earnings. The court agreed with the contingencies and same was applied.

[43] Counsel opines that 10% contingencies pre-morbid and 0% post morbid contingencies (10% spread) can be deemed to be fair and reasonable under the circumstances. This is because, the Occupational therapists,

are of the view that, regardless of the severity of the injuries and their sequelae, as much as they both acknowledge that the Plaintiff have been severely compromised and has been left being a vulnerable and an unequal competitor in the open labour market, however, he had not been rendered unemployable.

[44] However, the Industrial psychologist's opinion that the Plaintiff is unlikely to enter in the open labour market cannot be ignored. On past income, a 5% contingency deduction is recommended and justifiable.

KOCH CONSULTING ACTUARY

RESULTS

	UNINJURED	INJURED	NET VALUE
Past income	1 203 242	781828	
Future income:	6 024 605	0	6 024 605

Total Contingencies:

Past income:

Pre – morbid: 1 203 242 – 5% = 1 143 079.9

Post-morbid: 781 828 = 742 736.6

Total past income: R 400 343.3

Future income: Pre–morbid: 6 024 605 – 10%= 5 422 144.5

Post-morbid: 0 Total future income: R 5 422 144.5

TOTAL: R 5,822,487.8

GENERAL DAMAGES: Postponed sine die

LOSS OF INCOME: R 5,822,487.

[45] In light of the aforementioned cases and the principles enunciated in Southern Insurance Association v Bailey, it is evident that the application of contingencies in calculating loss of income is both a necessary and complex process. The task before the Court is to ensure that these contingencies are applied in a manner that is fair, reasonable, and reflective of the actual impact of the injuries on the plaintiff's earning capacity.

[46] The approach taken by Nicholas JA in Southern Insurance Association v Bailey emphasizes the use of logical bases, such as actuarial calculations, to estimate the value of what was lost. This approach is preferable as it attempts to quantify losses in a more objective and structured manner, rather than relying solely on subjective estimations.

[47] In the case at hand, the contingencies suggested by the Koch Consulting Actuary appear to be in line with the principles established in the aforementioned judgments. The application of a 5% pre-morbid and a 10% post-morbid contingency deduction on future income seems to be an appropriate reflection of the potential variations and uncertainties in the plaintiff’s income over time.

[48] The 5% deduction on past income, representing the pre-morbid contingency, is justifiable as it acknowledges the inherent uncertainties in income projections, even without the injury. The 10% deduction on future income, taking into account the post-morbid condition, reasonably

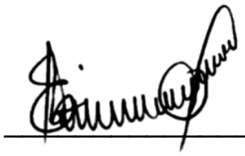
accommodates the reduced mobility in the marketplace and the impact of the injury on the plaintiff’s ability to earn.

[49] These deductions consider the plaintiff's compromised effectiveness in the workplace, especially in a specialized field, and the challenges in securing alternative employment. They also take into account the professional opinions of occupational therapists and industrial psychologists, which provide insight into the plaintiff's employability post-injury. Regard being had to the injuries that the plaintiff has sustained and the medico-legal reports the plaintiff will require future medical attention. It is trite that the defendant awards section 17(4) undertaking in relation to injuries sustained as a result of insured driver.

[50] In conclusion, the contingencies as suggested appear to be fair and reasonable. They balance the need to provide just compensation to the plaintiff while also considering the uncertainties and variations that could affect income both pre- and post-injury. This balanced approach aligns with the principles laid out in previous case law and ensures an equitable outcome in the calculation of loss of income. Therefore, I am inclined to agree with the suggested contingencies and that section 17(4) undertaking be awarded to the plaintiff.

Order

I have considered the draft order filed and have amended it, marked it X and made it an order of this court.



ACTING JUDGE OF THE GAUTENG HIGH COURT
KHWINANA ENB

COUNSEL FOR PLAINTIFF:	ADV OWEN MULIBANA
DATE OF HEARING:	23 OCTOBER 2023
DATE OF JUDGMENT:	31 DECEMBER 2023