IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 274/2019

In the matter between:

ADVOCATE NGAKA DAVID KHOKHO N.O Plaintiff

(Curator ad litem to M G)

And

THE ROAD ACCIDENT FUND Defendant

JUDGMENT: MOENG, AJ

HEARD ON: 4 SEPTEMBER 2019

DELIVERED ON: 19 SEPTEMBER 2019

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[1] This matter came before me as a stated case .The plaintiff's case against the defendant is for payment of damages arising from injuries sustained by M G (M) in a collision which took place on the 10th of August 2017 within the jurisdiction of this court. The plaintiff is Advocate David Ngaka Khokho, an advocate of the High Court of South Africa in his capacity as *curator ad litem* to M.

[2] The dispute relating to liability and future medical expenses was settled at the start of the trial and the parties agreed that the Fund is liable for 80% of the agreed or proven damages, suffered by M as a result of the collision. The Fund also conceded its liability to compensate M for 80% of his future medical expenses by way of an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act.

[3] A statement detailing the agreed facts was handed into the record and I was requested to determine the contingency to be applied for the future loss of earnings and to determine the quantum of the general damages suffered by M.

[4] The statement disclosed the following facts: On the 10th of August 2017 M was run over by the insured vehicle along Harvey Road in Bloemfontein and he sustained severe bodily injuries as a result. He sustained a severe traumatic brain injury consisting of a subdural haematoma, an extradural haematoma and a temporal brain stem haematoma. He further sustained a skull fracture, multiple lacerations and abrasions on the forehead, right arm, right elbow and right lower leg.

[5] He was unconscious after the collision and was transported to hospital immediately thereafter. He was admitted into the intensive care unit with a reduced Glasgow Coma Scale of 6/15. He received treatment and was discharged from hospital on 22 August 2017.

[6] He was subsequently re-admitted to hospital on 5 September 2017 due to the development of a subdural haematoma, as a consequence whereof burr holes were drilled into his skull on the 7th of September 2017. He was discharged from hospital on the second occasion on the 9th of September 2017.

[7] M suffered severe organic brain damage. He now has a greatly impaired walking gait, he is not able to ambulate without assistance and he has cerebral signs and tremors in the right arm. He is partially paralysed in the lower limbs, and his speech is severely impaired..

[8] He further suffers from disfigurement in that he has scarring on the frontal scalp and deep multiple abrasion marks on the right elbow. He has involuntary movement of the eyes and a scar above the left eye. All these marks are cosmetically visible.

[9] He suffers from severe neuropsychological deficiencies, in particular severe impaired attention; working memory; information processing and mental tracking deficiencies. He is unable to plan what to do and how to do it, problem solving, concept formation and verbal fluency. He has had a personality change after the collision and he in particular gets easily irritated and has lowered frustration tolerance. He suffers from bouts of rage and the brain injury had a substantial severe and prominent effect on his behaviour.

[10] He has an impaired insight and reasoning ability and depression which is secondary to the impairment of his ability to perform and enjoy his normal activities of daily living. He is struggling to wash and groom himself and cannot use his right hand to brush his teeth. He is unable to clothe himself and his mother has to assist him in this regard. He likewise needs assistance when using the bathroom which is an outside toilet. He has significant difficulty to transfer himself from a chair to a bed.

[11] He did not suffer from these deficits before the collision and his condition may be regarded as permanent and irreversible. He obtained his matric in 2002 and he was employed in various capacities from 2005 to 2017 as a packer, cleaner, salesperson, merchandiser and general worker. He would have continued to earn his pre accident earnings of R6500.00 per month with the ability to advance to higher levels of employment.

[12] He would have started earning on the Paterson A3 level from January 2019 and he would have progressed through to Paterson B2 level until his career ceiling at age 47. He would have remained at that level until the retirement age of 65 with inflationary increases only. He will, due to his injuries, never be employed in the open market.

[13] An actuarial calculation has been obtained from Dr Robert Koch based on the agreed facts and the methodology employed and results obtained have been agreed to by the parties relating to the plaintiff's claim for past and future loss of income.

[14] The plaintiff contends that a contingency deduction of 5% in respect of past loss of earnings and 25% in respect of future loss of earnings should be applied. The plaintiff

further submits that the Fund should be ordered to pay an amount of R133 200, 45 after the contingency deduction of 5% for past loss of income and an amount of R2 708 161, 50 after the contingency deduction of 25% for future loss of income. Having regard to the agreed facts, the plaintiff submitted that an amount of R1 7000 000. 00 should be awarded for general damages. A further 20% deduction based on the apportionment should still be made from the award the court will make after the deduction of the contingencies.

[15] The Fund agreed with the contingency and amount suggested by the plaintiff to be awarded for past loss of income. It however submitted that a contingency deduction of 35% be made in respect of future loss of income and that the Fund be ordered to pay an amount of R2 347 073, 30 to the plaintiff. In contrast, the Fund submitted that an amount of R1 3000, 00 be awarded for general damages.

[16] It was succinctly stated in **Southern Insurance Association Ltd v Bailey NO** 1984 (1) SA 98 (A) at 113F-G that:

‘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’... and at 114C–E ‘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 "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's "gut feeling" (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess. (Cf Goldie v City Council of Johannesburg1948 (2) SA 913 (W) at 920.)

[17] The parties have provided a factual basis that allows for the actuarial calculation. The actuarial calculations of Dr Koch reflect the loss of income before the application of general contingency deductions. These calculations, accepted by both parties, are premised on an allowance having been made for M to be continuously employed until the normal retirement age of 65 and for the risk of early and late death. No further allowances for this should thus be made under general contingencies.

[18] It is trite that in assessing damages, the amount to be allowed by way of a deduction for contingencies is variable and is closely connected with the circumstances of the particular case in which the trial Judge has to exercise his discretion. It may further be accepted that contingencies allow for the unknown possibility that the plaintiff may have less than 'normal' expectations of life and that he or she may have experience periods of unemployment, illness, accident or general economic conditions. This in essence relates to various imponderables and speculation about the future.

[19] In **Goodall v President Insurance Co Ltd** 1978 (1) SA 389 (W) it was held that age is an important factor in calculating contingencies. Thus, the period for the contingencies to be applied for a person who was already 46 years of age, was much shorter than in cases of younger plaintiffs. The Court held that the allowance for contingencies ought to be substantially less than the 20 per cent in such other cases as had been cited.

[20] In **Road Accident Fund v Guedes** 2006 (5) SA 583 (SCA) the approach to the application of contingencies by Koch was adopted and was set out as follows at 583:

'The author *Koch* describes his work as 'a publication of financial and statistical information relevant to the assessment of damages for personal injury or death'. The page in question is headed 'General contingencies'. It 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 the prerogative of the Court. . . . There are no fixed rules as regards general contingencies. The following guidelines can be helpful.'*

Then follows what is termed a 'sliding scale' and the following is stated: *'Sliding Scale:*
% for year to retirement age, ie 25% for a child, 20% for a youth and 10% in middle age
(see *Goodall v President Insurance Co Ltd*1978 (1) SA 389 (W). . . .'

[21] It should be noted that the calculations, accepted by both parties, are premised on an allowance having been made for M to be continuously employed until the normal retirement age of 65 and for the risk of early and late death. These factors should thus not be considered in making further contingency deductions.

[22] After taking into account that, although M's working life had been ordinary, he had been employed in various capacities from 2005 to 2017. Even though counsel for

the Fund argued that he had been job-hopping and had been retrenched at some stage, the parties agreed that the assumption should be made that he would be continuously employed until the normal retirement age of 65 years. The parties agreed that he would have progressed through to Paterson B2 level until his career ceiling at age 47. He would have remained at that level until the retirement age of 65.

[23] M suffered no ailments before the accident and he appears to have been in good health. Considering his background, he appears to have been a responsible and reasonable individual. There are no adverse factors which were advanced to warrant a higher contingency deduction.

[24] Taking the well-known principles of Dr Koch into account, and having regard to his age when the collision took place, the applicable sliding scale should, in my view, be in the vicinity of 16 to 20% which is categorised under youth. Counsel for plaintiff's contention that a 25% contingency be applied is reasonable under the circumstances to make provision for other unforeseen future occurrences. There is no basis, in my view, to make allowance for a 35% contingency. I am satisfied that a contingency deduction of 25% be applied for the loss of future earnings.

[25] I was referred to a number of comparable cases regarding general damages. No two cases are exactly the same, therefore past cases can only serve as a rough guide and ultimately, each case must be determined on its own merits. In determining general damages, I will take the factors agreed upon by the parties in the stated case into account. It goes without saying that Mongenzi sustained extreme severe physical and cognitive impairments.

[26] I was referred to the following cases:

a) **Torres v Road Accident Fund** 2010 (6A4) QOD 1 (GSJ)

The plaintiff was a 24 year-old male, who was 20 years old at time of his injury. He sustained severe diffuse brain injury; soft tissue injury to the neck and soft tissue injuries to the face and chin. He suffered significant neuro-cognitive and neuro-behavioural deficits associated with concentration, working memory, impulse control and abstract reasoning. He suffered from depression and adjustment disorder. He would have had a probable successful career in jewellery design and he was limited to sympathetic employment. An award of R1, 2 million in current terms was made.

b) **Megalane NO v The Road Accident Fund** 2006 (5A4) QOD 10 (W)

The victim was an 11-year-old schoolboy at the time of the accident and he was 14 years old at the time of the trial. He suffered a severe brain injury with diffuse and focal brain damage in the form of a subdural haematoma resulting in cognitive impairment characterised by poor verbal and visual memory; poor concentration and distractibility; impaired executive function characterised by frontal lobe disinhibition causing inappropriate behaviour; speech difficulties characterised by dysarthria and word retrieval difficulties; bilateral hemiparesis with severe spasticity of all four limbs and left facial paralysis as well as aphasis. He was confined to a wheelchair. His intelligence level was that of a young child. He was an above average scholar before the accident, who would probably have undergone tertiary education, left with severe permanent physical and mental disabilities rendering him unemployable. He was awarded R2, 1 million in present terms.

c) **Nepgen NO v Road Accident Fund** 2012 (6A4) QOD 129 (ECP)

The injured party was a 48-year-old manual worker. He suffered severe closed brain injury; fractures of the right tibia and fibula; fracture of the left clavicle and extensive soft tissue injuries. A remarkable recovery but left with permanent cortical blindness and a degree of intellectual compromise. Pain in leg related to weather and when walking longer distances. He suffered occasional backache. Severe concentration and tracking problems, learning and memory problems diminished verbal fluency and slowed mental processing. He was unemployable in the future. He was awarded R1, 3 million in present day monetary terms.

d) **Mngomezulu v Road Accident Fund** 2012 (6A4) QOD 95 (GSJ)

The plaintiff was a 25-year-old clerk. He suffered moderate to severe traumatic brain injury; compound fractures of the right tibia and fibula; closed chest injury with lung contusion; and a 30cm laceration of the right thigh. He had post-traumatic organic brain syndrome comprising attention and concentration difficulties, reduced cognitive processing speed, motor functioning difficulties, visual motor difficulties, verbal difficulties, memory difficulties, learning difficulties, and neuro- behavioural problems. Residual functional disability associated with right leg fractures. His future employment prospects were limited to a structured and routine environment and future tertiary education no longer possible. An award of R938 000 was made in present day monetary terms.

[27] I am satisfied that considering the above factors and the comparable cases that I have been provided with, general damages should be awarded in the amount of R1 500 000.00. A further 20% deduction based on the apportionment will be made to this amount, as well as the amount for past and future loss of income.

[28] In the result the following order is made:

1. The defendant is liable for payment to the plaintiff in his representative capacity and as duly appointed *curator ad litem* to M G, an adult male born on 28 September 1983, the amount of R3 473 089, 56 (three million four hundred and seventy three thousand and eighty nine rand fifty six cents) set out as follows:
   a. R106 560, 36 (one hundred and six five hundred and sixty rand thirty six cents) for loss of past income and;
   b. R2 166 529, 20 (two million one hundred and sixty six thousand five hundred and twenty nine rand and twenty cents) for future loss of income and an amount of;
   c. R1 200 000, 00 (one million two hundred thousand rand) for general damages, resulting from the motor vehicle collision as indicated above.
2. Payment of the capital amount and costs shall be made without set-off or deduction, within 30 (thirty) calendar days from date of the granting of this order, directly into the trust account of the plaintiff's attorneys of record by means of electronic transfer pending the establishment of the Trust contemplated hereunder:

   S.S.H. MEHLOMAKULU&CO Trust Account

   Bank - FNB

   Account No. - 53760023945
3. The defendant is ordered to furnish M G with an undertaking in terms of Section 17(4) (a) of the Road Accident Fund Act 56 of 1996, for 80% of the costs of the future accommodation of M G in a hospital or nursing home, or the treatment or

the rendering of a service or the supplying of goods to M G arising out of injuries sustained by him in the motor vehicle collision mentioned above. In terms of this undertaking the defendant will be obliged to compensate him in respect of these costs after the costs have been incurred and on proof of these costs being provided. These costs shall include the costs to be incurred for:

3.1 The establishment of a trust and the the appointment of a trustee;

3.2 The fees of the trustee in administering the aforesaid nett capital amount and the costs of administering the aforesaid undertaking as determined by the Administration of Estates Act, 66 of 1965;

3.3 The furnishing of security by the trustee and obtaining of annual security bond to meet the requirements of the Master of the High Court in terms of section 77 of the Administration of Estates Act, 66 of 1965

Subject thereto that the costs referred to in a, b and c above are limited to the prescribed tariff applicable to a *curator bonis*.

4. The defendant is to pay the plaintiff's taxed or agreed costs on the scale as between party and party until date of this order, including but not limited to the costs set out below: No interest will accrue in respect of any of the amounts stipulated above if payment is made on or before the stipulated dates; Should payment not be made in respect of any of the aforesaid amounts on or before the stipulated date(s), interest will accrue at 10.25 % (the statutory rate per annum), compounded; In the event that costs are not agreed, the plaintiff shall serve a notice of taxation on the defendant's attorney of record; and shall allow the defendant fourteen (14) court days to make payment of the taxed costs;

4.1 Appointment of the *curator ad litem,* including the costs of such *curator ad litem.*

4.2 The reasonable preparation / qualifying / accommodation / travelling and full reservation fees and expenses (if any) of the following experts, and the costs relating to the plaintiff attending their medico legal examinations;

i. Dr P.A Olivier (Orthopaedic Surgeon);

ii. Dr Wilkinson (neurosurgeon);

iii. Mrs Gibson (Neuropsychologist);

iv. Mr Mashaba (Occupational Therapist);

v. Dr Fine (Psychiatrist);

vi. Mr Mendelowitz (Industrial Psychologist);

vii. Dr R.J Koch (Actuary).

5. The plaintiff's attorneys are directed to:

5.1 Cause a trust to be established in accordance with the Trust Property Control Act, 57 of 1988

5.2 To pay such amount as may be due to M G for the trust for the benefit of M G

6. The trust instrument contemplated in paragraph 5 shall provide that :

6.1. M G shall be the sole beneficiary of the trust;

6.2. The first trustee shall be MOHALIA MOLEFE as nominee on behalf of ABSA Trust Limited;

6.3. The trustee(s) shall provide security to the satisfaction of the Master of the High Court of South Africa;

6.4. The ownership of the trust property shall vest in the trustee(s) of the trust, in his/her/their capacity as trustees

6.5. Procedures to resolve a potential dispute, shall be subject to the review of the above Honourable Court;

6.6. The trustee(s) shall be authorized to recover the remuneration of, as well as the costs incurred by the trustee(s) in administer in the undertaking as envisaged in paragraph 3 above;

6.7. There shall be an exclusion of any community of property in the event of the marriage of M G

6.8. The amendment of the trust instrument shall be subject to the leave of the above Honourable Court;

6.9. The trust shall terminate upon the death of M G in which event the trust assets shall pass to the estate of M G

6.10. The trust property and the administration thereof shall be subject to an annual audit;

6.11. The trustee(s) shall maintain M G as may be reasonably required from time to time.

7. The attorneys shall be entitled to make payment of and or recover all disbursements incurred by them in the action, including, but not limited to accounts rendered by:
   7.1. The expert witnesses;
   7.2. Counsel employed on behalf of the plaintiff;
   7.3. The *curator ad litem*

   from the aforesaid funds received by them in trust for and on behalf of M G
8. The attorney shall be entitled to payment from the aforesaid funds received by them in the trust on behalf of M G for their fees.

L. B.J MOENG, AJ

On behalf of the plaintiff:	Adv. S Strydom
	Instructed by: Mehlomakulu Attorneys
	c/o Matsepes
	BLOEMFONTEIN
On behalf of the defendant:	Adv. D Hattingh
	Instructed by: Maduba Attorneys
	BLOEMFONTEIN