

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION BLOEMFONTEIN

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

Case no.: 3172/2021

In the matter between:

M[...], N[...] A[...]

o.b.o S[...] M[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Link no.: 4311645

CORAM: VAN ZYL, J

HEARD ON: 2 & 4 AUGUST 2023; 4 SEPTEMBER 2023

DELIVERED ON: 8 MARCH 2024

[1] The plaintiff is the biological mother of S[...] M[...] (“S[...]” or “the minor”).

[2] On 27 December 2015 and in Bronville, Welkom, Free State Province, the minor was a passenger on a bakkie when the said vehicle was involved in an accident. This is an action for damages which the minor suffered as a result of injuries she

suffered in the accident. The plaintiff instituted the action in her representative capacity as the biological mother and natural guardian of the minor.

[3] In terms of the particulars of claim S[...] suffered the following injuries:

“6.1 head injury;
 6.2 laceration on the forehead;
 6.3 lacerations on the right cheek;
 6.4 injury to the right eye; and
 6.3 multiple bodily lacerations.”

[4] At the commencement of the trial the defendant conceded the merits of the action hundred percent in favour of the plaintiff. The defendant also tendered an undertaking for future medical expenses. The defendant rejected the plaintiff's Serious Injury Assessment Report and this aspect is to be referred to the HPCSA. The parties consequently requested at the commencement of the trial that an order be granted in terms of Rule 33(4) for the separation of issues to the effect that the determination of general damages stands over for later adjudication. I granted the requested order.

[5] I am consequently called upon to determine the loss of past and future income and earning capacity of the minor. In this regard the plaintiff is claiming an amount of R9 628 700.00 on behalf of the minor.

The evidence:

The plaintiff:

- [6] The plaintiff testified that S[...] is her child, who was born on 2[...] N[...] 2010. She is consequently currently 13 years old. She has two siblings, 8 years and 17 years old respectively.

- [7] The plaintiff testified that at the time of the accident she was the daily caretaker of S[...]. S[...] was 5 years of age at the time of the accident and she attended a creche, W[...] t[...] P[...], in Johannesburg. They were staying in Johannesburg at the time and were only visiting in Bronville when the accident occurred.

- [8] Prior to the accident S[...] was a normal, happy child. She presented with no problems at school and she was obedient, had many friends and played normally with her friends.

- [9] Since the accident S[...] has been showing many changes in her behaviour. According to the plaintiff S[...] is not coping at school, her grades are low and she failed grade 2. Every now and again is being called to school regarding S[...] to discuss her bad performance and the fact that she is violent towards other learners. At school they also complain about S[...]’s concentration, since she easily gets distracted from her schoolwork. S[...] is currently in grade 6.

- [10] The plaintiff further testified that since the accident S[...] has become short-tempered, she is violent, she uses bad

language and cries out of the blue and for no apparent reason. She is also cheeky and stubborn. The plaintiff was very adamant that this is not how S[...] conducted herself prior to the accident. She is sometimes bed-wetting at night, which never occurred previously.

[11] Since the accident S[...] is suffering from memory problems. She forgets to do her homework and when she is requested to perform chores at home, she also forgets to do same.

[12] S[...] is also suffering from headaches since the accident. At times she does not want to attend school, because of her headaches. The plaintiff used to take her to the clinic, but since the plaintiff is now employed, she is unable to take S[...] to the clinic regularly. She therefore buys her Panado pills.

[13] Prior to the accident S[...] did not suffer from any physical injuries or ailments. She suffered no complications with birth. The plaintiff described that the right hip and shoulder of S[...] locks and that her left hip also locks. She also experiences spasms in her hips and thighs which have the result that she cannot walk for long distances. She is attending school nearby. S[...] also has many scars as a result of the accident, above her right eye and all over her body. She is being teased at school because of the scars and when she tells the plaintiff about the teasing, she cries about it. The plaintiff also testified that S[...] is self-conscious as a result of the scars and also withdraws herself from her friends as a result of her self-consciousness.

- [14] Prior to the accident she had an excellent relationship with her peers. Since the accident, often when she plays with other children, she becomes moody and simply withdraws herself from them.
- [15] All three of the plaintiff's children, including S[...], has one father. The plaintiff is staying with their father. He used to be a security guard. The other two siblings of S[...], are also girls. The 8-year-old is doing well at school and was, at the time of the trial, in Grade 2. The other sibling was 17-years old at the time of the trial, but has since turned 18. She is in Grade 11. S[...]'s two siblings do not show any of the behavioural problems which S[...] does, not at school, nor at home.
- [16] Since the accident, the plaintiff has twice travelled to Welkom with S[...]. She testified that S[...] feels uncomfortable in a vehicle and tends to vomit. She is scared of travelling, more especially in a taxi. She becomes anxious in a vehicle. This was not the position prior to the accident.
- [17] The plaintiff became emotional when she testified that before the accident she wanted a better life for S[...], like any parent would. According to her S[...] would have been able to achieve a better life, but not since the accident occurred.
- [18] In cross-examination the plaintiff testified that they live in Johannesburg, but that she is working as live-in domestic worker in Pretoria. However, she goes home every weekend.

She started the said work in May 2022. Before that she used to work at a factory in Johannesburg.

[19] Grade 11 is her highest level of education. Her husband completed Grade 12 successfully.

[20] With regard to S[...], she testified that she sometimes takes her to the clinic and that she also received counselling there, during which counselling they advised S[...] and encouraged her. She took her for the said counselling because of her bad behaviour, which she never showed prior to the accident.

[21] The plaintiff further testified that she is very involved in her children's education. During weekends she helps them with their homework when she is at home. During the week, when she is at work, their father assists them.

[22] She further testified that S[...] misses approximately 30 days in a year due to her headaches and also due to unexpected nose bleeding from which she suffers since the accident.

[23] In re-examination she testified that despite the counselling at the clinic, S[...]`s behaviour is not improving.

Documentary evidence:

[24] As part of the plaintiff's case, the following expert reports, as confirmed by affidavits, were handed in as exhibits:

1. Mr Talent Maturure, Industrial Psychologist, exhibit "A".

2. Prof. Adrian Kelly, Specialist Neurosurgeon, exhibit "C".
3. Dr LT Nhlapo, Educational Psychologist, exhibit "D".
4. Ms L Grootboom, Neuro/Clinical Psychologist, exhibit "E".
5. Mrs René Walker, Occupational Therapist, exhibit "F".
6. Ms Julie Anne Valentini, Actuary, exhibit "G".

[25] The following joint minutes were also handed in as exhibits:

1. Dr Mpanza and Prof A Kelly, 15/04/2023, exhibit "H".
2. Dr LT Nhlapo and Dr D Kumalo, 15/07/2023, exhibit "J".
3. Ms S van der Merwe and Ms L Grootboom, 12/06/2023, exhibit "K".
4. Mr T. Maturure and Mr L Marais, 26 – 28/7/2023, exhibit "B".

[26] The plaintiff's Industrial Psychologist, Mr Talent Maturure, testified after the plaintiff. I, however, deem it apposite to first deal with joint minutes of the other experts.

Joint minute between the Educational Psychologists:

Pre-accident:

[27] In respect of the pre-accident scenario, the experts noted and agreed as follows:

1. S[...]’s delivery and birth were said to be uneventful.
2. No pre-existing conditions were reported.

3. S[...]’s gross developmental milestones followed a normal trajectory.
4. S[...]’s medical history does not include any significant medical illness prior to the accident.
5. S[...] is staying with her parents and siblings. Their family relationships and interactions were reported to be satisfactory. S[...] had been a Grade R learner at the time of the accident. She reportedly did not present with any cognitive difficulties as there were no cognitive challenges reported prior to the accident.
6. S[...] had the ability to pass matric with a Bachelor Endorsement and the experts opine that she could have been able to obtain post-school qualification at NQF Level 7. (My emphasis)

Post-accident:

[28] With regard to S[...]’s post-accident functioning, the experts stated as follows:

1. They noted and agreed that S[...] presents with forgetfulness, short memory span and the inability to comprehend instructions as expected. Furthermore, she presents with enuresis, physical and emotional complaints.
2. They noted and acknowledged that S[...] failed Grade 2 post-accident.
3. Dr Kumalo noted that S[...]’s failure in the foundation phase is an indication of cognitive fall outs and the

academic challenges she is experiencing, which will characterise her schooling path. She presented with short attention span, distractibility, impulsiveness, lack of planning, lack of comprehension of written text and poor planning, all of which factors are affecting her academic progress negatively. Dr Kumalo opines that S[...] will be classified as a learner who will need additional support throughout her schooling career.

4. Dr Nhlapo noted that the clinical diagnostic observations indicated that S[...] was easily distracted, she fatigued quickly and her thought processing and response were delayed. Her language usage was impoverished and her vocabulary was deprived, both in LOLT and Home language. She was fidgety, disorganised, impulsive and easily distracted. Poor planning was indicated. Teach and re-teach were required. Her attention span was short and inattentiveness and a lack of concentration were also indicated. Her performance was slow paced.
5. Dr Nhlapo noted that S[...] will not be able to retain her pre-accident cognitive function. She further noted that the accident had a negative impact on S[...]’s scholastic functioning.
6. Dr Kumalo noted S[...]’s pre- and post-accident cognitive abilities have not remained the same and she will need accommodation and concessions throughout her schooling. She will benefit from an Individualised Education Plan (IEP) to cater for her education needs.
7. The experts noted and agreed that S[...] may struggle to complete NQF Level 4 and her chances to complete

same without extensive specialised educational support, are limited. (My emphasis)

8. The experts noted and agreed that the psychometric test results revealed that S[...]’s intellectual ability is below average and that there is a discrepancy between verbal scale and non-verbal scale.
9. They noted and agreed that S[...] was still emotionally labile.
10. The experts noted and agreed that S[...]’s loss of amenities is highly likely.
11. Placement in a special school for children with mild intellectual disability (MID) must be sought for S[...]’s cognitive challenges to be fully supported in a skills development environment.
12. The experts agreed that following the accident and reported cognitive challenges, as well as the psychometric assessment results, it is unlikely that S[...] will still be able to obtain a NQF Level 7 qualification. She will probably be able to attain a NQF Level 5 in skills development sector depending on the correct school placement and support for her educational needs. She may need to be employed by a sympathetic employer and deference is made to an occupational and industrial psychologist. (My emphasis)

Joint minutes between the Clinical Psychologists:

Pre-accident:

- [29] The experts agreed that S[...] had no history of cognitive-, physical- or emotional challenges that would have impacted on the neuropsychological test results.

Post-Accident:

- [30] With regard to the post-accident scenario, the experts stated as follows:

1. They referred to records that S[...] sustained a mild traumatic brain injury, facial abrasions and laceration to the left forehead.
2. S[...] repeated Grade 2.
3. Ms Grootboom's neuropsychological assessment revealed mild to significant deficits in the domains of attention, memory, reasoning and higher order reasoning (executive function). It was, however, noted that executive functions are not yet fully developed in a child as young as S[...].
4. Ms van der Merwe noted symptoms of a childhood Post-Traumatic Stress Disorder and symptoms of a Mild Depressive Disorder.
5. Ms Grootboom noted that collateral information provided by her mother indicates significant mood- and behavioural disturbances suggestive of depressive- and post-traumatic stress symptoms. Given S[...]’s age, it is to be expected that she would have difficulty understanding and reporting on her own emotional functioning.

Personality changes were reported as she is aggressive to peers and siblings. She is also emotionally sensitive.

6. Chronic pain in the form of headaches, emotive dysfunction and facial scarring will continue to act as constant reminders of the accident and the trauma she experienced, thus perpetuating psychopathology.
7. Additionally, complaints of bed-wetting may be associated with S[...]’s psychological symptoms as the projective tests anxiety. However, a Urologist should be consulted to rule out the possibility of an organic aetiology.
8. S[...]’s psychological status is having a significant negative impact on her ability to fulfil her academic role specifically with regards to behavioural difficulties and on her ability to form and maintain peer relationships.
9. Should S[...] be placed in a more appropriate schooling system, it is possible that her psychological status can improve with the necessary psychotherapeutic support.
10. Ms Grootboom noted that S[...]’s neurocognitive deficits would affect her academic outcomes. (My emphasis)

Joint minutes between the Neurosurgeons:

Post-accident:

[31] The two experts agreed as follows:

1. S[...] sustained a head injury in the accident. Both experts suggested a mild traumatic brain injury as evident by a Glasgow Coma Scale 15/15 and no CT

brain scan was performed. The head injury was treated conservatively.

2. Since the accident, S[...] has been complaining of post head injury headaches. They agreed that the headaches be treated medically with non-steroidal anti-inflammatory medication.
3. S[...] complains of memory problems and in this regard, they deferred to the reports of the neuropsychologists.
4. She is also suffering from a mood disorder, and the experts defer to the reports of the clinical psychologists.
5. S[...] suffered soft tissue injuries of the right thigh and complains of right thigh pain.
6. S[...] complains of facial scarring and scarring of the left forearm.
7. The life expectancy of S[...] has not been influenced by the accident.
8. Permanent serious disfigurement is evident.
9. Severe long-term mental or severe long-term behavioural disturbance or disorder are evident. (My emphasis)
10. Both experts suggested that S[...] has a 2 – 3% chance of developing epilepsy in future. (My emphasis)

Joint minute between the Industrial Psychologists:

Pre-accident performance:

[32] Both experts agreed that S[...]’s gross developmental milestones followed a normal trajectory. She reportedly not

presented with any cognitive difficulties as there were no cognitive challenges reported. They agreed that S[...] had the pre-accident ability to pass Matric with a Bachelor Endorsement and opined she could have been able to obtain post-school qualification at NQF Level 7. (My emphasis)

Post-accident functioning:

[33] Both experts noted and agreed as follows:

1. Following the accident and reported cognitive challenges, as well as the psychometrics assessment results, it is unlikely that S[...] will still be able to obtain a NQF Level 7 qualification. She will probably attain an NQF Level 5 in skills development and sector depending on the correct school placement and support for her educational needs. She may need to be employed by a sympathetic employer with deference to an Occupational and Industrial Psychologist. (My emphasis)
2. They both noted the contents of the joint minute between the Neurosurgeons and also the contents of the joint minute between the Clinical Psychologist.

Pre-accident:

[34] The two experts noted and **agreed** as follows:

1. They agreed that S[...]’s choice of occupation will be determined by the level of education she achieves, as well as her interests she develop.
2. They noted that according to the Educational Psychologists S[...] would complete her normal schooling, passing Matric with a Bachelor Endorsement and opined that she could have been able to obtain post-school qualification at NQF Level 7. (My emphasis)
3. They further agreed that S[...] would have worked in the open labour market until the normal retirement age of 65 years depending on a variety of factors, such as a health status, personal circumstances, personal preferences and conditions of employment, etc. (My emphasis)

[35] Based on the joint minute of the Educational Psychologists, the two experts **disagreed** on the **pre-accident career path**:

1. Mr Maturure o.b.o the plaintiff:
 “With a Degree (NQF Level 7) level of education, she would have entered the open labour market at a Paterson Level B4/B5/C1, reaching her career ceiling earning at the upper quartiles of Paterson D1+ level. Her earnings would have plateau at around 40 – 45 and she would have received inflation increases, thereafter.”
2. Mr Marais o.b.o the defendant:
 “With a B-degree, she would have entered the open labour market, probably as an intern, and later secure employment, depending on the degree, at the Paterson Grade B4 and progressed to a career ceiling of Paterson Grade C4 or C5, at age around 48 years, due to the impact of the global Covid-19

pandemic had on employers and employment trends. In certain cases, individuals could progress to higher levels.”

Post-accident earning potential:

[36] With regard to her post-accident earning potential they **agreed** that:

1. Based on the reports at hand, S[...]’s scholastic abilities are likely to have been negatively affected as a result of the injuries she sustained in the accident.
2. S[...]’s choice of occupation will be determined by the level of education she receives, as well as her interests she develop.
3. Based on the joint minutes between the Educational Psychologists they agree that S[...] would only be able to reach a NCQF Level 05 in the skills development sector. (My emphasis)
4. They further noted that according to the Educational Psychologists, S[...] may need special schooling and they agree that with special schooling, employment opportunities and earnings have been reduced. (My emphasis)
5. The experts also agreed that with psychological limitations and potential health decline, S[...]’s employability has been compromised in the open labour market. (My emphasis)
6. The Educational Psychologists opined that S[...] may need to be employed by a sympathetic employer. They agreed that sympathetic employment is rare, thus S[...]

has been rendered an unequal competitor and a vulnerable jobseeker in the open labour market. She may experience difficulty securing and sustaining employment in her injured state.

7. The two experts suggested that a higher post-accident contingency be applicable to compensate S[...] as she has been rendered a vulnerable employee/jobseeker in the open labour market.

[37] With regard to S[...]’s post-accident career path and earning, the two experts **disagreed**:

1. Mr Maturure o.b.o the plaintiff:

“She will be a candidate for semi-skilled employment. She could enter the labour market as an unskilled labourer earning at the lower quartiles of unskilled labourers, reaching a career ceiling earning at the median quartiles of semiskilled labourers at around the age 40 – 45, receiving inflationary increases, thereafter. Current earnings are noted, refer to Appendix 1. Noting the experts’ findings on 6.1.6 above, Mr Maturure is of the view that she has been rendered practically unemployable in the open labour market considering the rarity of sympathetic employment.”

2. Mr Marais o.b.o the defendant:

“She will be a jobseeker with NQF Level 05, and could enter the open labour market in the semi-skilled occupational group at a Paterson A3 and progress to a career ceiling of Paterson B4 to at most a C1.”

[38] They deferred to the relevant experts regarding early retirement.

Mr Maturure:

[39] As indicated earlier, Mr Maturure was called as an expert witness, in his capacity as an Industrial Psychologist, on behalf of the plaintiff.

[40] In his evidence he repeated what he stated in terms of the joint minute between him and Mr Marais.

[41] He testified that should S[...] be able to attain a NCQF Level 05 in the skills development sector and should she be able obtain sympathetic employment, she would enter the labour market as an unskilled labourer at the lower quartiles of unskilled labourers.

[42] In cross-examination and re-examination, Mr Maturure, *inter alia*, testified as follows:

1. A jobseeker with NQF Level 7, hence with a degree, is not guaranteed to reach Paterson level D, but D1, which Mr Maturure used, is entry level for a person with a degree and that is why he avoided using the top level like D5.
2. When asked whether, considering the high unemployment figures, one may have a degree and still be unable to obtain employment, which he confirmed, but testified that people with no qualifications are even more affected by unemployment.

3. He testified that NQF level 5 is when a person goes through training in vocational area with the potential of obtaining a certificate.
4. With NQF level 5, S[...] will be a jobseeker, but she will not be able to compete in the open labour market, since she will be an unequal and vulnerable jobseeker.
5. Although S[...] may have the capacity to reach a NQF Level 05 in the skills development sector, she will probably still need to be employed by a sympathetic employer, due to her neurological and cognitive deficiencies. She is not on par with jobseekers who do not have these deficiencies.
6. Mr Maturure testified that there is also the possibility of periods of unemployment in-between.
7. In re-examination Mr Maturure testified that the possibility still exists that even with a NQF Level 05 in the skill development sector, S[...] is still likely to struggle to obtain employment and would need a sympathetic employer, which Mr Marais agreed is rare.
8. Mr Maturure opined that Mr Marais is evaluating the position of S[...] as though she is fit and well, which she is not.

Mr Marais:

[43] Mr Marais was called as an expert witness, in his capacity as an Industrial Psychologist, on behalf of the defendant.

[44] In his evidence he repeated what he stated in terms of the joint minute between him and Mr Maturure. He further testified in his evidence in chief as follows:

1. Mr Marais testified that although he agrees that the pre-accident potential of S[...] was NQ Level 7, he does not agree with the salary scales as testified by Mr Maturure. According to him people with degrees normally enter at Paterson B4 and progresses to C4/C5.
2. It usually takes 3 to 5 years to progress from B4 to C4/C5, on average 4 years.
3. Mr Marais explained that Paterson D4 is management level with fewer job opportunities. He did not exclude level D for the pre-accident scenario for S[...], but, according to him, it is more probable that she would have reached C4/C5.
4. Mr Marais testified that he is not disputing that S[...] is an unequal competitor and a vulnerable jobseeker in the open labour market, but he disagrees that she is unemployable. He opined that if one can obtain a vocational NQF Level 5, which entails some form of studying or education, one is marketable in the open labour market. S[...] could then enter the open labour market in the semi-skilled occupational group at a Paterson A3 (unskilled band) and progress to a career ceiling of Paterson B4 (semi-skilled band), or at most a C1.
5. He conceded that there will be terms of unemployment, possibly with a delayed entry.

[45] In cross-examination Mr Marais, *inter alia*, testified as follows:

1. He again explained that Paterson D is on managerial level, where job opportunities are much less, and although he does not exclude that S[...] might have reached Paterson D1 in her pre-accident state, but that the majority of people who are employed end at C4 or C5 level. He testified that it is the norm, not the exception. Since there is no indication that S[...] was considered to have been a gifted child pre-accident, she would probably have reached C4 or C5 level as opposed to D level.
2. Mr Marais explained that NQF Level 05 in the “*skills development sector*” means that it is in the vocational sector, which entails more practical training to develop skills as opposed to academic training, although it includes both theory and practical training.
3. It was put to him by Mr Steenkamp, who appeared on behalf of the plaintiff, that S[...] is practically unemployable. He denied same, stating that although employers prefer a non-injured employee, they do employ compromised employees too.

[46] The report of Mr Marais was handed in as an exhibit by Ms Banda, who appeared on behalf of the defendant, as exhibit “L1” and the addendum to his report as exhibit “L2”.

[47] That concluded the case for the plaintiff and for the defendant. I arranged with the respective legal representatives for the filing of heads of argument, which was done on 18 September

2023 and 3 October respectively. No replying heads of argument were filed.

Job Grading and Salary scales.

[48] I need to mention that in the expert report of Mr Marais, in the joint minute between him and Dr Mataruru and in his evidence, Mr Marais testified and explained about different scales that can be used for job grading and for salary scales. He testified that he prefers to make use of Peromnes grading system instead of Paterson. He also prefers not to make use of Robert Koch's estimated salary scales, but rather that of Deloitte. Mr Marais explained his reasons for his stance. Mr Mataruru testified that he prefers to make use of Paterson and Robert Koch's estimated salary scales.

[49] I considered the evidence in this regard, especially that an Industrial Psychologist may choose which scales to use. In the circumstances I can find no reason to deal with the different scales and earnings information. I prefer to make use of the Paterson grading system and Robert Koch's estimated salary scales, like we have been doing in our Courts for many years now.

Career path and loss of future earnings:

[50] As already evident, there is no past loss of earnings applicable, only future loss of earnings.

Pre-accident:

[51] In respect of the pre-accident scenario, it is evident that the respective experts are *ad idem* that S[...] had the ability to pass matric with a Batchelor Endorsement and she could have been able to obtain a post school qualification at NQF Level 7.

[52] The Industrial Psychologists are in agreement that S[...] would have worked in the open labour market until the normal retirement age of 65.

[53] The two Industrial Psychologists, however, disagree on the S[...]’s pre-accident career path. For the sake of ease of reference, I again quote the relevant parts from their joint minute:

1. Mr Maturure o.b.o the plaintiff:

“With a Degree (NQF Level 7) level of education, she would have entered the open labour market at a Paterson Level B4/B5/C1, reaching her career ceiling earning at the upper quartiles of Paterson D1+ level. Her earnings would have plateau at around 40 – 45 and she would have received inflation increases, thereafter.”

2. Mr Marais o.b.o the defendant:

“With a B-degree, she would have entered the open labour market, probably as an intern, and later secure employment, depending on the degree, at the Paterson Grade B4 and progressed to a career ceiling of Paterson Grade C4 or C5, at age around 48 years, due to the impact of the global Covid-19

pandemic had on employers and employment trends. In certain cases, individuals could progress to higher levels.”

- [54] Mr Maturure, on behalf of the plaintiff, testified that a jobseeker with NQF Level 7, hence with a degree, is not guaranteed to reach Paterson level D, but D1, which Mr Maturure used according to him, is entry level for a person with a degree and that is why he avoided using the top level, like D5. However, from their joint minute it appears that Mr Maturure in fact postulated S[...]’s pre-accident career ceiling at “*earning at the upper quartiles of Paterson D1+ level*” and not only Level D1.
- [55] According to Mr Marais, on behalf of the defendant, people with degrees normally enter at Paterson B4 and progresses to C4/C5. In his experience the majority of people who are employed, end at C4 or C5 level. He testified that it is the norm, not the exception. He explained that Paterson level D is on managerial level, where job opportunities are much less, and although he does not exclude that S[...] might have reached Paterson level D in her pre-accident state, since there is no indication that S[...] was considered to have been a gifted child pre-accident, she would probably have reached Paterson C4 or C5 level as opposed to D level.
- [56] In light of the totality of the evidence, I find that, on probabilities, with a Degree (NQF Level 7) level of education, S[...] would have entered the open labour market at a Paterson Level B4/B5/C1, and progressed, reaching her career ceiling earning at the upper quartiles of Paterson Level

C4/C5, at age around 45 years, and she would have received inflationary increases thereafter.

Post-accident:

[57] In respect of the post-accident scenario, it is evident that the respective experts are *ad idem* that S[...] should be able to obtain a NQF Level 5 in the skills development sector.

[58] The Industrial Psychologists are in agreement that S[...] will work in the open labour market until the normal retirement age of 65 years, depending on a variety of factors, such as health status, personal circumstances, personal preferences and conditions of employment, etc.

[59] The two Industrial Psychologists, however, disagree on the S[...]’s post-accident career path. For the sake of ease of reference, I again quote the relevant parts from their joint minute:

1. Mr Maturure o.b.o the plaintiff:

“She will be a candidate for semi-skilled employment. She could enter the labour market as an unskilled labourer earning at the lower quartiles of unskilled labourers, reaching a career ceiling earning at the median quartiles of semiskilled labourers at around the age 40 – 45, receiving inflationary increases, thereafter. Current earnings are noted, refer to Appendix 1. Noting the experts’ findings on 6.1.6 above, Mr Maturure is of the view that she has been rendered practically unemployable in the open labour market considering the rarity of sympathetic employment.”

2. Mr Marais o.b.o the defendant:

“She will be a jobseeker with NQF Level 05, and could enter the open labour market in the semi-skilled occupational group at a Paterson A3 and progress to a career ceiling of Paterson B4 to at most a C1.”

[60] The main issue between the parties regarding the post-accident career-path of S[...], is that according to the plaintiff, she will be employable on the open labour market, albeit that she will be an unequal competitor and vulnerable jobseeker. According to the defendant S[...] will need to be employed by a sympathetic employer, which the Industrial Psychologists agree is rare, and that S[...] is therefore practically unemployable.

[61] Mr Marais testified that he is not disputing that S[...] is an unequal competitor and a vulnerable jobseeker in the open labour market, but he disagrees that she is unemployable. He opined that if S[...] will be able obtain a NQF Level 5 in the skills development sector, which entails some form of studying or education, she will be marketable in the open labour market.

[62] From the totality of the evidence, I agree with the opinion of Mr Marais and is S[...] not to be considered as practically unemployable in the open labour market. However, having said that, I do intend to properly discount the vicissitudes of life, specifically in respect of S[...] personally, by means of a reasonable and fair contingency.

[63] With regard to the post-accident future earnings, after consideration of all the relevant evidence, I am of the view that S[...] will be a jobseeker with NQF level 5 in the skills development sector who could enter the open labour market as an unskilled labourer earning at the lower quartiles of Paterson Level A3 and progress to a career ceiling earning at the median quartiles at Paterson Level B4 at around the age of 40 – 45 years, receiving inflationary increases thereafter.

Contingencies:

[64] It is trite that it is for the court to determine the percentage of contingencies to be applied in a matter such as this.

[65] Contingencies discount the vicissitudes of life and it is a method used to arrive at fair and reasonable compensation. The determination of contingencies was dealt with in **Southern Insurance Association Ltd v Bailey N.O.** 1984 (1) SA 98 (A) at 113G and 116G – 117A:

“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, augurs 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 the loss.

...

Where the method of actuarial computation is adopted, it does not mean that the trial Judge is ‘tied down by inexorable actuarial calculations’. He has ‘a large discretion to award what he considers right’ (*per* HOLMES JA in *Legal Assurance Co Ltd v Botes* 1963 (1) SA 608 (A) at 614F). One of the elements in exercising that discretion is the making of a

discount for 'contingencies' or the 'vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. 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.

...

It is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable. In dealing with the question of contingencies, WINDEYER J said in the Australian case of *Bresatz v Przibilla* (1962) 36 ALJR 212 (HCA) at 213:

'It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned... (The) generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse: All 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad.'

- [66] In the judgment of **Gillbanks v Sigournay** 1959 (2) SA 11 (N) the following was stated at 17 E – F in respect of contingencies in an estimation of a plaintiff's claim for loss of earnings:

“In any estimate of a person's loss of earning capacity allowance must be made for all contingencies including the accidents of life and certain deductions must be made from the estimated gross income to allow for unemployment benefits, insurance and so on. These contingencies would include -

- (i) a possibility that plaintiff's working life may have been less than sixty-five years;
- (ii) a possibility of his death before he reaches the age of sixty-five years;
- (iii) the likelihood of his suffering an illness of long duration;
- (iv) unemployment;
- (v) inflation and deflation;
- (vi) alterations in the cost-of-living allowances;
- (vii) an accident whilst participating in sport such as hockey or cricket, or at any other time which would affect his earning capacity; and
- (viii) any other contingency that might affect his earning capacity.”

[67] In the judgment of **Dlamini v Road Accident Fund** (59188/13) [2015] ZAGPPHC 646 (3 September 2015) at paras [29] – [31] the court dealt with and applied some guidelines referred to by Koch in *The Quantum Year Book*:

[29] 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. (My emphasis)

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

‘Normal contingencies’ as deductions of 5% for past loss and 15% for future loss.

‘Sliding scale’: 1/2 % per year to 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.

‘Differential contingencies’ are commonly applied, that is to say one percentage applied to earnings but for the accident, and a different percentage to earnings having regard to the accident.

[31] When a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to minimize the adverse hazards of life rather than to accept them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should in exercising its discretion lean in favour of the plaintiff as he would not have been placed in the position where his income would have to be the subject of speculation if the accident had not occurred.”

[68] Mr Steenkamp submitted that 15% contingency deduction for pre-accident loss of earnings and 25% contingency deduction for post-accident loss of earnings should be applied as being fair and just. Ms Banda submitted that 35% contingency deduction for both pre-accident and post-accident loss of earnings should be applied.

[69] There appears to be two actuarial reports., The first one is dated 12 April 2022, drafted by Ms Valentini of Munro Forensic Actuaries, and which was handed in by the plaintiff as exhibit “G”. The second “revised” report was also drafted by

Ms Valentini, also on request of the plaintiff's attorneys, dated 31 July 2023, after obtaining the joint minute between the Industrial Psychologists, which was not handed in as an exhibit, but is attached to the heads of argument of Ms Banda.

[70] Mr Steenkamp is relying on scenario 3 of exhibit "G", where contingency deductions of 15% and 25% were made and the total loss of future earnings amounts to R9 628 700.00.

[71] Ms Banda is relying on scenario 2 of the revised actuarial report where contingencies of 15% and 25 % were applied and the total future loss of earnings amounts to R4 266 680.00. However, Ms Band applied a 35% contingency for both the pre- and post-accident scenario and submitted that the total loss of earnings amounts to R4 266 680.00.

[72] Be that as it may, since I have made different findings than those postulated in the five scenarios presented by the actuary, new calculations will in any event have to be made.

[73] With regard to the pre-accident contingency, I have already adapted the postulated career path on the basis that S[...], on probabilities, would have reached only Paterson C5 and not D1+ as postulated by the plaintiff's Industrial Psychologist. In the circumstances there are only the "usual" vicissitudes of life which need to be taken in consideration and therefore, in my view, a 10% contingency will be reasonable in all the circumstances.

[74] With regard to the post-accident contingency, I take the following relevant information into consideration in exercising my discretion:

1. Both Industrial Psychologists suggested that a higher post-accident contingency be applicable to compensate S[...] as she has been rendered a vulnerable employee/jobseeker in the open labour market.
2. The Educational Psychologists agreed that S[...] may struggle to complete NQF Level 4 and her chances to complete same without extensive specialised educational support, are limited. She will probably be able to attain a NQF Level 5 in skills development sector depending on the correct school placement and support for her educational needs. She may need to be employed by a sympathetic employer and deference is made to an occupational and industrial psychologist.
3. The Clinical Psychologist, Ms Grootboom, noted that S[...]’s neurocognitive deficits would affect her academic outcomes.
4. The Neurosurgeons agreed that severe long-term mental or severe long-term behavioural disturbances or disorders are evident. Both experts also suggested that S[...] has a 2 – 3% chance of developing epilepsy in future.

5. The Industrial Psychologists agreed that S[...] will probably attain an NQF Level 5 in skills development and sector depending on the correct school placement and support for her educational needs. They further noted that according to the Educational Psychologists, S[...] may need special schooling and they agree that with special schooling, employment opportunities and earnings have been reduced. The Industrial Psychologists also agreed that with psychological limitations and potential health decline, S[...]’s employability has been compromised in the open labour market. The Educational Psychologists opined that S[...] may need to be employed by a sympathetic employer. The Industrial psychologists agreed that sympathetic employment is rare, thus S[...] has been rendered an unequal competitor and a vulnerable jobseeker in the open labour market. She may experience difficulty securing and sustaining employment in her injured state.
6. Mr Maturure testified that although S[...] may have the capacity to reach a NQF Level 05 in the skills development sector, she will probably still need to be employed by a sympathetic employer, due to her neurological and cognitive deficiencies. She is not on par with jobseekers who do not have these deficiencies. There is also the possibility of periods of unemployment in-between.

[75] I am consequently of the view that a 50% contingency for future earnings post-accident will be fair and reasonable in all the circumstances.

Costs:

[76] There is no reason why the costs are not to follow the outcome, including the costs of the relevant expert witnesses, but excluding the wasted costs of 4 August 2023, which has already been determined.

Order:

[77] The following order is consequently made:

1. The defendant is liable to pay 100 % (Hundred Percent) of the plaintiff's proven damages.
2. The defendant shall furnish the plaintiff with an Undertaking, in terms of Section 17(4)(a) of Act 56 of 1996, in respect of future accommodation of the plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods of a medical and non-medical nature to the plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained in the collision which occurred on 27 December 2015.

3. The plaintiff's attorney of record is ordered to forthwith request the actuary to prepare an actuarial calculation on the following postulations, up to the date of this order:

- 3.1 Future loss of earnings pre-accident:

The minor would have obtained a Degree (NQF Level 7) level of education, whereafter she would have entered the open labour market at a Paterson Level B4/B5/C1, and progressed, reaching her career ceiling earning at the upper quartiles of Paterson Level C4/C5, at age around 45 years, and she would have received inflationary increases thereafter. A contingency of 10% is to be applied.

- 3.2 Future loss of earnings post-accident

The minor should obtain a NQF level 5 in the skills development sector, where after she could enter the open labour market as an unskilled labourer earning at the lower quartiles of Paterson Level A3 and progress to a career ceiling earning at the median quartiles of Paterson Level B4 at around the age of 40 – 45 years, receiving inflationary increases thereafter. A contingency of 50% is to be applied.

- 3.3 A retirement age of 65 years is to be applied to both the pre-accident earnings and the post-accident earnings

4. Leave is granted to the parties to approach Van Zyl, J in chambers, once the aforesaid calculation is received, with a draft order to obtain a further order for the payment by the defendant to the plaintiff of the amount calculated as aforesaid.
5. The aforesaid draft order is to also make provision for:
 - 5.1 An order in respect of costs; and
 - 5.2 The postponement of the issue of general damages to a pre-trial date.

C. VAN ZYL, J

On behalf of the plaintiff:

Adv. G.C. Steenkamp
Instructed by:
S.B SeshibeAttorneys
C/O Matsepes Attorneys
BLOEMFONTEIN
Ref: Mr Seshibe/RAF171/2021
brian@sbseshibeincattorneys.co.za
sewatabrian@yahoo.com

On behalf of the defendant:

Ms N.P. Banda
Instructed by:
Offices of the State Attorney
BLOEMFONTEIN
Link 4311645