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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 56048/15

**(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
Date: 18 April 2023**

In the matter between:

VAN DER MERWE, ADV J as Curator ad Litem for and on behalf of:

Z[....] N[....]

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

PIENAAR AJ

INTRODUCTION:

[1] The Plaintiff is the duly appointed Curator ad Litem for Z[....] N[....] (“the patient”). She claims delictual damages and or behalf of the patient from the defendant in terms of the provisions of the Road Accident Fund Act number 56 of 1996, as amended (“the Act”). The damages arise as a result of personal injuries sustained by the patient in a motor vehicle collision which occurred on the 1 March 2012 on the R58 near Necobo, Elliot an accident occurred.

[2] On 10 August 2022 Mrs Tammy-Jean van Jaarsveld was appointed as Curatrix Bonis for and on behalf of Z[....] N[....].

[3] The patient, whose date of birth is the 25 September 1993 was 19 years old at the time of the accident, she sustained a severe traumatic brain injury with diffuse and focal damage and very marked percent neuropsychological and cognitive impairments and fallouts and personality changes; a distal radius and ulna fracture left, facial injuries, neck injury, depression and anxiety, multiple permanent scars; bruising and contusion. She is currently 30 years old.

[4] On 19 March 2018 an order was made in favour of the Plaintiff in respect of 100% liability for merits.

[5] On 23 November 2021 an order was made in favour of the Plaintiff in respect of 100% liability for merits, R1 500 000,00 in respect of General Damages and future medical expenses with an unlimited undertaking in terms of the provisions of Section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996. This means the only issue which remains unresolved which I am required to adjudicate are that of the quantum of the Plaintiff's past and future loss of earnings/loss of income earning capacity/loss of employability.

[6] The defendant entered an appearance to defend and filed a plea, but at some stage the attorneys of record for the defendant withdrew and no attorneys were appointed. On 10 February 2022 the defendant's defence was struck out. It is on that basis that the plaintiff proceed with an application for default judgment.

[7] The Plaintiff did not present any viva voce evidence, but relied on numerous affidavits, accompanied by reports, compiled by expert witnesses.

[8] The Plaintiff amended the Particulars of Claim for past and future loss of earnings and/or earning capacity as follows:

8.1	Past loss of earnings/earning capacity	R1 000 000,00
8.2	Future loss of earnings/earning capacity	R8 000 000,00

[9] For sake of completeness the following documents is uploaded onto Caselines as exhibits for the trial, namely:

- 9.1 Plaintiff's quantum bundles as Exhibit A pg 1 -115 Caselines 012(a)
- 9.2 Plaintiff's hospital record bundles Exhibit B pg 1-149 Caselines 012 (b)
- 9.3 Plaintiff's expert reports bundles Exhibit C pg 1 -655 Caselines 014
- 9.4 Plaintiff's experts' affidavits Exhibit D pg 1 - Caselines 015 (a)
- 9.5 Plaintiff's Affidavit for trial Exhibit E pg 1 - Caselines 015 (b)
- 9.6 Plaintiff's amended actuary report for trial Exhibit F

[10] At the commence of the trial, the Plaintiff Counsel made submissions that past medical expenses must be postponed sine die.

THE FACTS:

[11] After the accident on the 01 May 2012 she was taken to All Saints Hospital from where she was transferred the following day to Queenstown hospital after a back slab

was put on the left arm. On arrival her GCS was 10/15 (03/05/12) this was two days later. She was in ICU for another 2 weeks. Ntame had difficulty to walk. She was very confused and she laughed at everything. She was transferred to Life Rehab Centre in East London on 16 May 2012 with the final diagnose of diffuse axonal head injury and left forearm fracture.

[12] She is emotionally unstable due to her injury/her mood is often changing and shifting and she appears to have episodes of confusion and disorientation.

[13] She complains of daily headaches, some of the headaches are vascular headaches (migraine). The pain is in her eyes. She does not want to open her eyes at all. She has severe chronic pain including headache, neck, arm and back pain. The neck and back pain suggestive of a whiplash injury. Dr M Mazabow (neuropsychologist) concludes in his report that Ms Ntame sustained a severe traumatic brain injury, comprising diffuse and right frontal focal components.

[14] Dr JA Smuts (neurologist) is of the opinion that she sustained a severe diffuse concussive head injury that influences both her memory and personality.

[15] Ms Ntame was a Grade 12 learner at the time of the accident. Reportedly she always obtained good academic results.

[16] According to the Natasha van der Heyde (Occupational Therapist), post-accident the plaintiff is unemployable in the open labour market, because of her functional difficulties, as well as her physical and psychological presentation. Also her cognitive, emotional and behavioural profile would preclude her from securing/maintaining gainful employment.

LOSS OF INCOME:

[17] Ms Möller (Educational Psychologist) opines that taking the background and her intellectual ability into account, Ms Ntame was a girl with promising learning potential. She had the intellectual potential to complete at least Grade 12 (NQF4) followed by a three year diploma (if finances were made available) enter the open labour market in her professional field of study.

[18] Dr Pretorius (Industrial Psychologist) accepts that, and the accident not occurred, Ntame would have searched for financial support to further her studies for one year. And postulates she would have entered the open labour market in January 2017 with earnings in line with Paterson Level B3(R179 049,00 p/a) reaching her earnings pinnacle around the age of 45 with earnings comparable to Paterson Level C4 (R619 749,00 pa/) followed by inflation related growth until retirement at age 45.

[19] After the accident she did not return to school but managed to complete Grade 12 the following year in 2013. She attempted to improve her marks and obtain further education and remained unemployed since leaving school until 2020 when she obtained contract work as a teacher's assistant and in January 2021 started self-employment as seller of handbags and flasks, but was unsuccessful and stopped in September 2022. At present she is 29 years old and unemployed and the experts concur that she is rendered unemployable in the open labour market.

[20] She sustained a severe traumatic brain injury and is unable to perform accordingly to her potential. The experts are in agreement that she sustained and note in their reports a severe traumatic brain injury resulting in profound cognitive and psychological impairments keeping her from functional autonomy in the prime of her life.

[21] According to Dr Nel (psychiatrist) she met the criteria for severe traumatic brain injury with chronic severe depressive illness and behavioral disorder secondary to the accident with significant mood disorder, behaviour disorder and cognitive deterioration.

[22] Due to the injuries sustained in the collision, the Plaintiff cannot even manage and take care of her personal affairs as a situation resulting to the appointment of a Curator ad Litem.

[23] The Plaintiff relied on the report, as confirmed via affidavit, of an Industrial psychologist, Dr Pretorius and an actuarial report compiled by Willem Boshoff from Munro Forensic Actuaries in support of the claim for past and future loss of earnings.

[24] Therefore, on the basis of the calculations as per the report by Munro Actuaries dated 23rd March 2023 including the RAF cap and after applying contingencies are as follows:

	Capped Loss	
Past	R	1 018 994
Future	R	6 783 300
Total	R	7 802 294

[22] This was submitted notwithstanding that the amended particulars of claim refer to an amount of R1 000 000,00 for past loss of earnings/earning capacity and no further amendments has been delivered or applied for to amend the amount to an amount being proposed by Plaintiff's Counsel.

CONTINGENCIES

[23] According to Munro actuary report, the Claimant is HIV positive. Koch defines life expectancy as "the sum of the separate chances of survival into each and every possible year and notes that it is assumed that a person has a normal expectation of life unless there is evidence to the contrary.

[24] Koch refers to the following as some of the guidelines a regards contingencies:

* “Normal contingencies” as deductions of 5% for past and 15% for future loss.

* Sliding scale: 1/2 % per year retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age and relies on **Goodall v President Insurance 1978 (1) SA 389**.

[25] In his book **The Quantum Yearbook**, Koch states that when assessing damages for loss of earnings or support it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is in the prerogative of the Court. General contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, loss of employment, promotion prospect, divorce etc.

[26] See **Van der Plaats v South African Mutual Fire and General Insurance Co Ltd 1980 (3)SA 105 (A)** at 114-5. The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge’s impression of the case.

[27] It is trite that the determination of a suitable contingency deduction falls within the discretion of the Court. In **Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (AD)** the advantage of applying actuarial calculations to assist in this task was emphasized. It was stated that:

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future without the benefit of crystal balls, soothsayers, augers or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of a loss.

It has open to it, two possible approaches. One is for the Judge to make a round estimate on an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try and make an assessment, by way of mathematical calculations on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the court cannot for this reason adopt a non-possums attitude and make no award”.

[28] Ms Ntame is currently 29 years of age. Having regard to all the uncertainties in the future, I am of the view that a 25% pre-morbid contingency deduction will be fair and reasonable.

As a result the following order is made:

[29] The Defendant shall make payment in the sum of **R7 783 300,00** (seven million seven hundred eighty three thousand three hundred rand and zero cents) as full and final settlement of loss of earnings/ earning capacity within 180 days from the date of this Court Order which is computed as follows:

29.1 Past loss of income R1 000 000,00

29.2 Future loss of income R6 783 300,00

At the hearing of the matter, I was presented with a draft order, which the Plaintiff's attorney is directed to account to the curatrix bones Mrs Tammy van Jaarsveld who has already been appointed and it is ordered that the net award payable from the proceeds of this order to her is to be administered mutatis mutants in compliance with the orders previously made.

I therefore make the Draft Order attached herewith an Order of Court, which I have marked "X" signed and dated.

M PIENAAR

Acting Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 23 March 2023

Date of judgment: 18 April 2023

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Appearance for the Respondents: No appearance

[1] Court Order dated 16 May 2019 - Curatrix ad Litem appointed

[2] Court Order dated 10 August 2022

[3] Court Order dated 19 May 2018 - Merits

[4] Court Order dated 23 November 2021 - Merits ; Section 17(4)(a) and General Damages

[5] Court Order dated 10 February 2022 - Defendant's defence be struck out

[6] Caselines : 00 (c) Trial of 23 March 2023 : Trial documents Notice of Set down
- 14 February 2023

[7] Goodall v President Insurance 1978 (1) SA 389

[8] Van der Plaats v South African Mutual Fire and General Insurance Co Ltd 1980
(3)SA 105 (A) at 114-5

[9] Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (AD)