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

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED.

CASE NO: 82476/2014

9/3/2018

In the matter between:

KIRSTEN BARNARD

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

L BAM AJ:

- [1] The Plaintiff instituted action against the Defendant consequent upon an accident that occurred on 31 July 2013. The merits were conceded 100% in favour of the Plaintiff and the quantum is largely settled but for the contingencies applicable to the post-morbid award recommended by the actuary. The actuary's assessment is based on relevant information gleaned from joint expert minutes.

- [2] The Plaintiff, a 23-year-old sports management student got injured when the insured driver's vehicle crashed into a shop where she was a customer and knocked her .Her injuries are common cause and the experts are in agreement regarding her future treatment needs as well as the effect of the injury on her employment and advancement prospects.
- [3] Counsel for the Plaintiff brought the court's attention to the fact that even though the orthopaedic surgeon and industrial psychologist acknowledged the consequences expected from future invasive operations of total knee replacement, the actuary does not seem to have made provision for these in his assessment. The orthopaedic surgeon indicated in his report that the Plaintiff will need rehabilitative treatment and assistive devices as well as domestic assistance during recuperation. It is envisaged that these operations may well become obstacles to her getting a job or if employed, a reason for termination of her employment. The actuary himself states as follows in his notes *"it is suggested that all the debilitating aspects be considered and addressed by means of a significantly higher post-accident contingency deduction .. ."*.
- [4] The Defendant on the other hand called for a higher contingency spread of 40%. The basis for this was said to be the opinion of the Defendant's Industrial Psychologist Ms Kheswa who expressed contrary views during the preparation of the joint minute. It appears however that the matter was discussed by the parties before the hearing started and Ms Kheswa was excused as a witness after the parties reached a consensus on the content of the joint minute. The court therefore was left with only the Plaintiff's submissions while the defendant sought to stress the point that joint minutes are binding on both litigants to the extent of the experts' agreements. Defendant's counsel also submitted that the Plaintiff can mitigate her loss by studying further and changing her current career path which requires a lot of physical activity.
- [5] At the end of the day, both parties acknowledged that the setting of contingencies remains the prerogative of the court guided by the expert reports. A holistic view of the facts is needed so that focus is not only on

the injury itself, but on the life of the plaintiff going forward. Both favourable and adverse contingencies have to be taken into account in determining the appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should, in exercising its discretion keep in mind that the Plaintiff would not have been placed in the position where her income would have to be the subject of speculation if the accident had not occurred. (See Mali AJ in DLAMINI v ROAD ACCIDENT FUND¹).

[6] I am satisfied that the contents of the various reports and joint minutes correctly reflect the Plaintiff's situation. I am also in agreement with the submission that a holistic assessment of the post-morbid award should take into account the consequences that will necessarily flow from the Plaintiff's further and more involved operations. The fact that the Plaintiff is still young and is expected; as is expected of any reasonable person; to mitigate some of the adverse effects of the injury, should not retract from the reality that hers is not an improving condition. The experts agree that with time there will be degeneration that will result in her ending up doing only sedentary work.

[7] In the premises I find it necessary to adjust the actuary's recommended award for post-morbid loss slightly higher to cater for the reality of the Plaintiffs situation going forward. I am also mindful of the fact that the Defendant should not be unduly burdened with unreasonable awards as its resources are very limited. The parties have already agreed on the amount of R13 507.02 in respect of past medicals as well as the pre-morbid contingency deduction of 15 percent.

[8] I am satisfied that a 30 percent spread in respect of the contingencies is reasonable and therefore the Plaintiff is entitled to the following:

A	In respect of past medicals	R 13 507.00
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B	In respect of past loss of income	R 7 953.00
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¹ (59188/13) [2015] ZAGPPHC 646 {3 September 2015} at [31]

In respect of future loss:

Pre-Morbid	R 7 122 026.00
Less 15% contingency	R 1 068 304.00
	R 6 053 722.00

In respect of future loss:

Post-Morbid	R 5 862 560.00
Less 45% contingency	R 2 638 152.00
	R 3 224 408.00

C TOTAL FUTURE LOSS: TOTAL R 2 829 314.00
AWARDED: **A + B + C = R 2 850 774.02**

[9] The Plaintiff has submitted a draft order which will be duly amended and made an order of court.

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

10.1 Draft Order marked "X", as amended, is made an order of court.

L BAM

ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicant: Adv Furgeson

Instructed by: WEHMEYERS ATTORNEYS

Counsel for the Respondent: Adv Matika

Instructed by: TAU PHALANE INC ATTORNEYS

Date of Hearing: 6 March 2018

Date of Judgment: 9 March 2018

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

CASE NO: 82476A/14

PRETORIA 09 MARCH 2018

BEFORE THE HONOURABLE MADAM JUSTICE BAM, AJ

In the matter between:

KIRSTEN BARNARD

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

HAVING HEARD counsel(s) for the parties and having read the documents filed the court reserved its judgment.

THEREAFTER ON THIS DAY THE COURT ORDERS

JUDGMENT

Draft Order marked "X", as amended, is made an order of court.

BY THE COURT

REGISTRAR

AM

Attorney: WEHMEYERS

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

**ON THIS 6TH OF MARCH 2018 AT PRETORIA IN COURT _____ BEFORE
THE HONOURABLE BAM AJ**

CASE NUMBER: 82476/2014

In the matter between:

**KIRSTEN BARNARD
ROAD ACCIDENT FUND**

**PLAINTIFF
DEFENDANT**

ORDER

THE COURT ORDERS THAT:

1. The Defendant is ordered to pay damages to the Plaintiff in a total amount of Two million, eight hundred and fifty thousand, seven hundred and seventy-four rand and two cents (R2 850 774-02)
2. The Defendant shall pay the Plaintiffs taxed or agreed party and party costs on the High Court scale, subject thereto that:
 - 2.1. In the event that costs are not agreed:
 - 2.1.1 the Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;
 - 2.1.2 the Plaintiff shall allow the Defendant 14(fourteen) Court days from date of *allocator* to make payment of the taxed costs; the costs incurred to accept the offer and make the offer an order of Court;
 - 2.1.3 should payments not be effected timeously, the plaintiff will be entitled to recover interest at the rate of 10.25% per annum on the taxed or agreed costs from the date of *allocator* to date of final payment;

- 2.2 such costs shall include:
- 2.2.1 the costs incurred in obtaining payment of the amounts mentioned in paragraphs 2 above;
- 2.2.3 costs to date of this order, which, preparation for trial and attendance at court which shall include all costs previously reserved, the reasonable costs incurred to accept the offer and make the offer and order of Court;
- 2.2.4 the costs of all medico-legal, radiological, actuarial, addendum and joint reports obtained by the Plaintiff, as well as such reports furnished to the Defendant and/or to the knowledge of the defendant and/or its attorneys, as well as all reports in their possession and all reports contained in the Plaintiffs bundles, irrespective of the time elapsed between any reports by an expert;
- 2.2.5 the reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by the Taxing Master, of the experts as in 2.2.4 above; .
- 2.2.6 the reasonable cost incurred by and on behalf of the Plaintiff in, as well as the costs consequent to attending the medico-legal examinations of both parties;
- 2.2.7 the costs consequent to the Plaintiffs trial bundles and witness bundles, including the costs of 6 (six) copies thereof;
- 2.2.8 the costs of holding all pre-trial conferences, as well as roundtable meetings between the legal representatives for both the Plaintiff and the Defendant, including senior-junior counsel's charges in respect thereof, irrespective of the time elapsed between pre-trials:
- 2.2.9 the costs of and consequent to compiling all minutes in respect of pre-trial conferences, including senior-junior counsels charges;
- 2.2.10 the cost of holding all inspections in *loco*, if any;
- 2.2.11 the reasonable travelling costs of the Plaintiff, who is hereby declared unnecessary witness.

3. The amounts referred to in paragraphs 2 will be paid to the Plaintiff's attorneys, Wehmeyers Attorneys, by direct transfer into their trust account details of which are the following:

Name: Wehmeyers Attorneys

Bank: First National Bank

Account Number: [...]

Branch Code : 252 345

Ref: WB0127

4. it is recorded that no valid contingency fee agreement is applicable in this matter.

BY ORDER OF THE COURT

REGISTRAR

Adv R Ferguson

Plaintiff's Counsel

082 770 0775

Adv

Defendants Counsel