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

CASE NO: 39437/2011

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **YES**

DATE: 13 July 2021

SIGNATURE

In the matter between:

B[...] **B[....]**

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

(CLAIM NO: 3[...]) (LINK NO: 2[...])

JUDGMENT

KHWINANA AJ

- [1] The Plaintiff is B[...] B[...], an adult female person, who instituted action against the Defendant in her personal capacity pursuant to a motor vehicle accident that occurred on the 10th of February 2009.
- [2] The plaintiff was 19 years old at the time of the accident. She is now 31 years old. The plaintiff was student at the time of the accident. She is currently a nail technician.
- [3] Merits have been settled and Quantum is still in dispute. It is common cause that with regard to future medical, hospital and related costs, the Defendant will provide the Plaintiff with an undertaking in terms of Section 17(4)(a).
- [4] The issue of liability was previously settled on the basis that the defendant is liable for 80 % of the Plaintiff's proven and/or agreed damages. Counsel submits that the issue of general damages and Future medical expenses, past and future loss of income was previously settled between the parties however said settlement has not been made an order of court and as such provision is made in the draft order the Plaintiff is moving for. Default judgment is moved for in terms of past medical expenses only. The defendant has prepared and filed confirmation of offer and acceptance that can be found on CaseLines. The Defendant's defence has been struck out. A notice of withdrawal of the attorneys of record was received.
- [5] The Plaintiff appointed the following experts: Orthopaedic surgeon; Plastic surgeon; Ophthalmologist; Urologist; Clinical Psychologist; Educational Psychologist; Occupational therapist; Industrial Psychologist; Actuary and Orthotist. The Plaintiff sustained the injuries.

General damages

- [6] The Plaintiff's appointed Plastic surgeon opinionated and stated the following: The Plaintiff's appointed clinical psychologist opinionated and stated the following: It is a trite principle of our law that a court in search of an appropriate quantum for general damages must have regard to previous comparable cases. As stated by the Supreme Court of Appeal in **De Jongh v**

Du Pisani [2004] 2 All SA 565 (SCA) at 682I an award made will be fair if it is consistent with previous cases of similar facts and law.

- [7] In the matter of **Wright v Multilateral Motor Vehicle Accident Fund** reported in **Corbett and Honey**, Vol 4 at E-3-31 and in particular to the passage at E3-36 where Broom DJP stated as follows: *“I consider that when having regard to previous awards one must recognize that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection in the changes of society, the recognition of greater individual freedom and opportunity, rising standards of living and a recognition that our awards in the past have been significantly lower than those in most other countries.”*
- [8] The age, sex, status, and relevant physical and psychological characteristics of the plaintiff may influence the award, e.g. physical state and other aspects of the plaintiff at the time of the accident as to endure pain or not etc. For more see **Klopper**, *The Law of Third Party Compensation* 1st Ed on p 144. The Judge will assess the award to what he/she deems to be fair and reasonable under the circumstances, the fairness and reasonableness towards the plaintiff and the defendant, i.e. the Fund. The list is not exhaustive, but include the pain endured, the intensity of the pain, the disfigurement of the body of the plaintiff, loss of amenities, shortened life/working expectancy of the plaintiff etc. See **Klopper** p 150 on. Previous comparable awards, adjusted to reflect current values, are also taken into account when calculating the reasonable and fair award to be made for general damages. See **Road Accident Fund v Marunga 2003 (5) SA 164 (SCA)** at 169E-F.
- [9] In the case of **Mohlaba v Road Accident Fund (12010/2014) [2016] ZAGPPHC 12** (21 January 2016) the plaintiff was awarded an amount of R540 000.00. The plaintiff suffered serious injuries which had a permanent effect on his life, in particular his future earning capacity. The injuries can be summarized as follows: *“the plaintiff sustained a right proximal radius and ulna fracture. A bony anklosis has formed between the proximal radius and*

ulna. On clinical examination the plaintiff has no pro-and supination of his forearm and his forearm remains in a fixed position 20 degrees pronation. The loss of the forearm pro- and supination of the plaintiff's dominant hand will prevent him from working as a motorcycle mechanic. He has suffered a significant loss of working capacity. He has suffered an injury to his right ulna nerve resulting in loss of sensation in his small and ring fingers and some loss of his intrinsic hand function".

- [10] In ***Abrahams v Road Accident Fund 204 (7J2) QOD 1 (ECP)***, a 41 year old male suffered a badly communicated fracture of the right proximal femur; fracture of the right distal fibula and patella, fracture of the right medial malleolus, severe soft tissue injuries to the left hand; secretion in the chest and a mild concussive traumatic head injury; shortening of the right lower limb with need to wear an assistive device. He was awarded general damages of R663 000-00 (in 2017 terms).
- [11] In ***Protea Assurance Co Ltd v Lamb 1970 (2E3) QOD 117 (A)*** where the plaintiff, aged 29 at the time, sustained injuries to his legs involving a closed fracture of the left femur and a compound fracture of the right tibia and fibula. After several skin grafts over several years, he had to wear a built up shoe with limited movement of his knee and ankle. His personality changed and he gave up all extra-mural activities such as playing rugby and dancing. He underwent various procedures during the following 4-5 years after the accident. He was awarded R20 000,00 for general damages after appeal, the converted 2016 value amount to R1 222 000,00.
- [12] In the matter of ***Roe v The Road Accident Fund (2009/161570 [2010] ZAGPJHC*** (1 April 2010) the plaintiff sustained a fracture of the femoral shaft, fracture of the tibia and fibula, fracture of the right patella, fracture of the left humerus, injury to the right foot and upper tooth fractures. In this matter the court awarded the plaintiff R650 000 in respect of general damages, which amount translates into an amount of R995 171.60 in 2016 terms. In light of the aforementioned it is submitted that the offer received is fair and reasonable.

[13] Loss of income

13.1 The defendant's expert (orthopaedic surgeon) recorded the following:

"WORK CAPACITY

Past

She returned to school around April 2009 and failed all her first quarter examinations. She then returned again at the commencement of the second quarter, attending school with difficulty, as she was wheelchair bound, and as a result failed her second quarter examinations as well. She passed her record examination, as well as the final Matric examinations, with university exemption, but was unable to take up further studies.

She was then employed as a cashier at the pharmacy for some months, as an assistant at a swimming school for children, from where she had to resign in order to be operated on in January 2011, after which she was employed on a part-time basis by a lawyer, doing administrative work, and commenced her studies as beauty therapist and nail technician. She commenced employment around January 2012 by Dr H C Toerien at 'Face & Body' in White River, where she worked with difficulty due to lower back pain, stiffness of the left hip and left knee when standing and sitting for some time.

Present

[13.2] *The patient is employed by Dr H C Toerien at Face & Body, and she performs her duties with some difficulties, as noted."*

The plaintiff's expert (occupational therapist) recorded the following:

RESIDUAL WORK CAPACITY AND EARNING POTENTIAL

- [13.3] *Ms B[...] was in Grade 12 at the time of the accident. She passed Grade 12 at the end of 2009. She obtained qualification as Nail Technician, also doing lashes, waxing and microblading. She is currently working as a Nail Technician where the physical demand appears to be within sedentary to light capacity.*
- [13.3.1] *During the physical assessment, she reported severe pain in her lower-back with prolonged standing, walking, kneeling, lifting and carrying of weights. She reported severe pain in her left knee with prolonged standing, squatting, kneeling, walking and ascending stairs. She reported pain in her left hip with prolonged walking. She displayed impaired left knee flexion with no movement in her left ankle. According to the WorkWell functional capacity evaluation, her current physical ability is within light parameters which meet the physical demand of her current job as a Nail Technician, but she experienced pain with prolonged sitting, standing and walking periods.*
- [13.3.3] *It is recommended that an occupational therapist will perform a work visit to implement ergonomic principles in her work environment. It is recommended that she will implement joint protection principles and spinal hygiene principles when performing her work tasks. She will benefit from proposed medical intervention, followed by comprehensive rehabilitation and should then be able to perform her work duties with more comfort. She would however need to make adjustments for the rest of her life when performing her word (sic) duties due to the mobility challenges she faces. It can be expected that her pain symptoms will influence her productivity since she needs to alter he position often to relief the discomfort in her lower-back and left leg. Her physical and emotional challenges render her a*

vulnerable person and an unequal competitor in the open labour market.

- [13.3.4] *Dr F A Booyse, orthopaedic surgeon, opines that the claimant's work capabilities were detrimentally influenced by her injuries and its' sequelae, and it is unlikely that the claimant will be able to return to her pre-accident level of activities and work capabilities as a result of pain and symptoms arising from her injuries. He reported that these injuries will result in increasing signs and symptoms of disability and will deteriorate with advancing age.*
- [13.3.5] *Ms R Nel, clinical psychologist, opines that the client's physical pain and discomfort as well as her scarring has had a significant impact on her emotional well-being, and reported symptoms of Major Depression. She reported that Ms B[...]s physical pain and decreased psychological functioning could impact on her motivation and efficiency which would prevent her from optimal functioning in any work environment.*
- [13.3.6] *Ms P Steyn, educational psychologist, opines that Ms B[...] probably had the potential to complete a three-year Diploma but for the accident. She was a Grade 12 learner and at the time of the accident and managed to pass Grade 12 despite intense pain and hospitalization, but did not continue with her studies. She managed to complete a certificate as a Nail technician leaving her with a NQF level 4 as highest qualification. Ms Steyn reported that although no significant cognitive decline was evident because of the accident, several operations to her left leg, pain and emotional turmoil contributed to a lack of motivation to uplift her qualifications to reach her pre-accident potential. Ms Steyn reported that she may never be regarded as an equal competitor in the open labour market as she may not do physically demanding work, can't sit, walk or stand for*

extended periods, she has gained a lot of weight and portrays as severely depressed. Ms Steyn stated that the psychotherapy might improve her general self-concept, but she will probably always be regarded as emotionally and physically vulnerable. She reported that discomfort, pain and signs of depression may thus always make Ms B[...] and unequal competitor in the open labour market.

[13.3.7] The plaintiff's expert (industrial therapist) recorded the following:

"The writer conducted a telephonic conversation with Ms Steyn (Educational Psychologist) on the 29th of March 2018 and she confirmed that a three-year diploma is at an NQF 6 level and that this was merely a typing error in her original report. The writer accepts Ms Steyn's expert opinion in this regard and Ms B[...]’s own testimony regarding her plans to further her studies after school. Uninjured, Ms B[...] would therefore have been in a position to do much better academically in Grade 12 and from 2010 she would have enrolled for a National Diploma in one of her fields of interest, such as in Education, Somatology, Human Resource Management, Business management, Public Administration or Interior Design. She would have been a full-time student for three years and would most probably have completed her studies by the end of 2012 and thereafter she would have entered the open labour market with the career and earnings potential of someone with an NQF level 6 qualification. The writer suggests that a significantly higher than normal post-accident contingency deduction should be applied to account for the fact that she will remain physically and psychologically vulnerable and is likely to suffer extensive future periods of unemployment and/or reduced levels of earnings."

[13.3.8] The actuary based his calculation on the following:

Income had the accident no occurred:

Considering the above, I assumed that, had the accident not occurred, Ms B[...]’s income would have been as follows:

Scenario 1:

- She would have completed a Diploma in December 2012 and remained unemployed for 6 months*
- She would have started working on 1 July 20213, earning R60’00 per year (R5’000x12, assumed in April 2018 terms) for 1 year*
- From 1 July 2014, an income of R214’176 per year (median basic salary Paterson B4 in September 2017 terms)*
- Increasing in a straight line until reaching R417’096 per year (median basic salary Paterson C4 in September 2017 terms) at age 45*
- Thereafter, increasing with earnings inflations until retirement at age 65.*

Scenario 2:

- She would have completed a Diploma in December 2021 and remained unemployed for 6 months*
- She would have started working on 1 July 2013, earning R60’000 per year (R5’000x12) assumed in April 2018 terms) for 1 year*

- *From 1 July 2014, an income of R280'140 per year (median guaranteed package Paterson B4 in September 2017 terms)*
- *Increasing in a straight line until reaching R580'116 per year (median guaranteed package C4 in September 2017 terms) at age 45*
- *Thereafter, increasing with earnings inflations until retirement at age 65*

[13.3.9] Income having regard to the accident:

Considering the above, I assumed that, having regard to the accident, Ms B[...]’s income would be as follows:

- *She completed Grade 12 in December 2009*
- *From 1 January 2010 until 30 June 2010: a total income of R21'000 (R3'500x6)*
- *From 1 July 2010 until 31 December 2011: a total income of R153'000 (R4'500x18 + R4'000x18)*
- *From 1 January 2012 until 31 December 2013: a total income of R120'000 (R5'000x24)*
- *From 1 January 2014 until 28 February 2016: I assumed that she did not make any profit in her capacity as a self-employed Nail Technician (deference is given to factual information)*

- *From 1 March 2016, an income of R93'000 per year (R7'000x12 + average commission of R750x12; in April 2018 terms)*
- *Increasing with earnings inflation until 31 December 2018*
- *From 1 January 2019, increasing in a straight line until reaching an income of R144'000 per year (R12'000x12, in April 2018 terms) at age 45*
- *Thereafter, increasing with earnings inflation until retirement at age 60.*

She will not earn any income for 5 days assumed from 1 July 2020, 4 weeks assumed from 1 July 2021 and for 12 weeks (20 % probability of occurrence) in 2038 in order to undergo medical treatment.”

[13.3.10] Limited loss:

Net limited loss of income	Past loss	Future Loss	Total loss
Scenario 1	460'259	4'267'425	4'727'684
Scenario 2	627'485	5'589'002	6'216'487

[14] The CAP is applicable in this matter and was taken into consideration.
The attorney made the following suggestion for settlement:

Past loss of earnings:

14.1 *Writer submit that a 15 % contingency deduction be applied to the pre-morbid amount for past loss of earnings and 0 % on the post-morbid amount for past loss of earnings.*

14.2 *After deduction of the suggested contingency percentages the total past loss of earnings equate to R344 318.60.*

Future loss of earnings:

14.3` *Writer submit that a 30 % contingency deduction be applied to the pre-morbid amount for past loss of earnings.*

14.4 *After deduction of the suggested contingency percentages the total past loss of earnings equate to R3 367 065.80.*

14.5 *The total amount for past and future loss of earnings after application of contingency percentages would be R3 711 384.40.*

14.6 *NOTE:* *Please take note that the abovementioned suggested contingency percentages are based on the actuarial calculation dated 4 July 2019. The 'RAF cap' is applicable to the calculation and therefore should these contingency deductions be applied*

Total average between two scenario's R5 472 085.50.

[15] Case law in support of proposed contingency deductions:

15.1 The percentage of the contingency deduction depends upon a number of factors and ranges between 5 % and 50 %, depending upon the facts of the case. (***AA Mutual Association Ltd v Maqula 1978(1) SA***

805 (A) at 812; *De Jongh v Gunther* 1975 (4) SA 78 (W) at 81, 83, 84D; *Goodall v President* 1978 (1) SA 389 (W) at 393; *Van der Plaats v SA Mutual Fire & General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114-115A-D).

- 15.2 In the matter of *Goodall v President Insurance Cc Ltd* 1978 (1) SA 389 (W) at 392H–393 A it was stated that:

“In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office.”

- 15.3 In the unreported judgment of *Ndinisa v Road Accident Fund* (55792/12) [2014] ZAGPPHC 409 (23 May 2014) Judge Hughes sums the approach up as follows:¹ *“the determination of contingency allowances involves a process of subjective impression or estimation rather than objective calculation, in other words, allowance on which judicial opinions vary appreciably. See Shield Insurance Co Ltd v Booysen* 1979 (3) SA 953 (A) at 965G-H.

- 15.4 In *Southern Insurance Association v Bailey* NO 1984 (1) 98 (AD) the two approaches that can be used to ascertain future loss of earnings are discussed on page 113 where the following is said by Nicholas JA:

“One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guess work, a blind plunge into the unknown. The other is to try to make an assessment by way of mathematical

¹ Paragraph 11-14

calculations, on the assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent.”

Continues on page 114C-D to state:

“In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an “informal guess” it has the advantage of a logical basis”.

15.5 In addition refer to in ***Smit NO v The Road Accident Fund, The Quantum of Damages, Corbett and Honey, Volume 5, B4-251.***

15.6 Robert J Koch in his book ***“The Quantum Year book”*** states that there are no fixed rules as regards general contingencies and one of his helpful guidelines is that of the sliding scale contingency theory: *“Sliding scale: ½ % per year to retirement age, i.e. 25 % for a child, 20 % for a youth and 10 % in middle age”.*

15.7 Koch’s support of this sliding scale theory is attained from ***Goodall v President Insurance 1978 (1) SA 389 (W).***

Analysis

[16] The parties have settled the general damages, past and future loss of earnings, and future hospital and medical expenses in terms of section 17(4). I have cumulatively taken into account all the medico-legal reports submitted. The plaintiff was involved in the motor collision at a very young age. Her injuries have been described as serious. The sequelae of the injuries and the

whole personal impairment are indicative of the seriousness of the offence. The general damages have been accepted by the defendant and thus the offer on the general damages.

[17] In ***Alla v Road Accident Fund***² a 41 year old correctional officer sustained fracture of the ankle resulting in displacement of the distal tibia-fibula joint and soft tissue injury. Surgery was in the form of an open reduction and internal fixation of the fracture. She was immobilized in a cast for six weeks and thereafter in an air cast brace. Pain was still being experienced in the ankle resulting in the difficulty in walking long distances. Claimant was awarded general damages in the sum of R200 000-00.

[18] Past awards serve as no more than to give some indication as to what some of awards are appropriate on the facts of a particular case. In striving to determine a fair amount for general damages the court should be guided by the broadest general considerations on an amount which is considered to be fair in all circumstances of the case.³ I have looked at the damages awarded in relation to general damages and I am satisfied that the offer of R 750 000.00 less 20% is fair and reasonable in the circumstances.

[19] In the matter of ***Mahlangu v RAF***⁴

“The award for general damages remains a compensation, it ameliorates the damage (pain and suffering) resulting from injuries sustained in an accident. It is not intended to be full compensation, if that is possible, and it is not intended to wipe out, if that is possible, the damage.as made less 80% is plaintiff has claimed past and future loss of earnings which is speculative and calculated on a possible income”.

[20] What is taken into account is that the plaintiff will have lost their productivity sense or the work. *In casu* the situation seems to be that the plaintiff will be

² 2013 (6EB) QOD 1 (ECP)

³ *Bay Passenger Ltd v Frazen* 1975 (1) SA 269 (A) at 274

⁴ (2013/46374) [2015] ZAGPJHC 342 (9 June 2015)

able to work but might not be as productive as she would have been but had it not been for the accident. It is imperative to note that she has been to different jobs and has been able to secure other jobs. She has never been lost in the market. The amounts that has therefore been alluded to by the actuary are postulated over a period of time. What is taken into consideration is the period of retirement which is usually 65 years but in this case it is until 60 years. I am satisfied with the manner in which the parties have taken into account contingencies.

[21] I have also looked at the supporting documents in relation to the past medical expenses and I am satisfied that the amount claimed has been proven.

[22] Past medical expenses

The TOTAL amount in respect of past medical expenses is R207 814.67 being vouchers submitted that are in relation to the accident. R 207 814.67 minus 20 % = R166 251.74 The Plaintiff will move for default judgment in the amount of R166 251.74 (one hundred and sixty-six thousand two hundred and fifty-one rand and seventy-four cents) after apportionment, in respect of the past medical and hospital expenses.

[23] Order sought

The Defendant is ordered to pay to the Plaintiff the amount of R3 302 194.62 (Three million three hundred and two thousand one hundred and ninety-four rand and sixty-two cents) made up as follows:

23.1 R600 000.00 (six hundred thousand rand), after apportionment, in respect of the general damages;

23.2 R2 535 942.88 (two million five hundred and thirty-five thousand nine hundred and forty-two rand and eighty-eight cents), after apportionment, in respect of the loss of earnings; and

23.3 R166 251.74 (one hundred and sixty-six thousand two hundred and fifty-one rand and seventy-four cents) after apportionment, in respect of the past medical and hospital expenses.

23.4 The Defendant will furnish to the Plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996 to pay the costs of the future accommodation of the Plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supplying of goods to her arising from injuries sustained by her in a collision which occurred on 10 February 2009 after the costs have been incurred, limited to 80%

23.5 Costs of suit on party and party scale.

[24] The following order is made:

The draft order marked "X" is made an order of Court.

**E.N.B. KHWINANA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

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

On this the 13th day of July 2021 before the Honourable Khwinana, AJ

Via Videoconferencing

Order granted electronically in accordance with the directives regarding special arrangements during the National State of Disaster

Case no: 39437/2011

In the matter between:

B[...] B[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

(CLAIM NO: 3[...])

(LINK NO: 2[...])

DRAFT ORDER

AFTER CONSIDERING THE PAPERS AND HEARING COUNSEL FOR THE PLAINTIFF, THE COURT MAKES THE FOLLOWING ORDER:

- 1 The Defendant is ordered to pay to the Plaintiff the amount of R3 302 194.62 (Three million three hundred and two thousand one hundred and ninety-four rand and sixty-two cents) made up as follows:
 - 1.1 R600 000.00 (six hundred thousand rand), after apportionment, in respect of the general damages;
 - 1.2 R2 535 942.88 (two million five hundred and thirty-five thousand nine hundred and forty-two rand and eighty-eight cents), after apportionment, in respect of the loss of earnings; and
 - 1.3 R166 251.74 (one hundred and sixty-six thousand two hundred and fifty-one rand and seventy-four cents) after apportionment, in respect of the past medical and hospital expenses.
- 2 The Defendant is required to pay the amount mentioned in paragraph 2 above into the Plaintiff's Attorneys Trust Account with account number 0[...] at Standard Bank White River, within 180 days from date hereof, during which period

interest shall not be payable. Should the Defendant fail to make payment as set out in paragraph 2 above then, in this instance, the Defendant shall be liable for payment of interest, calculated from 14 days after date hereof, at the *tempore morae* rate.

- 3 The Defendant will furnish to the Plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996 to pay the costs of the future accommodation of the Plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supplying of goods to her arising from injuries sustained by her in a collision which occurred on 10 February 2009 after the costs have been incurred, limited to 80%;
- 4 The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale to date.

**BY THE COURT
REGISTRAR**

CASE NO: 39437/2011

HEARD ON: 09 June 2021

FOR THE PLAINTIFF: ADV. C. SPANGENBERG

INSTRUCTED BY: Schutte De Jong Incorporated

FOR THE DEFENDANT: NO APPEARANCE. JUDGMENT BY DEFAULT

DATE OF JUDGMENT: 13 July 2021