REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG PROVINCIAL DIVISION, PRETORIA)

CASE NO: 12242/2014

Not reportable

Not of interest to other Judges

11/3/2016

In the matter between:

EUNICE CHABANGU Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

MAKGOKA, J:

[1] This is an action for damages in terms of the Road Accident Fund Act, 56 of 1996, as amended (the Act) pursuant to a motor vehicle collision on 29 April 2007. The plaintiff, then 23 years old, was a passenger in a vehicle which collided with another. She was treated at a hospital and discharged the same date. According to the neurosurgeon report, she sustained a closed head injury with frontal wounds. She has a frontal lobe or intracranial injury, the symptoms of which are persistent headache, tinnitus and amnesia. Her current complaints include chronic headache, itching of the scars on the forehead, tinnitus, rumination about the accident, itching of the scars on the forehead, backache, and anosmia. She also suffers from post-concussive syndrome and post-traumatic anxiety. The key question for determination is whether the plaintiff would, but for the accident, attained a university degree or only a diploma.

[2] The defendant has conceded full liability for the plaintiff's proven damages. The plaintiff's general damages have been agreed upon in the amount of R300 000. With regard to future medical expenses, the defendant has agreed to furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Act. Accordingly, the only issue for determination is the *quantum* for loss of earnings or earning capacity.

[3] The plaintiff is currently 32 years old. She is divorced and has two minor children. She matriculated in 2007, the same year in which she sustained the injuries. Below I make a comparison of the percentages achieved by the plaintiff in grade 11 and her final matric results:

Subject	Grade 11 (Pre-accident)	Grade 12 (Post-accident)
Xitsonga	78%	C (60%-69%)
English	60%	F (33,3%-39%)
Agricultural Science	58%	F (33,3%-39%)
Business Economics	55%	E (40%-49%)
Economics	45%	E (40%-49%)
Biblical Studies	70%	C (60%-69%)
Mercantile Law	53%	E (40%-49%)

[4] In the same year she matriculated, the plaintiff obtained a short diploma in office computing. She registered for a diploma in human resources management, which she did not complete, supposedly because of memory impairment problems. She was later employed as a cashier at a supermarket chain store, but had to stop working in 2012, again, supposedly because of repeated forgetfulness as a result of her injuries. In 2013 she was employed at a tea packaging company, which she also had to quit because of persistent headaches. In 2014 she found employment at a retail store, where she is still employed to date. According to the relevant reports of the experts, the plaintiff is struggling to cope even in her current position as she

makes a lot of mistakes resulting in cash shortages. According to those reports, she has been issued with a reprimand letter for warning.

[5] The plaintiff was born into a family of six children. Her mother has no formal education. She is self-employed, doing recycling and washing dishes. Her father, who passed away in 2015, completed grade 8 and had been employed by a municipality. None of her siblings had acquired any post-matric qualification. In fact, only two of her siblings passed matric. The others only reached the grades below matric. As a result, none of them are employed in any professional occupation. For the plaintiff, two scenarios are postulated for her likely career path, were it not been for the accident. According to this postulation, the plaintiff would have been able to enter the labour market either as an attorney or an advocate, earning accordingly at entry level, and increasing her earnings as she gained more experience, until retirement. On the other hand, on behalf of the defendant it is postulated that the plaintiff would only have achieved a diploma, and at most, a general university degree.

[6] Six witnesses testified. Mrs Paulina Mukansi (the plaintiff's mother) Ms Reneilwe Ndlovu, Dr Masello Matlala (educational psychologist) and Dr Malaka (industrial psychologist) all testified in the plaintiff's case. For the defendant, Ms Linda De Rooster (educational psychologist) and Mrs Cecile Nel (industrial psychologist) testified. It is not necessary to set out in any detail, the evidence led during the trial. What follows is a summary of that evidence.

[7] The plaintiff's mother, Mrs Mukansi, testified that before the accident, the plaintiff performed 'well' at school. She had never repeated a grade. After the accident, she became forgetful and lost interest in her studies. She further testified that the plaintiff's dream was always to become a lawyer. As a result, the plaintiff's father had been saving money for her studies. The plaintiff's ambition of becoming a lawyer was confirmed by the second witness, Ms Reneilwe Ndlovu. She works for a firm of attorneys as a general worker. She testified that the plaintiff had visited the firm in 2007 to know more about legal practice. She referred the plaintiff to the professional staff.

[8] Dr Matlala, an educational psychologist, prepared a report on behalf of the plaintiff, in which she evaluated the plaintiff's pre-accident, post-accident cognitive, emotional and educational potential as well as future occupational endeavours. She concluded that the plaintiff was of average intellectual ability. Pre-morbid, she would probably have passed matric with university entrance to study for a degree or diploma at a tertiary institution. For that conclusion, she took into consideration a number of factors, among which, the plaintiff's grade 11 results. I shall revert to this aspect later.

[9] Furthermore, Dr Matlala also took into account what she considered to be the plaintiff's self-drive. She pointed out that despite the plaintiff having had to quit school because of pregnancy, she managed to return to school to complete her matric, which Dr Matlala found to be demonstrative of her aptitude. Furthermore, she took into account the fact that the plaintiff managed to obtain a short diploma in office computing, after the accident. According to her, the plaintiff has the aptitude, intrinsic motivation and confidence to have attained a degree. The above factors would, according to Dr Matlala, made the plaintiff an exception to her siblings, who, as indicated earlier, neither of them had obtained tertiary education. Dr Matlala also considered letters from the primary school and secondary school which the plaintiff attended. In those letters, the plaintiff was described in laudatory terms.

[10] Dr Malaka, an industrial psychologist, prepared a report on behalf of the plaintiff, the purpose of which is to postulate what the plaintiff's likely career path and earning capacity would have been, but for the accident and the injuries suffered by her. Dr Malaka concluded that the plaintiff would have completed her educational career and resuming work in the open labour market as an attorney or advocate, had the accident not occurred. She would have been able to work until the retirement age, health and other aspects of life permitting. Post morbid, the plaintiff would be able to partake in an open labour market but in a sympathetic type of employment, given her physical and neuropsychological ailments. According to Dr Malaka, the plaintiff has a diminished work capacity, which has rendered her vulnerable.

[11] Ms De Rooster, educational psychologist, testified on behalf of the defendant as to the impact of the accident on the plaintiff's education and training possibilities, as well as the plaintiff's cognitive functioning. She concluded that the plaintiff was a person of average cognitive abilities pre-accident and that she would probably have been able to progress up to grade 12 with diploma endorsement in a mainstream school, but for the accident. Ms De Rooster further testified that the plaintiff would probably have been able to complete a diploma course (NQF6) successfully, if she received the financial aid she would have needed. Her socio-economic circumstances, and the effects of disadvantaged education, might have caused a delay in the completion of her studies.

[12] Ms De Rooster differed with Dr Matlala as to what tertiary qualification the plaintiff would probably have achieved. She was quite strong in her opinion that, given her poor socio-economic background, the fact that no one in her family had progressed beyond matric, her limited exposure to English, are all factors which militate against the proposition that the plaintiff would have attained a university degree. Ms De Rooster further emphasised the fact that the plaintiff has not been able to realize her pre-accident potential, and attained matric with lower marks than she anticipated, she still remained very much an average pupil. In this regard, Ms De Rooster pointed out that the plaintiff's grade 11 results were below average.

[13] Mrs Cecile Nel, an industrial psychologist who testified on behalf of the defendant, allowed for the possibility of the plaintiff acquiring either a degree or diploma.

[14] It is against the evidence that I have to consider the plaintiff's loss of earning capacity. The assessment of future loss of earning capacity presents obvious difficulties. These were discussed in *Southern Insurance Association Limited v Bailey NO* (supra) at 113F-114E where Nicholas JA stated as follows:

'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 the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It is open to it two possible approaches. 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 guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of 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.'

[15] The approach to calculating loss is trite and established: (a) calculate the present value of the income which the plaintiff would have earned but for the injuries and consequent disability; (b) calculate the present value of the plaintiff's estimated future income, if any, having regard to the disability; (c) subtract the figure obtained under (b) from that obtained under (a); (d) adjust the figure obtained as a result of this subtraction in the light of all relevant factors and contingencies (Gauntlett *Quantum of Damages*, Vol 1 (4ed) at 48. See also See also *D'Hooghe v Road Accident Fund* 2010 (6J2) QOD 1 (ECP) para 19.

[16] In the present matter, the dispute revolves around the plaintiff's probable career path, had the accident not occurred. As is apparent from the reports of the two educational psychologists, Dr Matlala and Ms De Rooster, the question is whether the plaintiff would have progressed to university degree or would have reached her educational plateau at diploma level. On the one spectrum is a scenario in which the plaintiff would have pursued a degree in law and qualified to practice as an advocate or an attorney. On the other hand, the defendant postulates that the plaintiff would have obtained only a diploma.

[17] In my view, the probability of the plaintiff qualifying either as an attorney or an advocate seems far-fetched. When one considers her grade 11 results, I am inclined to agree with Ms De Rooster that the plaintiff was, pre-accident, very much an average pupil. If those marks are anything to go by, the plaintiff would most certainly have struggled with a law degree, or any specialized degree. It would have been a different situation had she, for example, been injured in her second or third year of her studies in law, or as correctly pointed out by *Mr Williams*, had one of her parents been a legal practitioner.

[18] Having said that, I do not think it would be unrealistic to suggest that she could have obtained another degree, perhaps in social sciences or the arts. Ms De Rooster could not explain why the plaintiff would only obtain a diploma but not a degree. What is more, I do not accept the central thesis of her conclusion, which is that, because of her disadvantaged socio-economic background, the plaintiff would have been confined only to a diploma. That appears very arbitrary. She was pressed to concede during cross-examination that many successful people share the plaintiff's socio-economic background. On the other hand, I find Dr Matlala's reasoning more cogent in concluding that the plaintiff's self-motivation and drive, would have carried her through. The fact that the plaintiff did not allow pregnancy and the accident to deter her from pursuing her studies, is demonstrative of that self-motivation. I therefore conclude that the plaintiff would, in all probability, have progressed to obtain a degree.

[19] The parties have agreed on certain actuarial calculations for different scenarios. Using the opinions expressed by the industrial psychologists in respect of the plaintiff's probable qualifications and career path based on her attaining a degree, GRS Actuarial Consulting, actuaries, have made a calculation of what the plaintiff would have earned in the remainder of her working life had she not been injured. The retirement age is assumed at age 62½. The actuaries have calculated (on the basis of various assumptions) that but for the accident, the plaintiff would, in the scenario where she enters the open labour market with a degree, she would have earned R7 566 314. Her income, given that the accident occurred, is calculated at R2 325 137, resulting in the loss of R5 241 177. To these amounts, provision should be made for contingencies of life, and adjust the amounts accordingly. One should do so having regard to the two scenarios: the 'but for' and 'having regard to' scenarios. The actuaries have incorporated the general contingency deductions into the net limited loss of 10% for past income and 25% for future income in the 'but for scenario' and 5% and 30% in the 'having regard to scenario.'

[20] I am of the view that in the light of the evidence which surfaced during the trial, further contingency deductions should be applied. This is so since where actuarial calculations are relied upon, the Court still retains a discretion in the

quantification of damages. It is 'not tied down by inexorable actuarial calculations'. (*Legal Insurance Company Ltd v Botes* 1963 (1) SA 608 (A), at 614F-G). See also *Anthony and Another v Cape Town Municipality* 1967 (4) SA 445 (A) at 451B-C.

[21] In the 'but for scenario', I must consider a number of factors such as the plaintiff's skills, age and prospects of progression in the labour market. The plaintiff is 32 years old. Her highest academic achievement is matric, completed in 2007. She demonstrated keen interest in studying and bettering her position through education. The negative contingencies include the possibility that the plaintiff might not have obtained the degree, after all; the possibility of errors in the estimation of the plaintiff's retirement age and in calculation of future pay progression; her taking early retirement; the likelihood of illness or unemployment which would have occurred in any event, and similar considerations.

[22] Given that the accident happened before the plaintiff could realise her full potential, resulting in a lot of uncertainty as to her career path, I am of the view that a 20% contingency deduction should be applied to the uninjured scenario, that is R7 566 314 – 20% = R6 053 051.20.

[23] Turning now to the 'having regard to' scenario. In this scenario, I have to consider a number of variables consisting, among others, of the probability of the plaintiff retaining his present employment; and the possibility of career change, due to continued therapy for the *sequelae* of the injuries sustained in the accident. There are both negative and positive contingencies.

[24] Having regard to all the relevant factors, a contingency deduction of 30% in the 'having regard' to scenario is in my view, fair and adequate compensation for the plaintiff. Thus R2 325 137– 30% = R 1 627 595.90. The difference between the 'but for' and 'having regard to' scenarios is therefore: R6 053 051.20 – R 1 627 595.90, resulting in the net future loss of earnings at R4 425 451.30. From this amount, a further deduction in the amount of R300 000 should be made, which is the amount of general damages already advanced by the defendant to the plaintiff as an interim payment. This leaves the plaintiff's damages in the amount of R4 125 451.30.

[25] There remains the issue of costs. The plaintiff employed the services of senior counsel. Ms *Maite*, counsel for the defendant submitted that the matter is not so complicated as to warrant the employment of senior counsel. I agree. I would therefore allow costs of one counsel. It is up to the taxing master to decide whether to allow costs of senior counsel or only of the junior.

[26] The plaintiff's counsel handed up a comprehensive draft order, which incorporates most of the various aspects of the order I intend to make. The draft also attaches a trust deed for the creation of a trust to manage the capital on behalf of the plaintiff, given the nature of her injuries and vulnerability. There are however, a few aspects that were not addressed to me but appear in the draft order. Firstly, in paragraphs 3 and 4 of the draft, provision is made for the furnishing of an undertaking in terms of s 17(4)(a) of the Act 56 by the defendant to the plaintiff, as per an order of this court made on 15 May 2015. I simply do not think it is technically correct to include that paragraph into the present order. An order has already been made in that regard. If there is no compliance with that order, the plaintiff has the necessary remedies in terms of which she may approach this court on application for the necessary relief.

[27] Secondly, there are also the costs incurred on 15 May 2015. In paragraph 5.5 of the draft, provision is also made for payment of those costs. The court on that occasion made a costs order in respect of the qualifying fees of six experts (in paragraph 4 of the order) and in the duplicated paragraph 4 it made provision for costs of counsel, travelling and preparation. Similarly, I do not see any reason why that court order should be duplicated here. I was not addressed on this aspect, and maybe there are cogent reasons why those costs should be included here. For this reason my view would be provisional until either party does, within five days hereof, give notice of intention to make submissions why those costs should be duplicated here. On the lapsing of that period, the order shall become final.

[28] Thirdly, in paragraph 7 of the draft, it is stated that the plaintiff was advanced an amount of R500 000 by her attorneys. I do not have any information about this, except what is stated in the draft. Similarly, the issue was not addressed to me

during the trial. If I were to make that provision part of the court order, I would be doing so in the dark. If there is an agreement between the plaintiff and her attorneys in that regard, it is enforceable as between them, and it does not need the imprimatur of this court.

[29] The upshot of all the above, is that paragraphs 3, 4, 5,5, and part of paragraph 7, do not find their way into the order I am about to make.

[30] In the result I make the following order:

1. The defendant is ordered to pay the plaintiff R4 125 451.30;
2. The defendant is ordered to pay the plaintiff's costs of the action, such costs to include:

   2.1 the costs of one counsel;

   2.2 the reasonable taxable fees for consultation and preparation for trial, qualifying and reservation fees (if any) and on proof thereof as well as the costs of the reports of:

   2.2.1 Dr L Kgalema;

   2.2.2 Ms G Mathala;

   2.2.3 Dr Y Matlala;

   2.2.4 Dr M Malaka;

   2.2.5 Dr Lazarus K Nkuna;

   2.2.6 Dr K Mafeekane;

   2.2.7 Dr M Mohapi;

   2.2.8 George Schwalb;

   2.3 The costs of all other reports served on defendant's attorneys not mentioned above;

2.4 The costs of obtaining all actuarial reports from the actuaries GRS Actuarial Consulting;

2.5 The costs of establishing the Eunice Chabangu Trust referred to hereunder;

2.6 The costs of the trial enrolled for 3 March 2016;

2.7 The plaintiff's reasonable hotel accommodation, transportation costs for attending consultation with the medico-legal experts as well as reasonable transportation for attending to court.

3. It is noted that the amount in paragraph 1 and the costs are to be paid into the trust account of Dolamo Attorneys.

4. It is noted that after deduction of agreed/attorney fee due to the plaintiff's attorney and their correspondent, and after deduction of disbursements (including counsel's fees) the net amount of the award is to be paid to the EUNICE CHABANGU TRUST. A copy of the draft trust deed of the EUNICE CHABANGU is attached hereto marked **"A"**.

5. It is noted that the plaintiff has agreed to furnish the defendant with at least 14 (fourteen) days written notice of taxation.

6. The plaintiff's attorney is entitled to charge contingency fees in terms of the Contingency Fees Act on the basis of the contingency fee agreement dated 15 February 2010.

TM Makgoka
Judge of the High Court

Date of hearing:	4 March 2016
Judgment delivered:	11 March 2016
Appearances:	
For the Plaintiff:	Adv. J.O Williams SC
	Adv. M.G. Mola
Instructed by:	Nchime Dolamo Attorneys Pretoria
For the Defendant:	Adv. L. Maite
Instructed by:	Diale Mogashoa

"A"

DEED OF TRUST

entered into by and between

NCHIME DOLAMO

(hereinafter referred to as the "DONOR")

and

JACOBUS FREDERIK DE BEER

(hereinafter referred to as the "TRUSTEE")

In terms of which the DONOR donates to the TRUSTEE, the sum of R100.00, which amount is to be held by the TRUSTEE in trust and be administrated by him in terms of the conditions and terms of this Deed of Trust as is herein set out:-

1. **DONATION**

The DONOR hereby donates to the TRUSTEE the sum of R100.00, which amount will be paid to the TRUSTEE and will be received by him with the registration of this Deed.

2. **NAME OF TRUST**

The Trust will be known as the EUNICE CHABANGU TRUST

3. **TRUSTEE**

3.1 There will at all stages be one trustee who must be an admitted attorney or a registered chartered accountant;

3.2 The TRUSTEE of this Trust will be the person described as TRUSTEE in the preamble to this Trust Deed. This office will be held by him for an indefinite period until his resignation or incapacity or the termination of the Trust;

3.3 The TRUSTEE must furnish security to the satisfaction of the Master of the High Court of South Africa for the assets of the Trust and for the due compliance of all his obligations towards the Trust.

4. BENEFICIARIES

The beneficiary of this Trust will be EUNICE CHABANGU with regards to the income derived from the Trust assets and the capital shall also be used to the benefit of EUNICE CHABANGU in such a way as the TRUSTEE may deem appropriate. At the death of the mentioned EUNICE CHABANGU the Trust's assets will be transferred to the heirs of EUNICE CHABANGU as set out in the Will of EUNICE CHABANGU or should EUNICE CHABANGU not leave behind any will, the assets will be transferred to the intestate heirs of EUNICE CHABANGU in accordance with the provisions of the Intestate Succession Act.

5. OBJECTIVES

The objectives of this Deed of Trust are the following:-

5.1 To maintain and support the said EUNICE CHABANGU physically and mentally for the remaining part of her life;

5.2 The TRUSTEE will as far as possible endeavour to utilize the funds of the Trust to comply with the medical needs of the mentioned EUNICE CHABANGU. In this respect the TRUSTEE will in his discretion, and if he deems it necessary, be authorised to make use of medical advice in overseas countries and if necessary, send the mentioned EUNICE CHABANGU to the foreign country if the TRUSTEE in his discretion deem it to the benefit of EUNICE CHABANGU and if there are sufficient grounds and funds for such advice and medical treatment;

5.3 To provide accommodation to the beneficiaries and one other person who will act as the beneficiary's caretaker/nurse if necessary and affordable. In this respect the TRUSTEE will also be entitled in his discretion to employ people and to remunerate them for services rendered to EUNICE CHABANGU where and if necessary and affordable;

5.4 To do anything that the TRUSTEE in his discretion deem necessary for the general well-being of the mentioned EUNICE CHABANGU and the TRUSTEE will be entitled to incur such reasonable costs as he deems necessary in this regard in his absolute discretion;

5.5 To invest the Trust's assets and to act therewith in such a manner so as to attempt to increase same and if possible to cause capital growth in order for the funds paid over in trust to be administered for as long as possible, to the benefit of EUNICE CHABANGU.

6. **ASSETS**

The assets of the Trust will include:-

6.1 The assets donated to the TRUSTEE in terms of this Deed as well as any additions and accruals thereto;

6.2 All donations and inheritances donated or bequeathed to the Trust in supplementation of the Trust's assets;

6.3 All assets that the Trust may purchase with its own funds or borrowed funds or that may be acquired by any other juristic act;

6.4 Any assets that may be allocated to the Trust in terms of an Order of Court or settlement of the action.

7. **INCOME FROM THE TRUST**

The income of the Trust will be all income earned by means of the Trust's assets.

8. **POWERS OF THE TRUSTEE**

8.1 To enable the TRUSTEE to comply with all obligations in terms of the Deed of Trust, the TRUSTEE will be entitled:-

8.1.1 To perform any act in general, whatsoever, that is according to his opinion, beneficial for the preservation and growth of the assets of the Trust, or in the interest of the Beneficiary. The powers entrusted to him according to the paragraphs hereinafter do not limit the generality of this sub-paragraph;

8.1.2 To use any part of the assets or income of the Trust for payment of any costs reasonably incurred by him in relation to his duties and obligations as TRUSTEE;

8.1.3 To invest the assets or income of the Trust or any part thereof, in such a manner as he may deem proper in his discretion. Without detracting from the generality of the aforementioned clause, he will be entitled to invest in shares in public companies, building societies, loans with security, investments in state and municipal shares, investments in fixed property or any such assets as he may deem beneficial to the Trust and its beneficiaries which will also include moveable assets of whatsoever nature if deemed reasonably to the benefit of the beneficiaries. Such moveable assets may be used or consumed by the TRUSTEE if, in his discretion, it is deemed to be reasonably in the interest of the beneficiary. He will furthermore be entitled to call up any investments, to make any investments solvent, to convert, amend, realise and to reinvest such investments in any manner reasonably deemed appropriate;

8.1.4 If the TRUSTEE practices a profession and in such capacity performs any other act or service on behalf of the Trust, in such capacity, the TRUSTEE will be remunerated for his professional services rendered without limiting or reducing his right to remuneration as stipulated hereinafter;

8.1.5 To institute legal and arbitration proceedings and to oppose same in any competent court with regard to any matter forthcoming from the Trust and to pay the costs incurred in relation thereto from the assets or income of the Trust;

8.1.6 To purchase, sell, let, hire or to hire-purchase any assets;

8.1.7 To acquire or renounce, in any manner whatsoever, rights on behalf of the Trust;

8.1.8 To acquire money through a loan or expend money by way of a loan on any conditions and against proper security being furnished where money is expended by way of a loan;

8.1.9 To encumber any assets of the Trust by way of a bond, pledge, hypothec or session as security;

8.1.10 To perform all acts on behalf of the Trust which may be necessary to effect transfer of any assets of the Trust;

8.1.11 To grant extensions for the complying with any duty towards the Trust, to reach compromises and oppose claims against the Trust, to recognise, and settle same and to handle any claims in favour of the Trust in the same manner;

8.1.12 To employ people to perform any act and to remunerate them from the assets or income of the Trust. The possibility that the TRUSTEE would have been able to perform such act himself does not detract from the aforementioned entitlement;

8.1.13 To utilize the assets and income of the Trust in such a manner as the TRUSTEE may deem proper for the conservation, maintenance or replacement of any assets of the Trust and to demolish any buildings if deemed appropriate by the TRUSTEE to erect new buildings on the fixed property of the Trust;

8.1.14 To exercise his voting right as deemed appropriate, with regard to any shares which belong to the Trust and are held in any company or society. The exercise of his discretion and authority hereunder is not reduced where they directly or indirectly have an interest in such company or society, neither will the TRUSTEE, due to his confidential relationship with the Trust, be obliged to give account of any benefit, which accrues to them due to such interest either directly or indirectly, nor is any act, agreement or deed of the TRUSTEE void or voidable on the ground that they received such benefit. The object of this clause is to avoid that the consequences of voidability or voidness due to the confidential office of the TRUSTEE will supervene and insofar as it may affect agreements and relationships with companies and societies in which the TRUSTEE has a personal interest;

8.1.15 To lend money to any person or legal entity on such conditions as he in his absolute discretion may stipulate on the condition that proper security is provided by the lender;

8.1.16 To enter into insurance contracts and to pay the premiums from the assets of the Trust;

8.1.17 To pay the debts of the Trust;

8.1.18 To accept or refuse donations and inheritances to the Trust;

8.1.19 To open a bank account and to borrow money from a bank on the overdraft facility or otherwise;

8.2 Notwithstanding the stipulations of paragraph 5.1 or any other paragraph in this Deed, the TRUSTEE will not be entitled to dispose of any assets or income of the Trust for his own benefit or the benefit of his estate. Without detracting from the generality of the aforementioned he will specifically not be entitled or authorised to appropriate or to dispose of any of the assets or income of the Trust as his own, as he deems fit, if he by doing so will benefit himself or his estate. The TRUSTEE will furthermore not be authorised to use or consume any of the assets of the Trust, for his own benefit unless so authorised by the Master of the High Court of South Africa;

8.3 If the Trust shows drastic growth and if the administration thereof requires it, the TRUSTEE will be entitled to employ a person or persons, full time or part time, to assist with the administration of the Trust and in this respect he will be entitled to pay a reasonable salary or remuneration, which he in his discretion deem appropriate, to such a person or persons. Control and care over the Trusts assets will however always be the responsibility of the TRUSTEE including fixed property or a bond with regards to any place in the Republic of South Africa. In this regard the only limitation is that investments may only be made within the borders of the Republic of South Africa.

9. **BOOKKEEPING**

9.1 The TRUSTEE must keep a complete set of accounting records with regard to the affairs of the Trust;

9.2 The TRUSTEE will ensure that the accounting records of the Trust are audited by a chartered accountant and that such accountant will have free access to the books, documentation and assets of the Trust.

10. APPLICATION OF INCOME

The TRUSTEE will use the income of the Trust to pay the administration costs for the administration of the Trust and to realise the objectives of the Trust.

11. DUTIES OF THE TRUSTEE

The TRUSTEE will:-

11.1 As far as possible endeavour to realise the objectives of the Trust;

11.2 Open a current account with a registered commercial bank of his choice, which account will be used for the receipt of all cash which is paid to the Trust;

11.3 Invest and reinvest the funds of the Trust in such a manner as he may deem fit in shares, securities or any assets of whatsoever nature including fixed property or on bond in any place in the Republic of South Africa and in this respect the only limitation is that investments may only be made within the borders of the Republic of South Africa;

11.4 Amend, regroup or reinvest the investments in such a manner and on such conditions and for such objectives as the TRUSTEE in his sole discretion may deem appropriate;

11.5 See to it that proper minutes of all decisions made by him, are kept in a safe place;

11.6 See to it that the financial statements of the Trust for each year are kept in safe custody for the period of the existence of the Trust;

11.7 See to it that all contracts are fulfilled;

11.8 Make all payments that may be payable on the income of the Trust;

11.9 If he deems it necessary to effect any amendments to the Trust Deed, he will be entitled to make the said amendments on condition that such amendments are approved by the DONOR during his lifetime. After the death of the DONOR he will be entitled to make such amendments as he may deem appropriate on condition that such amendments will not amend the objective of the Trust;

11.10 See to it that the set of books that he must open and keep will immediately become operational and at the same time appoint a firm of auditors for the Trust as soon as the Master of the High Court has registered this Deed;

11.11 See to it that the firm of auditors that is appointed for the Trust will at all times have free access to the books and accounts and vouchers of the Trust and he further undertakes to obtain such information as the auditors may require and to make same available to the firm of auditors and if explanations are required, to provide same;

11.12 To report and file statements of account to the Master of the High Court, Pretoria, as at 28 February of every year.

12. <u>POWERS OF THE TRUSTEE</u>

The following people will be incompetent to act as TRUSTEE of this Trust:-

12.1 Any person who is incompetent to act as a director of a company in terms of the stipulations of the relevant Company Laws of the Republic of South Africa;

12.2 Any person who is an unrehabilitated insolvent;

12.3 Any person who has previously been removed as a TRUSTEE from a trust due to his/her misadministration of the said Trust;

12.4 Any person who has previously been found guilty, in the Republic of South Africa or elsewhere, of theft, fraud, forgery, perjury, corruption or any misconduct or offence where dishonesty was an element of and resulted in that person being found guilty;

12.5 Any person who has been declared mentally ill or incapable of managing his/her own affairs.

13. TERMINATION OF THE TRUST

The Trust will terminate at the death of the mentioned EUNICE CHABANGU. It requires an application to the High Court in Pretoria, to terminate or dissolve the Trust prior to the death of EUNICE CHABANGU.

14. DISSOLUTION OF THE TRUST

With termination of the Trust as a result of the death of EUNICE CHABANGU the Trust will be liquidated and the capital will after all the administrative costs and debts as well as claims against the Trust have been paid, be allocated according to the stipulations of the will of the mentioned EUNICE CHABANGU and if the mentioned EUNICE CHABANGU dies intestate, the net assets of the Trust will be divided equally between her intestate heirs in accordance with the relevant Intestate Succession Act that is applicable in the Republic of South Africa. If the Trust is terminated by Order of the Master of the High Court of South Africa, the funds will be paid out in accordance with the stipulations of such order.

15. **EXEMPTIONS**

With regard to the aforementioned the following exemptions will be applicable:-

15.1 No TRUSTEE will be incapable due to his office as TRUSTEE of this Trust, to enter into a contract with the Trust or any company in which the Trust has an interest. Furthermore any contract entered into between the Trust and such company will not be void due to the Trustee's interest in the company. The only requirement with regard hereto, is that the TRUSTEE must before any negotiations are entered into, disclose his interest in the contract or entity, to the Master of the High Court of South Africa before such negotiations take place;

15.2 Any TRUSTEE, who is a member of or a partner in a firm of professional practitioners, may be employed by the Trust or render services for the Trust and in such instance the TRUSTEE will be entitled to a fee in his professional capacity;

15.3 No TRUSTEE will be requested to make good any damages that the Trust may have suffered, regardless of how such damage was caused, with the exception of such damage that was caused by the dishonesty of a TRUSTEE or as a result of his negligence;

15.4 No TRUSTEE will be liable for any dishonesty or wrongful act committed by any other TRUSTEE unless such a TRUSTEE had knowledge thereof and allowed such dishonest acts or acted as an accessory;

15.5 The TRUSTEE shall be indemnified out of the assets of the Trust with regards to any claims that may be instituted against him personally and which result from the reasonable acts of the TRUSTEE and the exercise of any of his competencies which he/she is entitled to exercise in terms of this Deed.

16. **REMUNERATION**

If the TRUSTEE is a professional person, he will be entitled to his reasonable professional fees for any professional work done for the Trust. Such fees will include any fees that are reasonably payable to his partners and he will further be entitled to make use of the services of other similar professional people as also auditors, medical doctors, attorneys and advocates. With regard to services rendered by the TRUSTEE for the general administration of the Trust and arrangements which he will make with regard to the care of the mentioned EUNICE CHABANGU, the TRUSTEE will be entitled to a yearly fee as stipulated in the relevant legislation of the Republic of South Africa.

17. **ACCEPTANCE**

The TRUSTEE hereby accepts the donation made to him according to this Deed subject to the conditions of this Deed and further undertakes to realise the objectives of this Trust Deed.

SIGNED at PRETORIA on this the ________ day of MARCH 2016.

AS WITNESSES:

1. ________________________ ________________________ **DONOR**
2. ________________________

SIGNED at PRETORIA on this the ________ day OF MARCH 2016.

AS WITNESSES:

1. ________________________ ________________________ **TRUSTEE**
2. ________________________

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO : 12242/2014

In the *ex parte* application of :

CHABANGU EUNICE Plaintiff

(IN RE :

THE APPOINTMENT OF A TRUST FOR
EUNICE CHABANGUI
(born 12 September 1984)

I, the undersigned

JACOBUS FREDERIK DE BEER

confirm that :

1. I am practising as an attorney of the firm, Gildenhuys Malatji Incorporated, Pretoria.

2. I am not related to the patient and she is not known to me.

3. I agree to act as trustee for EUNICE CHABANGU.

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JACOBUS FREDERIK DE BEER