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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: **2621/2022**

In the matter between:

GS JANSE VAN RENSBURG N.O.

Plaintiff

(On behalf of SABELO DIBA)

and

THE ROAD ACCIDENT FUND

Defendant

CORAM: HEFER AJ

HEARD ON: 11 OCTOBER 2023

DELIVERED ON: 8 DECEMBER 2023

[1] Sabelo Diba (herein later referred to as “**Diba**”), incurred serious injuries during an incident which occurred during December 2017 whilst Diba was conveyed as a passenger at the back of an open “bakkie”. During this incident, the driver

of the vehicle lost control of the vehicle after the tyre thereof burst, and it then overturned, resulting in the injuries sustained by Diba.

[2] As a result of the incident, Diba incurred the following serious injuries:

2.1 Head injury:

2.1.1 Open laceration scalp;

2.1.2 Left peri-orbital swelling;

2.1.3 Open skull fracture;

2.1.4 Left posterior occipital laceration;

2.1.5 Extradural hematoma and right hemiplegia;

2.1.6 Facial fractures; and

2.1.7 Contusion bleeds.

2.2 Superficial abrasion left hip / buttock;

2.3 Superficial abrasions both knees;

2.4 Left pneumothorax;

2.5 C5-6 disc injury.

[3] As a result of the aforesaid injuries, Diba was hospitalized and underwent medical treatment, suffered disability, disfigurement, pain and a loss of amenities of life.

- [4] Subsequent to the institution of the action against the Road Accident Fund, for the recovery of damages resulting from the injuries referred to, Adv *GS Janse van Rensburg* was appointed in terms of an Order of Court, to act as *curator ad litem* for Diba in the action against the Road Accident Fund (RAF). The reason for Mr *Janse van Rensburg's* appointment was that it appears that, due to Diba's neurological injuries, he is unable to manage his own affairs and therefore unable to conduct any proper litigation.
- [5] The matter was enrolled to be adjudicated upon in regard to both the merits as well as the quantum. On the first day of trial, I was informed by the legal representative on behalf of the Defendant, that due to certain commitments in regards to other similar trials, the said legal representative was not able to attend the hearing. On that basis, the matter proceeded in Court without any legal representation on behalf of the Defendant. It needs to be mentioned, that in spite of non-appearance, the Defendant did not apply for postponement of the matter. It is on that basis that the matter then proceeded.
- [6] After Ms *Van der Sandt*, appearing for the Plaintiff, applied therefor, an order in terms of Rule 38(2) was granted in terms of which the Plaintiff was granted leave to present the evidence of the experts engaged in preparing medico-legal reports by way of affidavit as envisaged in terms of the provisions of Rule 38(2).
- [7] It needs to be mentioned that at the commencement of the trial, evidence were presented on behalf of the Plaintiff in respect of the merits of the matter. This

consisted of the evidence of one eyewitness who was also conveyed on the same vehicle as which Diba was conveyed when the incident occurred. After such evidence had been presented, leave was granted to the Plaintiff to file Heads of Argument and present argument as far as the merits and the quantum is concerned, in this manner.

[8] Ms *Van der Sandt* filed her Heads of Argument in regards to both the merits as well as the quantum on the 19th of October 2023. Subsequent to the receipt of the Plaintiff's Heads of Argument, I commenced with the preparation of the judgment based on the argument as contained in the Heads of Argument. Whilst in the process of preparing the judgment, the Defendant then filed its Heads of Argument on the 8th of November 2023. From these Heads of Argument, it then appeared that the Defendant conceded the merits of the matter at 100% on the 11th of October 2023 already. Attached to Defendant's Heads of Argument was an e-mail dated 11 October 2023 sent at 02:14 pm from which it appears that the merits had indeed been conceded on the said date. This was apparently sent by the claims handler of the Defendant to the legal representative of the Defendant.

[9] I wish to voice my disapproval of the fact that the Defendant did not bring it to the attention of the Plaintiff's legal representatives nor the Court before filing its Heads of Argument during November 2023, almost one month later, that such concession in regards to the merits had been made. Both the Plaintiff as well as

the Court proceeded on the basis that the merits of the matter also needed to be adjudicated upon.

[10] In view of such concession, this judgment will therefore only deal with the quantum of Plaintiff's claim.

[11] The following medico-legal reports were obtained on behalf of the Plaintiff:

- (a) Dr L.F Oelofse – Orthopaedic Surgeon;
- (b) Dr M.B Huth – Neurologist;
- (c) Dr L Panieri-Peter – Special Forensic Psychiatrist;
- (d) Ms A Wright – Occupational Therapist; and
- (e) Ms A van der Bijl – Industrial Psychologist.

[12] As stated, these medico-legal reports were then entered into evidence subsequent to the application in terms of Rule 38(2) being granted.

[13] The Defendant did not appoint any expert witnesses and did not file any expert reports.

[14] Assessment by Dr Oelofse:

14.1 Dr Oelofse examined the Plaintiff during October 2022. According to Dr Oelofse, the information as contained in his report, was gathered from a RAF1 document, a referral letter from Botshabelo Hospital, an ambulance transfer letter, documentation from Pelonomi Hospital,

referral letters from Pelonomi Hospital, a speech and language report as well as the patient during the assessment. He mentioned that no documentation regarding the patient's treatment at Botshabelo Hospital or his follow-up surgery at Universitas Hospital during 2018 was available for perusal in compiling his report.

14.2 From the documentation Dr Oelofse could ascertain that upon arrival at the emergency room at Botshabelo Hospital, Diba's Glasgow Coma Scale was noted at 14/15. He was presented with an open laceration over his scalp as well as left peri-orbital swelling. He was diagnosed with an open skull fracture for which wound irrigation was performed. He was then transferred to Pelonomi Hospital.

14.3 Upon arrival at Pelonomi Hospital, Diba was assessed in the ER during which the following were noted:

- (a) Glasgow Coma Scale of 15/15, but confused and disorientated;
- (b) Left posterior occipital laceration – already sutured;
- (c) Superficial abrasions over the left hip / buttock;
- (d) Superficial abrasions over both his knees;
- (e) Pain over the sacrum / lower pelvis – clinically no fractures.

14.4 Diba was then sent for a CT scan of the brain as well as X-rays of his cervical thoracic and lumbar spine, chest and pelvis and was diagnosed with the following:

- (a) A depressed open scar fracture with extradural haematoma and right hemiplegia;
- (b) Left pneumothorax;
- (c) Facial fractures;
- (d) Contusion bleeds.

14.5 From information gathered from Diba:

- (a) Immediate and acute pain was evident in his head / face, chest, left hip, lower pelvis and bilateral knees and persisted for at least 2 – 3 weeks;
- (b) The acute pain was accompanied by weakness in his right arm and leg;
- (c) He again experienced a period of acute pain in his head after surgery was performed during 2018; and
- (d) Prescribed pain medication provided Diba with adequate relief from pain.

14.6 As far as chronic pain and suffering was concerned, the following information was provided by Diba to Dr Oelofse:

- (a) He continues to suffer from *sequelae* of his head / facial injury with pain and residual symptoms that gradually became more pronounced;
- (b) Weakness in his right arm and leg persisted;
- (c) As time progressed, Diba also became aware of occasional pain in his neck;
- (d) Pain in his chest, left him weak, lower pelvis and bilateral knees dissipated over time with no fairly symptoms, complains or actual treatment rendered.

14.7 According to Dr Oelofse there is a definite probability that the weakness in Diba's right arm will be permanent. Furthermore, his right leg will always show some weakness as well. Although Diba's symptoms have improved, at the time of Diba's assessment, being three years after the incident, no more improvement was expected.

14.8 Diba has no history of injury or pain of his neck and did not receive any related treatment prior to the incident – consultation with a doctor, medication or physiotherapy. However, Diba has a high probability for the degeneration of his neck to progress which will result in his neck becoming symptomatic. Provision must be made for future conservative and surgical treatment throughout his total lifespan.

- 14.9 According to Dr Oelofse, Diba must be placed in a permanent light duty / neck-friendly position during any future working environment as determined by an occupational therapist. From an orthopaedic perspective, Diba's cervical spine injury had an impact on his amenities of life, productivity and working ability. As his cervical spine becomes more symptomatic, it will have a profound impact on his future amenities of life, productivity and working ability. Diba's cervical spine injury will adversely affect Diba's ability in securing alternative employment in future. As degeneration in his cervical spine progresses, it will have a profound impact on all aspects of his life. Also, it has an added burden of his head injury with the associated weakness in his right arm and right leg.
- 14.10 Diba has become an unfair competitor in the open labour market with regards to advancement in his training environment at the time of the assessment, as well as gaining future employment. He will find it difficult to compete with other healthy subjects for work, according to Dr Oelofse.
- 14.11 At the time of the assessment, Diba was 26 years old. According to Dr Oelofse, Diba would have been able to work until the normal retirement age of 65 if not for the incident and the injuries sustained. If accommodated in a light duty / neck-friendly position, provision must

be made for 10 years earlier retirement. If not accommodated, Diba must not be allowed to do physical labour again.

14.12 Dr Oelofse recommended the following treatment:

- (a) Conservative nonsteroidal anti-inflammatory drugs and analgesics;
and
- (b) Physiotherapy.

14.13 Should Diba not respond to the above treatment, or his cervical spine becomes symptomatic, the following treatment is recommended:

- (a) MRI scan;
- (b) Cervical spine fusion of the involved levels;
- (c) Adjacent level cervical spine fusion of the involved levels.

14.14 After each of the abovementioned surgeries, Diba will require physiotherapy as well as rehabilitation.

14.15 Dr Oelofse foresees that Diba will incur the following future medical expenses:

- (a) MRI scan – R14,000.00
- (b) Cervical spine fusion of the involved levels – R150,000.00

(c) Adjacent level cervical spine fusion of involved levels –
R150,000.00

(d) General practitioner – R5000.00

(e) Orthopaedic surgeon – R22,500.00

(f) Physiotherapy – R30,000.00

14.16 According to Dr Oelofse, the medical cost inflation at a rate of 19.6% must also be taken into consideration.

[15] Assessment by Dr M B Huth:

15.1 Dr Huth examined Diba during October 2020 and compiled his medico-legal report based on his neurological evaluation. Approximately two years after the evaluation he also received the medico-legal report compiled by Dr Panieri-Peter, the Specialist Forensic Psychiatrist.

15.2 According to the subjective count as received from Diba, Diba was admitted for two weeks in hospital. He convalesced at home for three months before returning to work.

15.3 Dr Huth confirmed the same injuries as discussed by Dr Oelofse above.

15.4 According to Dr Huth, Diba had a normal birth and reached all age-appropriated milestones. Diba attended a school and passed all grades including matric without failures. As a scholar Diba participated in soccer. Diba further obtained qualification as a technician and at the time of the assessment was studying electrical engineering and completing his practicals. He had normal friendships. He had healthy family relationships and was engaged in the community. He also had well maintained social interactions. At the time of the incident, Diba's main duties entailed (a) standing, (b) reaching, (c) fine motor coordination, (d) concentration, (e) spinal extension and rotation, (f) heavy lifting. At the time of the assessment as stated, Diba's second-year electrical engineering practicals entailed the same duties.

15.5 Since the incident Diba is unable to play soccer and does not socialise as much anymore as he prefers his own space.

15.6 Distal fine motor screening tests revealed that Diba has decreased reflexes in the right arm and right leg. Wasting of the right hypothenar eminence and decreased fine motor skills and forearm pronation and supination, were also evident.

15.7 The final neurological diagnosis by Dr Hath revealed:

(a) Post-traumatic epilepsy;

(b) Right side hemiparesis of the right arm and leg;

(c) Chronic post-traumatic headaches;

(d) According to Diba's history and clinical record, the head injury will be classified as moderate. Diba's head injury classification based on these presenting clinical features do not corollate well or determine Diba's long-term outcome, impairment or disability.

15.8 If one compares Diba's pre- and post-accident status, it appears that pre-accident Diba did not have any symptoms of any neurological illness whereas after the incident there are symptoms of neurological illness, including headaches, epilepsy and post-traumatic cognitive changes and right-sided hemiparesis.

15.9 According to Dr Huth, Diba developed symptoms that have caused his impairment and disability in terms of decreased punctuality on his right side, affecting his ability to do physical activities. Whereas he is righthanded, his capability for his job is affected. His epilepsy is also a cause of concern. The disability is not likely to improve. There is no effect on his capacity selfcare or either basic complex activities of daily living.

15.10 In his initial report, Dr Huth commented that Diba will not require a curator to be appointed for any rewards as he is not incapacitated for making high-stake decisions. However, at a later stage, Dr Huth reported, after perusal of both his initial report as well as the report of

Dr Panieri-Peter's report, that a curator should be appointed to protect any funds awarded to the patient. This recommendation was done due to the severity of the patient's head injury and the cognitive and psychological *sequelae* reported on by Dr Panieri-Peter.

15.11 According to Dr Huth, the total cost per annum for comprehensive pharmacological and non-pharmacological treatment or neuralgic headaches, post-traumatic epilepsy and right-sided hemiparesis including treatment for *sequelae* and complications that are in the private sector of the RSA, is R50,000.00 per annum conservatively, this includes pharmacological and non-pharmacological treatment, doctors visits and medication expenses and is a comprehensive sum.

[16] Assessment by Dr L Panieri-Peter:

16.1 A psychiatric assessment was conducted on 21 October 2020. Dr Panieri-Peter perused and considered the following documentation:

- i) RAF form 1 and medical form;
- ii) A copy of the patient's identity document;
- iii) Colour photographs of the patient's injuries; and
- iv) Copies of hospital records.

16.2 According to her, Diba has only partial insight into his current functioning and is clearly a person who does not like to complain. She

also confirmed that he achieved his normal milestones and development and was described as a healthy child. He liked school, was good academically and had many friends. He played chess but did not do sport at all and she confirmed that he passed all grades at school. It appears that he obtained a B-average for matric. He enrolled in the Central University of Technology during 2013 after receiving a bursary from SATU. He struggled in his first year of university. He found the changes very difficult and he had to travel long distances to and from university each day. Consequently, he failed a number of first year courses which he needed to repeat during 2014. During 2016 he obtained a bursary and he completed the theoretical component of his degree in that same year. During 2017 he obtained a working post at Botshabelo Hospital where he was a technician in training.

16.3 His medical and psychiatric history prior to the incident showed *inter alia* that Diba used to drink alcohol on social occasions prior to his head injury. He indicated that since his accident, alcohol makes him very angry and provocative so he tries not to drink much. If he does drink, it is only on weekends.

16.4 After the incident he attended physiotherapy where he was taught to walk and talk again. He was discharged home to the care of his mother. He tried to return to his work after four months but within a

month of returning, he was sent home after doctors assessed that he was unfit for work.

16.5 CT scan findings indicate *inter alia*:

- i) Left posterior parietal comminuted, depressed skull fracture, with overlying soft tissue swelling, a large parietal hematoma and smaller hematomas in the anterior parietal region. Evidence of brain swelling was noted and decreased cortical sulcation and parietal effacement of the left lateral ventricle was reported.
- ii) There was indication of base of skull fracture with linear fractures of the greater wing of the sphenoid bone into skull base;
- iii) Fractures of the roof and lateral wall of the orbit were seen;
- iv) Bilateral frontal contusions were also noted.

16.6 During the assessment, Diba insisted that he was mostly recovered apart from dizziness and difficulties with functioning of his hand. However, it was clear from the events, from the clinical assessment and from his ongoing symptoms that he has many residual difficulties that are significant. His insight is impaired.

16.7 A few months after the accident Diba applied to Eskom for a position he required for his training. He had an interview and was accepted. He did not tell them he had recently had an accident. He signed a contract during March 2018 and started training during April 2018. However, within a month of being there, he was called in by the supervisor who took the matter to the Human Resources Department as it was clear that he was unable to meaningfully function in his job. He was sent to see doctors and recommendation was made that he be put off work from June 2018 until January 2019.

16.8 During 2018 he had surgery to his skull to repair the cranial defects.

16.9 The assessment and collateral information confirmed the following difficulties:

- i) He had a right hemiplegia noted after the accident and still finds that his right hand does not function normally. He finds it difficult to use his right hand in most activities. He also finds that he is unable to run although he opines that he can walk normally (collateral suggest that he falls and slips easily).
- ii) He experiences considerable dizziness. He describes that the dizziness arrives “like an uninvited thing”. He fears that he will have a seizure when he feels dizzy.

- iii) He has post-traumatic epilepsy which started in 2019. The clinical description is typical and is confirmed by his family. He experiences dizziness, whereafter he loses consciousness, shakes and on occasion wets himself. He is fearful of driving and having a seizure whilst driving.
- iv) Although Diba indicates that his memory is fine, his family reports that he is forgetful. Furthermore, it is clear that he was not able to function at work and he has failed the test and representations he is required to be doing. He has tried to do his driver's licence on a number of occasions since the accident and has repeatedly failed. Diba believes that this is due to the feeling he has that his intelligence has dropped.
- v) His cognitive capacity has decreased in that he struggles to write in his home language and he describes that his attention is poor. He struggles to stay focused and this is worse when he has to concentrate on online activities.
- vi) He suffers from severe headaches which occur at least twice every week.
- vii) He is required changes in his personality:
 - (a) He prefers to be alone and no longer enjoys socializing;
 - (b) When asked he admitted that friends tell him that he has become more short-tempered and irritable than previously.

People are somewhat afraid of him as he is now known to have a short fuse;

(c) He indicated that his friends describe him as very angry and that he has been unable to find peace;

(d) He feels down, sad and as if he is a failure.

16.10 As far as his mental state examination is concerned, the following *inter alia* was noted:

i) His attention decreased quickly over time. He started to shift in his chair and he struggled to maintain focus;

ii) Over time he became disinhibited, overly flippant and it was clear that he has frontal disinhibition;

iii) He had only partial insight into some of his many difficulties and he every significantly underestimates his neurocognitive difficulties which were evident and also reported by his family.

16.11 Dr Panieri-Peter concluded that:

(a) Diba's difficulties with insight affect his judgment as is evidenced by his early application for a job shortly after his accident. However, within a month it was plain and evident to his employers that he could not function. Worryingly he was at that stage doing his

practical training online, but it appeared from his marks that he was not managing.

(b) He also has physical difficulties consequent to right hemiplegia, which involved unsteadiness, falling, inability to run and an inability to use his right hand in a functional manner.

(c) His functioning is compromised by a combination of neurocognitive personality, psychiatric, insight and physical difficulties as well as his epilepsy.

16.12 Diba has in effect reached maximum medical improvement.

16.13 He requires treatment for his epilepsy. Medication needs to be prescribed by a neurologist or psychiatrist. He would also benefit from physical therapists to assist him in improving his physical functioning.

16.14 She also confirmed that Diba will require a *curator bonis* to manage his finances should he receive compensation from his claim.

[17] Assessment by Dr R Bredenkamp:

17.1 Dr Bredenkamp confirmed that the CT scan was consistent with the presence of extradural haematoma.

17.2 Furthermore, right-sides hemiplegia was present as well as cognitive dysfunction.

17.3 As far as his functional impairment and disability is concerned, the following was noted:

17.3.1 Physical impairment:

- (i) Diba notes that this walking has improved but he still struggles with co-ordination;
- (ii) He reports decreased righthand strength. The right side of his body is still weak. He now has to rely heavily on his lefthand to conduct tasks;
- (iii) Hearing in his right side is diminished;
- (iv) He experiences headaches and wants to sleep when this occurs;
- (v) He becomes easily fatigued and requires a period of rest after working for approximately 2 hours;
- (vi) He reports that his eyesight was declined.

17.3.2 Psychological impairment:

- (i) Diba reports that his personality has changed. He is short-tempered.
- (ii) He is frustrated by his impairments particularly his diminished eyesight.

- (iii) He occasionally feels like giving up, but states that he is happy and cheerful most days.
- (iv) He is frustrated by his inability to play soccer.

17.3.3 Cognitive deficits:

- (i) Diba stated that his mind gets stuck at times and he occasionally struggles to encode new information. However, he later stated that he has no problem studying and acquiring new information.

17.4 The neuro behavioural cognitive status examination revealed *inter alia*:

- i) *“Mr Diba displays difficulty with attention, auditory processing and receptive language. However, poor hearing and language factors may have negatively influenced his results in this regard. Furthermore, he displays mildly impaired numerical ability”.*
- ii) *“Mr Diba disclosed difficulty with motor speed and lateralised co-ordination, especially with his right hand. Furthermore, results indicate poor right hand manual dexterity. He demonstrates slight difficulty with sustained attention and inhibition.”*

17.5 Dr Bredenkamp’s treatment and prognosis as contained in his report are the following:

“Mr Diba is aware of his cognitive deficits but positive that he can work and earn an income. He is ambitious and driven to be successful in life despite the accident and traumatic brain injury. Therefore, everything possible must be done to support him in achieving his ideals. A psychologist can help him with this. About 20 sessions of psychotherapy will suffice at the cost of R1500.00 per hour.

Mr Diba will benefit from career guidance to chose a work environment that can accommodate his shortcomings. For this, he can be referred to a career counsellor.

Mr Diba should be referred to an audiologist, a speech and language pathologist and an eye specialist.

He should be compensated for pain and suffering and loss of amenities of life.”

[18] Assessment Ms A Wright:

18.1 The following observations were made by the Occupational Therapist regarding Plaintiff's loss of earning potential:

(a) *“Upon his return to work, the plaintiff was accommodated for a period of six months during which he was limited to office space*

work only, thus not doing onsite visits and not performing any physically strenuous work”.

(b) *“The plaintiff reported no difficulties relating to his studies, however, collateral information from his supervisor during his participation contradicted the plaintiff’s view of now academic difficulties, indicating that he has poor insight into his limitations as a result of the accident. His supervisor stated that he did not know for sure if the plaintiff can work in his preferred line of work.”*

(c) *“The plaintiff presented with fine motor / co-ordination throughout during his evaluation which would be expected to negatively affect his performance as an electrical engineer.”*

(d) *“From collateral information obtained it was noted that the plaintiff required significant supervision during his training and his ability to work as an electrical engineer is questioned.”*

[19] Assessment by Ms A van der Bijl:

19.1 A telephonic interview was held by Ms Van der Bijl with Diba during May 2022.

19.2 She focused her research on Diba’s specific occupation, skills level and education.

19.3 Under her discussion of Diba's uninjured income, Ms Van der Bijl considered the following, *inter alia*:

- (a) Diba completed Grade 12 and a National Diploma in Electrical Engineering;
- (b) Diba was at the date of the injury, enrolled in university (CUT) studying for a Bachelor of Engineering Technology in Electrical Engineering;
- (c) At the time of the incident, the Plaintiff had been working as an intern at Botshabelo Hospital for three months;
- (d) The Plaintiff planned on becoming a qualified engineer.

19.4 In considering the information obtained during the assessment and having regard to the reports by the medical experts, Ms Van der Bijl postulated that the Plaintiff will struggle to maintain employment because of his limitations and will experience periods of unemployment.

[20] Wim Loots – Actuary:

20.1 Mr Wim Loots was appointed to calculate Diba's loss of income as a result of the accident.

20.2 In his calculations, he had regard to the Plaintiff's payslip from December 2020 as well as his certificates of achievement.

20.3 Mr Loots did not make provision for the deduction of any contingencies in calculation of the loss of earnings of Diba. In regards to the past loss of earnings by Diba, he calculated the amount to be R339,263.00 and in regards to the future loss of earnings, the total amount of R3,208,776.00.

[21] I will now continue to deal with the arguments as advanced on behalf of both the Plaintiff as well as the Defendant.

Contingencies:

[22] It is trite law that in respect of contingencies, a Court is to make a reasonable allowance for "*contingencies, the result of which it is impossible accurately to assess*". See: **Smit v Road Accident Fund**¹.

[23] Deductions used in practice range from 0% - 60%; with 10% - 20% being the most common; whilst recognition have been given to the principle that a short period of exposure to the risk of adversity justifies a lower deduction than would be appropriate to a longer period.²

¹ 2013 JDR 0902 (ECG) at par. [15]

² Smit *supra* par. [22].

[24] In determining what percentage of contingency deductions should be applied, the guideline of the sliding scale of a half percent per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in regards to a middle-aged person may be appropriate.³

[25] At the time of the accident Diba was 23 years old and is currently 29 years old. Ms *Van der Sandt* argued that he therefore falls within a category of a youth with a suggested 20% contingency. I am in agreement with Ms *Van der Sandt* that the 20% contingency deduction to the Plaintiff's claim for total loss of income is appropriate. No argument contrary to such submission had been made by the Defendant in this regard. In respect of Diba's total amount of loss of income when the 20% is then applied to the total amount as calculated by the actuary, it amounts to the amount of R2,567,020.80.

Past medical expenses:

[26] Although past medical expenses were estimated and claimed as such at R50,000.00, the Plaintiff did not pursue such claim any further whereas no proof of such expenses had been provided.

Future medical and related expenses:

³ Smit *supra* par. [32].

[27] It appears that the Defendant did not have instructions to give an undertaking in terms of Section 17(4) of the Road Accident Fund Act 56 of 1996 for future medical expenses to be incurred by the Plaintiff. In its Heads of Argument, it was also indicated that the Defendant did not furnish instructions on all heads of damages and in such Heads, the Defendant's legal representative, indicated that she does not have a mandate nor the authority to make submissions that will bind the Defendant.

[28] In **K obo M v RAF**⁴, the joint hearing of two matters came before a Full Bench of the Gauteng Provincial Division as a consequence of a directive issued in terms of Section 14(1)(a) of the Superior Courts Act 10 of 2013 by the Acting Judge President of the division at the time.

[29] The one question upon which the Court needed to decide upon, was formulated by the Acting Judge President as follows:

“Is it competent for a court to order that a plaintiff's claim for future medical and hospital expenses be compensated by the Road Accident Fund by way of an undertaking issued in terms of section 17(4)(1A) of the Road Accident Fund Act, 56 of 1996, where default judgment is granted and in the absence of a tender to that effect.”

[30] The Court declared that “... *it is generally not competent for a court to direct the Road Accident Fund to furnish an undertaking as contemplated in section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in circumstances where*

⁴ 2023 (3) SA 125 (GP)

*the Road Accident Fund has not elected to furnish such undertaking, by default or otherwise”.*⁵

[31] However the Court heard that the Road Accident Fund has, during the course of the hearing, conveyed a so-called “*blanket election*” to furnish an undertaking to every claimant who is entitled to a claim for payment of future medical and ancillary expenses in terms of Section 17(4)(a). The Full Bench held as follows:

“The result is that, once a plaintiff proves his claim as contemplated in section 17(4)(a), it is entitled to claim an order catering for a direction to the fund to furnish such an undertaking and a court is entitled to grant such an order. This will also apply in instances where orders by default are sought.”

[32] I therefore agree with Ms *Van der Sandt*’s submission that the Plaintiff is entitled to such undertaking in the present matter.

General damages:

[33] In her Heads of Argument, Ms *Van der Sandt* argued that, from the expert reports, it is clear that Diba has suffered severe injuries during the accident, the most serious being a fracture of the skull. She further argued that whereas

⁵ *K obo M v RAF (supra)*, p. 148C

Diba's whole person impairment score was calculated at 55%, it satisfies the requirement for a claim for general damages.

[34] However, in its Heads of Argument, the Defendant referred me to the matter of **Road Accident Fund v Duma and 3 similar cases**⁶ where the Supreme Court of Appeal ruled as follows:

“... The decision whether or not the injury of a third party is serious enough to meet the threshold requirement for an award of general damages were conferred on the fund and not on the court. That much appears from the stipulation in regulation 3(3)(c) that the fund will only be obliged to pay general damages if the fund – and not the court – is satisfied that the injury has correctly been assessed in accordance with the RAF4 form as serious. Unless the fund is so satisfied the plaintiff has no claim for general damages. This means that unless the plaintiff can establish the jurisdictional fact that the fund is so satisfied, the court has no jurisdiction to entertain the claim for general damages against the fund. Stated somewhat differently, in order for the court to consider a claim for general damages, the third party must satisfy the fund, not the court, that his or her injury was serious.”

[35] In the matter of **K obo M v RAF** (*supra*) the second question posed to the Full Bench by the then Acting Judge President, was whether a Plaintiff is entitled

⁶ 2013 (6) SA 9 (SCA)

to pursue the adjudication of general damages at trial in a default trial court in instances where the Fund has not accepted the serious injury assessment report. The Full Bench came to the following conclusion:

“It is declared that plaintiffs in actions against the Road Accident Fund are not entitle to pursue the adjudication of non-pecuniary damages in the absence of either the Road Accident having accepted the injuries in question as constituting serious injury as contemplated in section 17(1A) of the Road Accident Fund Act 56 of 1996, or of assessment of such injuries as constituting serious injury by the Appeal Tribunal contemplated in Regulation 3 of the Road Accident Fund Regulations, 2008 (as amended).” (own emphasis)

[36] This aspect had not been dealt with by the Plaintiff during argument.

[37] In Plaintiff's Particulars of Claim it was alleged that the Plaintiff did comply with Section 17 of the Act read with Regulation 3 in that:

“A duly completed serious injury assessment report (RAF4 form) was provided by Dr Panieri-Peter and Dr Oelofse in terms of Regulation 3(3)(a) in relation to the nature of the injuries sustained by the plaintiff. The aforesaid RAF4 form was submitted to the defendant in terms of Regulation 3(3)(b)(i), separately and after the submission of the

plaintiff's claim but before the expiry of the period for the lodgement of the claim prescribed in the Act and the regulations."

[38] In answer to such allegations, Defendant pleaded as follows:

"The defendant denies each and every allegation contained in these paragraphs as if specially traversed and puts the plaintiff to the proof thereof. The defendant specifically denies that the plaintiff suffered severe bodily injuries in terms of section 17(1) of the Act.

Alternatively to paragraph 4.1 above, should the above Honourable Court find that the plaintiff sustained of the injuries in any consequent non-pecuniary damages, as alleged or at all (which is denied), then and in that event:

Defendant denies that the injuries sustained by the plaintiff constitutes serious injury as defined in section 17 of the Road Accident Fund Act 56 of 1996 as amended, read together with Regulation 3 of the Regulations promulgated under the said Act. Accordingly, the Defendant pleads that it is not liable to compensate the plaintiff as alleged for any non-pecuniary damages as the plaintiff has failed to satisfy the requirements of section 17 of the Road Accident Fund Act 56 of 1996 as amended.

Further the defendant pleads that in the event of a dispute arising as to whether or not the injuries sustained by the plaintiff constitute serious injury, then in terms of Regulation 3(4)(a) of the Regulations promulgated under the said Act, such dispute must be referred to the Health Professions Council of South Africa for adjudication.”

[39] It is therefore patently clear that since the date of the filing of the plea by the Defendant, the Plaintiff and his attorney, must have been aware of the fact that although the RAF4 form has indeed been filed as alleged by the Plaintiff, the Defendant disputed the seriousness of the injuries for purposes of Section 17 of the Act. In its plea, the Defendant also drew the Plaintiff's and its legal representatives' attention to the fact that by implication, such dispute must be referred to the Health Professions Council of South Africa for adjudication. Irrespective thereof, the Plaintiff still continued to have the matter proceed to trial and in particular in regards to the quantum.

[40] In accordance with the findings in both the **Duma** as well as the matter of **Kobo M v RAF**, the Plaintiff is therefore not entitled to pursue with the adjudication of non-pecuniary damages in the absence of the Defendant having accepted such injuries as constituting serious injuries.

[41] The question then remains whether the Plaintiff's claim in respect of general damages should be dismissed. In the **Duma**-matter, the Supreme Court of Appeal upheld the special pleas in respect of all four matters which served

before Court in respect of the non-compliance by the Plaintiff with Regulation 3 of the Act. In that regard the Court said the following:

“It will be remembered that these special pleas rested on the contention that the plaintiffs’ claims for general damages were premature and that they had failed to establish that the injuries were serious in accordance with the method prescribed in Regulation 3. In consequence, the fund’s prayer in these special pleas was that the claims for general damages be dismissed, alternatively, that these claims be stayed pending the compliance by the plaintiffs with Regulation 3.”⁷

[42] In its Heads of Argument, the Defendant argued that whereas the Defendant have not accepted or rejected to the Plaintiff’s RAF4 form report by Dr Oelofse, the Defendant submitted that the Court does not have jurisdiction to adjudicate the Plaintiff’s claim for general damages. In its Heads of Argument, Defendant also indicated that Plaintiff’s remedy to the Defendant’s failure to reject or set the RAF4 form lies in Section 6(2)(g) and 6(3)(a) of the Promotion of Administrative Justice Act 3 of 2000 which allows for judicial review of administrative authorities’ failure to take a decision.

⁷ RAF v Duma *supra*, par. [40], p. 25.

[43] The legal representative on behalf of the Defendant in her Heads of Argument also referred me to the unreported case of **Justine Phiri v RAF**⁸, in which it was also a matter that the Fund had not accepted or rejected the Plaintiff's RAF4 form. In that matter Judge Nichols indicated that it is now trite that an agreement on whether the injury is to be regarded serious or not cannot be assumed and a Court which proceeds with the claim for general damages on this basis will be exceeding its powers. The Court indeed held that there was no basis in which it could conclude that the RAF has accepted the Plaintiff's injuries as serious, thereby entitling him to a claim for general damages. The Plaintiff's claim for general damages was thus postponed.

[44] It is therefore evident that in both the **Duba**-matter as well as the **Justine Phiri**-matter, the Court postponed the Plaintiff's claim for general damages. In the circumstances of the present matter, I deem it just and equitable that the same route should be followed in regards to the general damages.

Costs:

[45] The Plaintiff proceeded in regards to both the merits as well as the quantum at the day of the hearing.

[46] In respect of the merits, the Defendant conceded 100% liability in favour of the Plaintiff on the date of the hearing.

⁸ Case No: 3448/2018, delivered by Judge T Nichols (Gauteng Division – Johannesburg)

[47] As far as the quantum is concerned, save for the general damages, the Plaintiff is also successful in regards to the claim in respect of the loss of earnings as well as in obtaining an undertaking as contemplated in Section 17(4)(a) of the Act.

[48] In view of the above circumstances and facts, Plaintiff is therefore entitled to a cost order in his favour in regards to the costs up to date.

ORDER:

Therefore, I make the following order:

1. Defendant is liable for 100% of the Plaintiff's proven, or agreed damages, resulting from the motor vehicle accident which occurred on 2 December 2017.
2. Defendant is ordered to pay the Plaintiff the amount of R2,906,283.80, which amount is made up as follows:

(a) Past loss of earnings	R 339,263.00
(b) Future loss of earnings	<u>R2,567,020.80</u>
Total	<u>R2,906,283.80</u>

3. The aforesaid amount is to be paid into the following bank account:

Name of account holder:	Venters Incorporated
Name of Bank:	[...]
Account number:	[...]
Branch code:	[...]
Reference:	[...]

4. Should payment as aforesaid not be made within 14 (fourteen) days from the date hereof, Defendant shall be liable for payment of interest on the amount of R2,906,283.80, calculated at the prescribed *mora* rate, from 14 (fourteen) days after this court order till date of payment.

5. Defendant is to furnish the Plaintiff with an undertaking in term of Section 17(4)(a) of the Road Accident Fund Act, 1996 for payment of 100% of the costs of the future accommodation of the Plaintiff in a hospital or nursing home, or treatment of, or rendering of service or supply of goods to the Plaintiff arising out of the injuries that he sustained in the motor vehicle collision which occurred on 2 December 2017 and the *sequelae* thereof, after such costs have been incurred and upon proof thereof.

6. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs, on a High Court scale to date of this order, which includes the reasonable qualifying and reservation fees (where applicable) of the following experts:

6.1 Dr LF Oelofse – Orthopaedic Surgeon;

6.2 Dr MB Huth – Neurologist;

6.3 Dr L Phieri-Peter – Special Forensic Psychiatrist;

6.4 Ms A Wright – Occupational Therapist;

6.5 Ms A van der Bijl – Industrial Psychologist;

6.6 Mr Wim Loots – Actuary.

7. The Plaintiff shall allow the Defendant 14 (fourteen) calendar days to make payment of the taxed or agreed High Court costs.

8. The Defendant will pay the costs of the application to appoint the *curator ad litem* on the High Court scale, as between party and party, including costs of the medical reports filed as part of the said application, as taxed or agreed.

9. Defendant shall pay the costs of the *curator ad litem* on the High Court scale, as taxed or agreed.

10. In the event of a *curator bonis* being appointed, Defendant shall pay the costs of the *curator bonis*, as taxed or agreed, such costs including for sake of clarity, but not limited to the costs of the application to appoint the *curator bonis* on the High Court scale as between party and party, as taxed or agreed (the application cost), the cost, if any, incurred by the *curator bonis* in furnishing security to the Master, and the fees and costs of the *curator bonis* in respect of administering the capital and the undertaking in terms of Section 17(4)(a).

11. Plaintiff's claim for general damages is postponed *sine die*.

J J F HEFER, AJ

Appearances on behalf of the Plaintiff:

Adv M van der Sandt

Instructed by:

Venters Incorporated
Bloemfontein

On behalf of the Defendant:

State Attorney
Bloemfontein