



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A327/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
<u>11 April 2024</u>	
Date	Signature

In the matter between:

ADVOCATE S. SAYED N.O.

APPELLANT

(CURATOR AD LITEM N.P. KHOZA)

and

THE ROAD ACCIDENT FUND

RESPONDENT

This judgment has been delivered by uploading it to the case lines digital data base of the Gauteng Division of the High Court, Pretoria, and by circulation to the Parties' legal representatives by email.

JUDGMENT

SETHUSHA-SHONGWE AJ (MOLOPA-SETHOSA J and MOGALE AJ)

[1] This is an appeal against the Judgment and Court Order of Acting Judge Tsatsi (the Court *a quo*), dated 28 June 2021, regarding the loss of earnings and/or earning capacity suffered by the appellant.

Introduction

[2] The appellant instituted an action against the respondent for damages suffered as a result of a motor vehicle collision that occurred on 19 August 2016 on the N11, between Ermelo and Hendrina, Mpumalanga, between a motor vehicle with registration letters and number HYD 908 MP (“the first insured vehicle”) and a motor vehicle with registration letters and number HFT 619 MP (“the second insured vehicle”), in which latter vehicle Nondumiso Precious Khoza (“the appellant”), born on 06 November 2001, was a passenger. The appellant was 15 years old and pregnant at the time of the accident. She lost the foetus during the accident. The appellant is represented by Advocate S Sayed (the *curator ad litem*), appointed by the court on 02 December 2020.

[3] The matter proceeded at the Court *a quo* regarding Loss of earnings/earning capacity only. The issue of General Damages was separated in terms of Rule 33 (4) of the Uniform Rules of Court and postponed sine die since the respondent had not yet decided on whether the appellant’s injuries were serious or not to qualify for General Damages.

[4] The Road Accident Fund initially defended the action (“the respondent/RAF”). The trial hearing was conducted on the Teams Virtual Platform on the 7th of June, 2021. The court *a quo* was informed that the respondent [RAF] was not represented and that the legal representative had withdrawn from the matter. Counsel for the appellant requested to proceed with the matter and referred the court to emails sent to the respondent’s claim handlers, which indicated that various attempts were made to engage with the respondent to ensure its representation at trial, to no avail. There was no appearance on behalf of the respondent on the day of trial, and the matter proceeded unopposed. In terms of Rule 38 (2), the expert reports were acknowledged to constitute evidence adduced at the trial. The experts filed affidavits confirming the findings in their various medico-legal reports aforesaid. The judgment was delivered on 28 June 2021.

[5] The Court *a quo* awarded the appellant R1 100 000.00. In her amended particulars of claim, the appellant claimed, as compensation for loss of earning capacity, a future loss of income, including loss of employment, in an amount of **R9 500 000.00**. In her notice of appeal, she pleads that the court *a quo* ought to have awarded her an amount of **R9 130 303.00** after the CAP for future loss of income/earning capacity [the total claimed being **R14 855 819.00** after contingency deductions. Before contingency deductions, the total amount for loss of earnings/earning capacity is calculated by R Immermann of Gerhard Jacobson Actuaries to be **R24 865 849.00**. I deal with these calculations further below.

[6] It is apposite to mention that going through the documents uploaded onto caselines, there does not seem to have been an amendment to the Particulars of Claim in respect of the amount claimed, nor was such a request made orally during the trial at the Court *a quo*, when one has regard to the record. This is an important observation

made by this appeal Court, which the appellant/plaintiff's attorneys should pay attention to in the future. However, being aware of the appeal, the defendant must have been aware of the amount being contended for but did not raise any objection to the amount being contended for, even though it differed drastically from the amount claimed in the Particulars of Claim. The defendant must be taken to have acquiesced in the increased amount claimed by the appellant. This appeal court will thus adjudicate this appeal based on the increased amount claimed.

[7] Subsequent to the award of R1 100 000 for loss of earnings aforesaid, the appellant sought leave to appeal the said judgment and order of Tsatsi AJ dated 28 June 2021. Leave to appeal was granted to the full Court of this Division by the Court *a quo* on 08 November 2021.

[8] The appellant has applied for condonation of the late delivery of the record because the same could not be obtained timeously from the transcribers. The late delivery of the record and the Heads of Argument was not due to any fault on the part of the appellant and can also not cause any prejudice to the respondent, same only being some 4 days late. Condonation is thus granted.

[9] The appellant sought that the order of the court *a quo* be set aside. The appellant is appealing against the specific finding and the order granted by the court *a quo* in respect of the appellant's claim for future loss of income/earning capacity as a result of the injuries she sustained in the collision. The appellant is accordingly asking the Appeal Court to improve the award significantly.

[10] The respondent (Road Accident Fund) was unrepresented at the hearing of the appeal; however, there was an advocate present during the appeal proceedings who indicated that she had only been instructed by the respondent to come and observe the appeal proceedings.

Grounds of appeal and analysis

[11] The appellant's grounds of appeal are numerous. In their notice of appeal, the appellant raises several issues on appeal. The grounds of appeal revolve around the Court *a quo*'s findings about the nature of the head injury that the appellant suffered and the effect that this had upon the appellant's earning capacity, and her ability to earn an income, and the quantum awarded to her in respect of her future loss of income/earning capacity. In essence, this entails the issue of the amount awarded in respect of the appellant's future loss of earnings/earning capacity, regard being had to the nature of the head injury which the appellant suffered, and the effect that this had upon the appellant's earning capacity and her ability to earn an income in the future. There is no past loss of earnings/earning capacity because the appellant was still a scholar at the time of the accident.

[12] The appellant, in her Notice of appeal, reiterated in her Counsel's Heads of argument, contends that the Court *a quo* erred in the following respects, in respect of the appellant's loss of earnings/earning capacity:

[12.1] The Court *a quo* erred in not finding that the evidence of the appellant's medico-legal experts, including a neurosurgeon and clinical psychologist (specializing in neuropsychology), in conjunction with the medical

records, was sufficient evidence of the severity of the plaintiff's brain injury.

[12.2] The Court a quo erred in not finding that the appellant sustained a severe brain injury.

[12.3] The Court a quo erred in not finding that there was a marked difference between the appellant's pre- and post-accident educational prospects.

[12.4] The Court a quo erred in not finding that the appellant was capable, pre-accident, of achieving a Master's Degree level of education and functioning within the working environment at an employment level commensurate with such a level of education. The Honourable Court a quo erred in not finding that the appellant, in the post-morbid scenario, would only be able to obtain a Degree level of education, with delayed completion thereof, and the inability to function in a working environment commensurate with such a level of education.

[12.5] The Court a quo erred in not finding that the appellant, in the post-morbid scenario, would only be able to obtain a Degree level of education, with delayed completion thereof, and the inability to function in a working environment commensurate with such a level of education.

[12.6] The Court a quo erred in not finding that the appellant's pre-morbid employment potential was as set out in the evidence of the appellant's Industrial Psychologist, Mr Barend P G Maritz.

[12.7] The Court erred in not finding that the appellant's post-morbid employment potential was as set out in the evidence of the appellant's Industrial Psychologist.

[12.8] The Court a quo erred in not finding that the appellant's pre-morbid future earning capacity amounted to R22 156 158.00 before the application of contingencies.

[12.9] The Court a quo erred in not finding that a contingency deduction of 25% should be applied to the appellant's pre-morbid future earning capacity.

[12.10] The Court erred in not finding that the appellant's post-morbid future earning capacity amounted to R2 709 691.00 before the deduction of contingencies.

[12.11] The Court erred in not finding that a 35% contingency deduction should be applied to the appellant's post-morbid future earning capacity.

[12.12] The Court a quo erred in finding that an award of R1 100 000.00 in respect of loss of income/earning capacity was reasonable based upon the evidence; i.e., the Court erred in finding that the appellant was only entitled to R 1 100 000 00 in respect of loss of earnings/earning capacity.

[13] Before the court were the expert reports of:

[13.1] Dr. P. Engelbrecht- Orthopaedic Surgeon

[13.2] Dr. T.P Moja - Neurosurgeon

[13.3] Dr. T.P Moja (Addendum Report - Neurosurgeon

- [13.4] Ingrid Jonker- Neuropsychologist
- [13.5] Dr. J.A Smuts - Neurologist
- [13.6] Dr. J.A Smuts (Addendum Report - Neurologist
- [13.7] Dr. M. Naidoo - Psychiatrist
- [13.8] Prof J. Seabi - Educational Psychologist
- [13.9] Dr. JPM Pienaar - Plastic & Reconstructive Surgeon
- [13.10] Dr. C. Weitz - Ophthalmologist
- [13.11] Dr. Burgin - Gynaecologist
- [13.12] Michael Sissison - Clinical Psychologist
- [13.13] Dr. Fredericks - Disability & Impairment Assessor
- [13.14] N. September - Occupational Therapist
- [13.15] Bernard Maritz - Industrial Psychologist
- [13.16] G. Jacobson - Actuaries
- [13.17] G. Jacobson (Updated Report - Actuaries

[14] From the evidence, the appellant suffered several injuries, including a head injury, neck, knees, and multiple fractures of the right clavicle.

[15] As a result of the injuries aforesaid, more specifically the head injury, the experts state that she suffers from neuro-cognitive difficulties such as memory difficulties, decreased ability to concentrate, mental slowing, multitasking difficulties, and planning difficulties. Further that, she suffers from neurobehavioral difficulties, amongst others, in the form of low frustration tolerance associated with verbal outbursts, problems coping with pressure and stress, neuropsychiatric difficulties, and post-traumatic stress disorder.

[16] The appellant further has some scarring over her right forehead and into her right frontal and parietal scalp; there is a large 15 cm scar that is visible and very

unsightly. On her right arm, there is a 15 cm x 5 cm hyperpigmented abrasion scar that is very visible and unsightly. Over her right clavicle, there is a 6,5 cm surgical scar and three 1cm puncture scars that are visible and unsightly. On both knees, there are multiple abrasions and lacerations. On the left, it is 6 cm x 4 cm, and on the right, it is 4 cm x 4 cm. They are irregular, hyperpigmented, visible, and very unsightly. She has bilateral patchy and mild peripheral visual field scotomas.

[17] The issue to be considered is the court's findings about the nature of the head injury and to what extent it will affect the Plaintiff's future earning capacity.

[18] In paragraph 34 of the Judgment, the Court *a quo* finds as follows:

"34. In casu, there is no verified specialist radiology report to confirm the alleged "severe brain damage" allegedly suffered by the Plaintiff. The specialist radiology report is the report that would have been the one confirming the clinical diagnosis of the alleged "severe brain damage" allegedly suffered by the Plaintiff. This report is supposed to contain the Plaintiff's brain images showing the alleged brain damage."

[19] In paragraph 40 of the Judgement, the Court *a quo* states:

"40. I am of the considered view that it is difficult to consider the alleged severe brain damage and link same to the motor vehicle accident without the verified report of a qualified diagnostic radiologist. I am of the view that the verified report of the qualified diagnostic radiologist and an affidavit by a qualified diagnostic radiologist confirming the contents of the radiology report, confirming the clinical findings, would have assisted the Court in this regard."

[20] In paragraph 41, the Court *a quo* further states:

"41. The verified report of a specialist radiologist would have been compiled from images verifying the alleged "severe brain damage." The name of the specialist diagnostic radiologist is not contained in the draft order, indicating that such a report was not considered. "

[21] It was submitted on behalf of the appellant, correctly so, that the aforesaid paragraphs, read together with the wording used almost throughout the judgment of "alleged" "Severe Brain Injury," indicate that the Court *a quo* did not consider the nature of the injury as having been proven to be "Severe."

[22] It was further submitted that the Court *a quo* erred in not finding that the brain injury was severe. The hospital records, including the brain scan reports, were admitted by the respondent's erstwhile attorneys. Indeed, the Court *a quo* erred in not considering that the appellant suffered a serious brain injury and not having regard to the CT Brain scans forming part of the Ermelo Hospital records, which records were admitted by the respondent's erstwhile representatives. Therefore, there was no need for the appellant to prove the facts that were admitted. The Authorities are clear on this.

[23] At a pre-trial conference held between the appellant and the respondent's erstwhile attorneys on 03 December 2019, the respondent/RAF was represented by an attorney, Mr Kgomommu. Mr Fourie represented the appellant. The defendant's representative was asked whether the 'defendant admits the records of Ermelo Hospital,' and the answer was affirmative. Paragraph 3.13 reads as follows:

“Does the defendant admit the records of Ermelo Hospital as served on the defendant?”

Defendant’s “ANSWER: Admitted”

[24] It is not in dispute that the appellant was taken to the Ermelo Hospital after the accident. She was treated and hospitalized there.

[25] The purpose of the pre-trial conference has been said to be *"intended to expedite the trial and to limit the issues before the court."* See *Hendricks v President Insurance Co Ltd* 1993 (3) SA 158 (C) at 166E.

[26] Rule 37(4)(a) and Rule 37(6)(g) specifically make provision for parties to request admissions and for admissions, so made, to be recorded in trial proceedings. Therefore, suppose one regards Section 15 of the Civil Proceedings Evidence Act 25 of 1965 as read with Rules 22 and 37 of the Uniform Rules of the High Court. In that case, any admissions made either in the Plea or in a pre-trial conference are admissions "on the record" in the proceedings to which the same relate and accordingly absolve the plaintiff of presenting evidence to prove the same and stop the defendant from presenting evidence to disprove same. See *Road Accident Fund v Krawa* 2012 (2) SA 346 (ECG).

[27] Section 15 of the Civil Proceedings Evidence Act 25 of 1965 provides as follows:

"It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings".

[28] In pleadings, an admitted issue is eliminated from the issues to be tried, and the plaintiff is relieved of the duty to present evidence to establish the issue. The corollary to the aforesaid is that a defendant is estopped, for purposes of that case, from contending to the contrary of the facts which have been admitted. See *Gordon v Tarnow* 1947 (3) SA 525 (A); and *Whitaker v Roos* 1911 TPD 1092 at 1102,

[29] The Supreme Court of Appeal decision of MEC for Economic Affairs, Environment & Tourism v Klaas Kruizenga and others (169/2009) [2010] ZASCA 58 (1 April 2010) is quite informative in respect of the attitude which the courts should adopt in respect of the withdrawal of admissions made by attorney, during the course of litigation and pre-trial conferences specifically. Generally, a party who has made such an admission will be bound to such an admission, or the entire purpose of the pre-trial will be diluted.

[30] When one has regard to the findings of the Court a quo set out above, it becomes obvious that it is not that the radiological report was not considered to be insignificant or less significant than any other expert. Still, the appellant didn't have to prove the content of the relevant brain scans because their content had already been admitted by the defendant and could, therefore, be considered and relied upon as fact by the other expert witnesses without the necessity of producing further evidence to prove the already admitted facts. The admitted hospital records, together with the evidence of the appellant's experts, show that the appellant indeed sustained a severe brain injury.

[31] It is not correct that "...*there is no verified specialist radiology report to confirm the alleged "severe brain damage" allegedly suffered by the Plaintiff.* The very first 3 pages of the records of Ermelo Hospital relate to a CT Brain and cervical spine Scan report at Caselines ("CL") page 064-1, dated 19 August 2016 [taken on the

day of the accident]; this would be on the admission of the appellant; the CT scan indicates that amongst others, there was “brain contusion and cerebral oedema”.

[32] The 4th page of the Ermelo hospital record is the second CT Brain scan report, at CL page 064-4, dated 21 August 2016, indicating “brain contusion and mild brain oedema.”

[33] All the experts refer to these Ermelo CT scans in their reports; this shows that they all had regard for the C T brain scans aforesaid when they assessed the appellant.

[34] The specialist neurosurgeon, Dr. Moja, after assessing the appellant, states in his report, dated 03 August 2019, as well as in his Addendum report dated 26 August 2020, that the appellant has” sustained a severe traumatic brain injury, and a large open wound on her head; and that she is suffering from neurocognitive and neuropsychological problems.

[35] The neurologist, Dr J A Smuts, states in his report dated 04 July 2019 that the appellant has suffered a serious head injury but moderate brain injury. In his Addendum report dated 26 August 2020, he explains as follows:

“In the report, there is mention of a serious head injury but a moderate brain injury. This is not contradictory since what is implied is that the direct trauma to the head included a significant amount of soft tissue trauma. Brain damage is determined based on many other factors including the functional outcome over time. Using these criteria, the brain injury, which is diffuse axonal in nature, was classified as moderate in severity.”

[36] The court a quo clearly misdirected itself in finding that the absence of a qualified Diagnostic Radiologist report creates a non-existent link between severe brain damage and motor vehicle accidents. The Court a quo simply disregarded the admitted Ermelo Hospital records, which included the CT scan reports. Thus, the court a quo erred in not finding that the brain injury was severe.

[37] In respect of loss of earnings/earning capacity, the appellant's Industrial Psychologist postulates that:

Pre-morbidly:

[37.1] Had it not been for the accident, the appellant would have likely completed grade 12 (NQF Level 4) at the end of 2020 (aged 19). Taking into consideration that she was pregnant in 2016, she would have likely obtained her Grade 12 one year later than the norm

[37.2] Considering her family background, socio-economic circumstances, and educational achievement mark before the accident, she would have been able to further her studies after completing grade 12.

[37.3] As such, in 2023, she would likely have obtained a three-year degree qualification of choice (NQF Level 07), most likely furthered her studies for a year to receive an honors degree (NQF Level 08, end of 2024), and probably proceeded to get a Master's degree (NQF 09) to complete by the end of 2027.

[37.4] After that, she could have obtained or secured a job related to NQF Level 09 qualification, entering the labor market with earnings comparative to a Paterson C2 (MED Level) basic salary.

[37.5] After two years of employment, her earnings would likely progress to a total annual package comparable to Paterson E1 (MED Level) by the age of forty to fifty, resulting in her reaching her career ceiling.

[37.6] Her earnings would have increased depending on the inflationary increases, further promotional opportunities, and the company or industry until retirement.

[37.7] The appellant would have been able to function in a suitable occupation until the average retirement age of 65 years.

Post-morbid

[38] Dr. PR Engelbrecht (Orthopaedic Surgeon) noted that “already at 17 years, she has marked degeneration of C1 / C2 cervical joint and lumbar spine. She will require a fusion of C1/C2, and as such, the neck rotation will be impaired by at least fifty percent, impacting her future career choice, work capacity, and lumbar spine. She will require six weeks to three months’ sick leave allowed for recovery, respectively.

[39] Dr. C Weitz (an Ophthalmologist) found “myopic astigmatism, which is a coincidental finding and correctable with spectacles” and “bilateral patchy and mild peripheral visual field scotomas.”

[40] Dr. N. Naidoo (Psychiatrist) noted that in lieu of the documented GCS 5/15, it is likely the appellant suffered, at the very least, “Severe traumatic brain injury,” which is associated with neuropsychiatric sequelae. He states that “it is likely that the

Plaintiff is presenting mild Neurocognitive disorder “due to traumatic brain injury,” which is associated with neuropsychiatric sequelae.

[41] Dr T P Moja (Neurosurgeon) noted the risk of developing late post-epilepsy is about 10% to 15% and that she has reached maximum medical improvement. He states that the appellant has sustained a severe traumatic brain injury and that “she suffers from residual neurocognitive and neuropsychological problems.”

[42] Dr J P M Pienaar’s (Plastic and Reconstruction Surgeon) report deals with scarring on the appellant, which he says “subjects her to social rejection, stigmatization and inappropriate remarks by peers and strangers. These issues have to do more with General Damages, and scar revision surgery suggested by this doctor is covered by section 17(4) of the Road Accident Fund undertaking.

[43] Dr. J A Smuts (Neurologist) states that the appellant has “*sustained a blow to the head which resulted in a moderate concussive head injury with associated brain injury.*” amongst others, stated that “*due to the neurological status, the patient is likely not to be able to perform in the capacity as what would have been the case had the accident not occurred.*”

[44] Dr J Seabi (Educational Psychologist), states that the appellant “*is cognitive, emotional, physical, social and scholastic difficulties following the accident are directly linked to the injury at hand*”,; and that “*her psychological and scholastic functioning has been severely compromised by accident and pre-morbidly, she would have been able to complete her master’s degree had she not been involved in an accident.*” Post-morbidly, he believes that “based on all available information (including cognitive difficulties, i.e. slow mental processing of information, Average Verbal cognitive functioning, concentration lapses, and difficulties with retrieval of

information), which serve as added barriers; recurrent headaches; uncontrolled seizures; emotional trauma; and travel related anxiety incurred due to the accident and the sequelae of her injuries), given the accident in question, her highest level of education would in all likelihood be a bachelor' degree (NQF level 7), mostly likely with delayed graduation by a year or two".

[45] Ms J Jonker (Counselling Psychologist) stated that the appellant's intellectual level has dropped as opposed to pre-accident as she shows significant cognitive problems that include (but are not limited to) visual and auditory multi-tasking, mental processing speed and memory difficulties. As such, she cannot work in executive or managerial positions in the market. Further, Ms Jonker noted that her self-esteem, including her choice of study, future career choices, progression, and earning capacity, are affected.

[46] Ms. N September (Occupational Therapist) stated that "delays in entering the open labour market are inevitable due to projected delays in obtaining and securing tertiary education/vocational training." She further projected a ten—to fifteen-year premature retirement due to cervical and spine deterioration coupled with neuropsychiatric challenges; as such, she will be precluded from medium, heavy work, hence narrowed vocational options.

[47] Ms. September further noted that Plaintiff would probably take five years to complete a three-year course due to her cognitive and psychological shortcomings. She will seek a semi-skilled work environment and earn medium and upper quartiles for related positions.

[48] There is no past loss of earnings, as the appellant was still a scholar at the time of the accident. Based on her academic performance, she was promoted to Grade 10

the year following the accident and completed Grade 12, with a Bachelor's pass, in 2019 (aged 18).

[49] It was submitted on behalf of the appellant that although she successfully completed Grade 12 without having to repeat a grade and appears to be coping from a scholastic and future educational/employability perspective, when one considers all specialists' opinions, it is evident that the accident has had a severe impact on her physical, cognitive and psychological capacity.

[50] At the time of the trial, the appellant was enrolled in a five-month ICDL course at Ngetalwati Computer School, which she must have obtained by October 2020. It was submitted that this qualification has no NQF Level assigned as recognized by SAQA and that a delay in educational progression and potential is already a reality. If truth be told, this cannot be correct because the delay may be because the appellant did not apply timeously to a University to commence studying for her chosen degree, and this delay has nothing to do with the injuries she sustained.

[51] At the time of the hearing of this appeal, the appellant was studying for a Degree in Psychology at the North West University. It was stated in the Heads of argument on behalf of the appellant that qualification for this degree will likely take her five years to complete due to her cognitive and psychological shortcomings. However, this was not elaborated on during the argument in the appeal, as the appellant had already commenced her psychology degree studies.

[52] It is further contended that should she succeed in obtaining the qualification, she will not meet the minimum requirements to proceed with an Honours Degree and will be obligated to seek employment. Should she secure employment (after approximately one year of active job hunting), it will most likely entail a basic salary

comparable to a Paterson B5 (MED Level), and such employment entails cognitively demanding work and considering the specialist's opinions, she will never be able to sustain such employment; she will never be able to fulfil the cognitive demands imposed by job opportunities related to such a qualification, resulting in her finding it increasingly difficult to sustain employment. Therefore, she will most likely only remain in similar positions for a maximum of six months per annum for approximately five years.

[53] On the facts before this Court, it is difficult to fathom the basis upon which this conclusion is reached that the appellant will mostly probably only work for six months per annum for five years. This is one of the considerations considered in arriving at the actuarial calculations. Further, the industrial psychologist postulated that the appellant would likely study for her honors degree after completing her junior degree. So, it is not correct that she will not meet the minimum requirements to proceed with an Honours Degree.

[54] It is further contended that to sustain a living; the appellant will most probably pursue employment within the Semi-Skilled corporation environment, earning between the Median and Upper Quartiles for related positions. Furthermore, she will remain in such a capacity for the duration of her working life, only benefitting from inflationary increases up until retirement. The postulation that the appellant's earnings are limited to semi-skilled laborers (per the Industrial Psychologist) cannot, in my view, hold. It is highly unlikely that with a degree, even if it were to be said that she would somehow be compromised due to the sequelae of her injuries, she would end up earning such a low semi-skilled laborer's basic salary. To some extent, the postulation of the appellant's future loss of earnings is exaggerated.

[55] The opinion of the experts should not be looked at in isolation, for they serve as a guide and not a directive. Having considered all expert reports and references to case law and all submissions by counsel for the appellant, also considering that the appellant enrolled for a second-year Psychology course at a University with no reports of not coping with the course she studies, she can still work and build her career even as a consultant, where she would work at her own pace, without any pressure, and earn a decent living wage. The Plaintiff is not a paraplegic with a total and permanent impairment. See *Rudman v RAF* 2002(4) ALL SA 422 (SCA) dealing with a test on loss of earnings. I believe that the plaintiff's employability is not entirely restricted.

[56] When the expert reports were compiled, mostly in 2019, the appellant was doing Grade 12. At the time of the hearing of this matter at the court *a quo*, the appellant was doing a Computer course at Ngetalwati Computer School. It is not in dispute that she was at the University of North West when the appeal was heard.

[57] The calculations of the Actuary, R Immermann of Gerhard Jacobson Actuaries, set out in the updated actuarial report dated 27 May 2021, are calculated as of 1 June 2021. According to the industrial psychologist, Mr B Maritz, if one considered the expert opinion objectively, the appellant would still be studying and not yet employed in 2021. There can't be any loss before 2023 because the appellant would not have been working; she would still be a student [when one applies one's mind thoroughly to the facts]

[58] Further, and most importantly, none of the experts considered that since the appellant was pregnant at the time of the accident, there is a possibility that she may have had to stop going to school to look after her baby for a considerable time, not only for 1 year, as most experts if not all, postulate that she would have delayed for 1 year only due to childbirth. This aspect was never explored at all. The appellant might

not have even progressed to higher education because of the need to work to support her child. These aspects call for a much higher contingency deduction.

[59] The actuary, R Immermann, applied a 25% contingency deduction to the pre-morbid future loss of earnings and a 35% contingency deduction on the post-morbid future loss of earnings. The appellant's counsel mooted for the above-mentioned contingencies to cater to increased risks.

[60] As a result, counsel for the appellant arrived at R 14 855 819 (fourteen million eight hundred and fifty-five thousand eight hundred and nineteen rands). According to the actuarial calculations, the cap is applicable in this matter. Therefore, the loss, which the appellant is allowed to recover, amounts to R9 130 303 (nine million one hundred and thirty thousand three hundred and three rands).

[61] As much as I concede that the amount awarded by the trial court in the sum of R1 100 000 (one million one hundred thousand rands) in exercising its discretion was not reasonable and fair in the circumstances, I cannot find persuasive reasons to confine to the total amount of R9 130 303 (nine million one hundred and thirty thousand three hundred and three rands) as per the Actuarial Report after the cap.

[62] It is trite that contingency deductions are within the court's discretion and depend upon the judge's impression of the case. See *Southern Insurance Association v Bailey* NO 1984 (1) SA 98 (A) @ 113 and Robert Koch: *Quantum Yearbook* 2011 at p. 104.

[63] In *Southern Insurance Association Ltd v Bailey* NO, the following was stated:

“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.”

Matters that cannot be otherwise provided for or cannot be calculated exactly but that may impact upon damages claimed are considered contingencies and are usually provided for by deducting a stated percentage of the amount or specific claims. See *De John v Gunter* 1975 (4) SA 78 (W) at 80F. Contingencies include any possible relevant future event that might cause damage or a part thereof or which may otherwise influence the extent of the plaintiff's damage. See *Erdmann v Santam Insurance Co. Ltd* 1985 (3) SA 402 (C) at 404; *Burns v National Employers General Insurance Co Ltd* 1988 (3) SA 355 at 365. Further, “....A court may be entitled to qualify an amount of damages from an estimate of the plaintiff's chances of earning a particular figure. The figure will not be proved on a balance of probability but will be a matter of estimation.” See *De Klerk v Absa Bank Ltd and Another* 2003 (4) SA 315 (SCA); See also *Goodall v President Insurance Company Ltd* 1978 (1) SA 389 (W); and *Road Accident Fund v Guedes* (61104) 2006 ZASCA 19 2006 SCA 18 (RSA-. “The deductions are the court's discretion, and there are no fixed rules regarding general contingencies. “

[64] Taking into consideration all the facts before this court and the totality of the evidence before this court, as well as the observation and concerns raised, I am of the view that the best way to deal with this matter is to apply higher contingencies; [higher than the contingencies suggested by the actuary and counsel for the appellant. I am of the view that the following contingencies are more appropriate: 50% deduction Pre-morbid and 45% deduction post-morbid.

[65] Based on the above, and applying contingencies stipulated in paragraph [64] hereabove, fair and adequate compensation for the appellant's future loss of earnings is **R6 842 894.00** (Six Million Eight hundred and forty-two thousand Eight hundred and ninety-four rands)

[66] As a result, I would uphold the appeal and substitute the court a quo's award accordingly.

[67] I accordingly make the following order:

1. The appeal is upheld.
2. Prayer 2 of the Court order of the Court a quo, dated 7 June 2021 [stamped 28 June 2021], is set aside and replaced with the following order:

“2. The Defendant shall pay the Plaintiff an amount of **R6 842 894.00** (Six Million Eight Hundred and Forty-Two Thousand Eight Hundred and Ninety-Four Rands) in full and final settlement of Plaintiff's claim for loss of earnings, payable into the Plaintiff's attorneys of record trust account with the following details:

Account Holder: Ehlers Attorneys

Bank Name: FNB

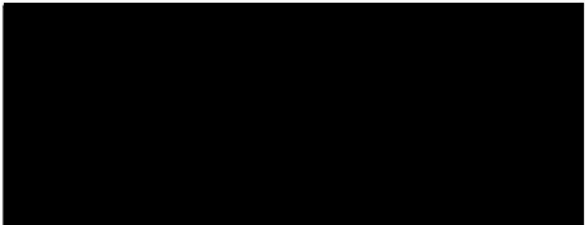
Branch Code: 261550

Account Number: 62024226799”



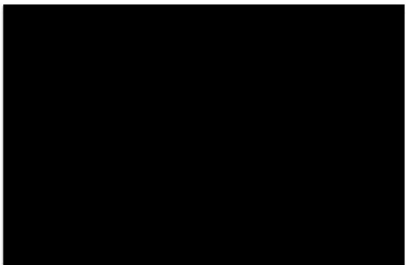
N.C. SETHUSHA-SHONGWE
Acting Judge of the High Court

I agree, and it is so ordered



L M MOLOPA-SETHOSA
Judge of the High Court

I agree



K J MOGALE
Acting Judge of the High Court

Appearances

Counsel for the Appellant.
Instructed by

: Adv. C.M. Dredge
: Ehlers Attorneys Inc

Counsel for the Respondent

: No Appearance [Unopposed]