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: A109/2018

In the matter between:-

ADV JJF HEFER N.O. (CURATOR TO M H"THE PATIENT") **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

CORAM: MBHELE J, CHESIWE, J et OPPERMAN, J

HEARD ON: 10 JUNE 2019

DELIVERED ON: 17 SEPTEMBER 2019

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[1] This is an appeal against the Judgment of Van Schalkwyk AJ. The appellant, aggrieved by the manner in which the trial court exercised its judicial discretion in its determination of the patient's future loss of earnings, approached this court on appeal.

[2] The appellant prays for an order in the following terms:

2.1 That a post morbid deduction of 85% be applied to the agreed post morbid earnings of R4 764 854-00 resulting in a nett loss of earnings in an amount of R5 388 305.00.

2.2 That the amount of R3 244 035-00 in paragraph 1 of the order be substituted with the amount of R5 388 305.00 and that such payment be ordered to be paid to Plaintiff on his representation capacity for the benefit of the patient.

[3] The grounds of appeal are stated as follows in the appellant's notice of appeal:

"1. That the trial court erred in finding:

1.1 That the Appellant was unduly pessimistic in applying a 75% contingency deduction to actuarial calculation of the Patient's post morbid agreed loss of income;

1.2 That a 40% contingency deduction to the post morbid scenario would be more than adequate, therefore implying that the Patient has a 60% chance of maintaining employment for the rest of her working life;

1.3 By necessary implication that the Patient has a 60% chance of earning the post morbid agreed amount of R4 764 854.00, and in so doing not adequately considering the following agreements and/or evidence:

1.3.1 The agreement by the psychiatrists that the Patient suffers from an Organic Brain Syndrome due to a head injury sustained in the accident in question which resulted in permanent and irreversible mood and behavioural and personality changes, and that the Patient requires suitable protection of any award of a large sum of money.

1.3.2 That in accordance with the reports of the clinical psychologists the Patient had a Glascow Coma Scale score (GCS) of 6/15 and post traumatic amnesia which extended for some weeks, such being indicative of severe brain injury, and the agreement between the clinical psychologists that the neuropsychological sequelae / deficits of the Patient were now permanent and irreversible.

1.3.3 The agreement between the occupational therapists that the Patient would be compromised regarding the pursuit of further education as well as securing work in the open labour market. In addition, that emotional and psychological factors arising from her injuries could negatively impact her work potential, hence limiting her future employment prospects and opportunities which she might have explored pre-morbidly. Furthermore, that depending on the controllability of her epilepsy, she would need to avoid work environments that could trigger seizures.

1.3.4 That the accepted (admitted) report of the neurosurgeon, Dr Lewer-Allen, the MRI brain scan revealed axonal brain injury, especially in the frontal lobes and in the temporal and parietal areas and that further scans revealed subdural bleeding in the right frontal, temporal and parietal lobes. Further, that her GCS after admission to hospital deteriorated to 3/15, leading Dr Lewer-Allen, upon his consideration of all pertinent factors, to opine that the accident caused long term neurocognitive, neurobehavioral and neuropsychiatric changes which have in turn compromised the Patient's future career prospects and earning capacity.

1.3.5 The agreement between the educational psychologists that pre-morbidly the Patient would have completed Grade 12 and a three year diploma, whereas post-morbidly they were agreed that she could, with concessions for extra time achieve a basic Grade 12 and a vocational certificate. This was attributed to findings by Dr Rossi (for the Plaintiff) that the Patient's full scale intelligence fell

within the low average range post-morbidly, while Dr Mayisela (for the Defendant) found her full scale intelligence to fall within the cognitively handicapped range post-morbidly.

2. His Lordship erred in not finding, if not expressly, then by necessary implications:

2.1 On the basis of the uncontested testimony of Dr Rossi, the educational psychologist that the Patient only has a 75% of completing matric, and even in the event that she does obtain her matric, and notwithstanding a 90% chance of her obtaining a one-year vocational certificate thereafter, the Patient would only have a 25% chance of securing employment in view of the severe sequelae of her brain injuries.

2.2 In the light of the uncontested testimony Mr Van Huyssteen, the industrial psychologist, that he estimated the Patient's chances of obtaining employment to be between 25% and 30%, but that the Patient has limited capacity to sustain employment. He was therefore of the opinion that she only had a 10% to 15% chance of sustaining employment over the rest of her working life.

3. In the premises it is respectfully submitted that this Honourable Court should uphold this appeal and in so doing order:

3.1 That a post-morbid contingency deduction of 85% be applied to the agreed post- morbid earnings of R4 764 854 resulting in a nett loss of earnings in an amount of R5 388 305;

3.2 That the amount of R3 244 035,00 in Paragraph 1 of the order be substituted with the amount of R5 388 305,00 and that such payment be ordered to be paid to Plaintiff in his representative capacity for the exclusive benefit of the Patient."

[4] The appellant's case hinges around the testimonies of Dr. Rossi, the educational psychologist and Mr. Van Huyssteen, the Industrial Psychologist.

[5] Dr. Rossi's testimony was to the effect that the appellant sustained a head injury which involved a subdural bleeding on the right. Her investigations revealed that the appellant was an above average performer before the accident. Her academic performance dropped after the accident with year to year decline up to a point where she performed below class average. Directly after the accident she failed a grade. Cognitively her IQ level showed a significant drop. Her IQ test results and severe educational deficits are consistent with a severe head injury. She found that her concentration was weak and that she struggled with understanding language. She complained of headaches, weight gain, and hoarse voice. She shows personality and behavioural changes; she becomes easily irritated, verbally aggressive and short tempered since the accident. She opined that pre- morbidly she would have passed grade 12 and a 3 year diploma at the University of Technology. It is assumed that post-morbidly she will pass grade 12 and attain vocational certificate. Dr. Rossi estimated the patient's chances of holding on to a job at 5% in the worst case scenario and 50% at best. She settled her chances of holding on to a job at 25%. She found that she will not be able to work in managerial capacity because of her executive functioning difficulties. In addition, her emotional liability places her future relationships at home and work at risk.

[6] Mr. Van Huysteen referred to Dr. Rossi's findings in relation to the patient's expected academic achievements before and after the

injury. In his view the pre-morbid expected qualification would have placed the patient at level 5 of the South African Nation Qualifilation Framework (NQF). She would have entered the labour market on a Grade B3 and would have progressed to C3/C4 on the Patterson job grading system at the age of 45. He found that the patient's earning capacity will be negatively impacted by her reduced educational potential as well as neuropsychological, psychiatric and communication deficits. The above deficits will have an impact on the patient's ability to obtain and maintain employment as well as on her progression in the workplace. Because it is difficult to indicate the exact impact from financial perspective, Mr. Van Huyssteen is of the view that these uncertainties can be better addressed by contingencies.

[7] The joint minutes of various experts were accepted as evidence:

Dr. Rossi and Dr. Mayisela were in agreement that the patient may, with learning support and extra time, achieve a basic mainstream matric and attain a vocational certificate. They recommended intensive and long term learning support and psychotherapy.

[8] Dr Angus found that the patient is best suited to work that is relatively routine and structured. Irritability and poor insight into her behaviour could affect her relationships in the workplace and put her at some risk for disciplinary problems.

[9] The trial court found as follows in paragraphs 26 and 27 when dealing with contingency and assumptions by the actuary:

> "26 Having regard to inter alia the aforementioned considerations I am of the view that a contingency deduction of 75 % is unduly pessimistic and the evidentiary value thereof is devaluated by the averment of the actuary as set out in clause 4.1 of annexures C, the joint minutes on page 24 thereof where he asserted: "We have been instructed to make the following deductions for general contingencies:
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> 27 I am of the view that the contingencies contained in the Joint Minutes of the experts and more specifically the actuarial calculation thereof from page 21 – 24 will be more than adequately addressed by applying contingency deduction of 40 % to the post morbid scenario"

[10] Mr Kriel, on behalf of the appellant submitted that the trial court failed to consider all factors regarding the likelihood of the patient participating in open labour market as well as her ability to sustain employment due to severe brain injuries which had a severe psychological effect on her. He contended that by applying 40% contingency to the post morbid scenario, the trial court meant that the patient has 60% chance of finding and maintaining employment.

Mr, Thompson, on behalf of the respondent submitted that the undertaking in terms of section 17 (4) (a) is meant to help the patient manage her condition to cope with difficult work environment. He, further, submitted that various experts whose reports were accepted do not exclude a possibility of the patient finding and sustaining employment, they state there are chances

she may be employed but she will require supervision and further medical attention to help her cope.

APPLICABLE LEGAL PRINCIPLES

[11] Contingencies are arbitrary and also subjective in nature. In **Goodall v President Insurance Co Ltd** 1978 (1) SA 389 (W) at 392 H – 393 A the following was said:

> '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 practiced by ancient prophets and soothsayers, and by authors of a certain type of almanack, is not numbered among the qualifications for judicial office.'

[12] The trial court has a wide discretion when it comes to determining contingencies. An appeal court will therefore be slow to interfere with a contingency award of a trial court and impose its own subjective estimates. An appeal court cannot simply substitute its own award for that of the trial court.

In **Road Accident Fund v Guedes** 2006 (5) SA 583 (SCA) the court set out the circumstances under which an appeal court is entitled to interfere with the trial court's assessment of the appropriate contingency deduction as follows:

> (a) Where there has been an irregularity or misdirection (for example the court considered irrelevant facts or ignored relevant facts); (b) Where the appeal court is of the opinion

that no sound basis exists for the award made by the trial court; (c) where there is a substantial variation and striking disparity between the award made by the trial court and the award which the appeal court should have made.

[13] In determining contingencies the age of the claimant is one of the factors that have to be taken into consideration. The younger the victim, the longer the period over which the vicissitudes of life will operate and the greater the uncertainty in assessing the claimant's likely career path. See **Bee v Road Accident Fund** 2018 (4) SA 366 SCA at para 116.

[14] Courts are not bound by the view of any expert. They make the ultimate decision on issues on which experts provide opinion. See **Road Accident Appeal Tribunal & Others v Gouws & Another** 2018 (1) ALL SA 701 (SCA) at par. 33.

Expert opinions serve as a tool to assist the court to come to a conclusion.

[15] The evidence does not suggest that the patient will not be in a position to obtain and stay in employment. They evidence shows that her chances of finding employment and maintaining it have been diminished. The argument that application of 40% contingency by the trial court suggests that the patient was considered to have 60% chance of obtaining and sustaining employment is misplaced. As stated in **Bee** *supra* a lot of factors have to be taken into account particularly when the victim is young.

The trial court had an advantage of appraising witnesses. This court cannot interfere with the discretion of the trial court merely because it would have come to a different conclusion. There must

be a just cause in law for the appeal court to interfere. In the absence of misdirection this court is not at liberty to substitute the findings of a trial court. The trial court correctly analysed the evidence before it and further commented on the assumptions made by the Actuary. Paragraph 4.1 of the actuarial report relied upon for calculations shows that the 75% contingency deduction was arrived at as per the instruction from the plaintiff. It is so that the patient has permanent brain injury which has altered her life significantly. The experts are of the view that although the quality of her life has been severely altered she may be able to stay in employment albeit with difficulty. The defendant made an undertaking in terms of section 17 (4) (a) to provide future medical care for the patient. I am unable to find any demonstrable or clear error on the part of the trial court to justify interference with its findings. The appeal must fail. Costs are in the discretion of the court. This is a typical matter where each party must pay its own costs.

In the circumstances I make the following order.

ORDER

The appeal is dismissed

Parties to pay their own costs.

NM MBHELE, J

I concur

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S CHESIWE, J

I concur

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ML OPPERMAN, J

On behalf of the Appellant:	Adv AL Kriel
Instructed by:	MCINTYRE VAN DER POST BLOEMFONTEIN
On behalf of the defendant:	Adv DR Thomson
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