IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION, MAKHANDA]

CASE NO.: 3614/2021

In the matter between: -

N[...]O P[...] S[...]
Obo Z[...] S[...] **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

NORMAN J:

[1] On 31 July 2024 the parties agreed in a further rule 37 minute filed that the only issue for determination is the contingency deductions to be applied on the past and future loss of earnings claimed by the plaintiff. Ms Westerdale appeared for the plaintiff and Ms Futshane for the defendant.

Background facts

[2] The claim is a damages claim involving a minor child. On 19 December 2019 at approximately 12h00 in G[...] Street, Motherwell, Gqeberha, in the province of the Eastern Cape, a truck collided with a minor boy child, Z[...], who was a

pedestrian. At the time Z[...] was seven years old. Plaintiff is his biological mother who instituted the action, on his behalf, and claimed general damages, past and future medical expenses, future loss of income and/or reduction of earning capacity.

[3] Defendant conceded liability and confirmed that no apportionment would be applied to the plaintiff's claim. The parties settled general damages in the sum of R600 000.00. They also settled future medical expenses, however, an undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act 56 of 1996 was inadvertently omitted from the agreement, an issue that will form part of the order in this matter as agreed by the parties. Plaintiff's claim in relation to future loss of income and/or loss of earnings capacity is R2 450 210.00. An interim payment towards loss of earning capacity in the amount of R350 000 was also agreed.

[4] Defendant admitted the medico-legal reports relied upon by the plaintiff and admitted the correctness of their contents including the opinions expressed and factual information relied upon by each expert witness. Defendant also agreed that the following medico- legal reports be admitted into evidence without any further proof thereof. Those are: The reports of Dr R. Jaffe, an orthopaedic surgeon and addendum thereto dated 20 September 2021 and 02 April 2021, respectively, together with the RAF4 Form in relation to the seriousness of the injury sustained by Z[...] compiled by the same expert; a report by Dr K. Cronwright, a plastic and reconstructive surgeon who had also assessed the plaintiff and compiled the serious assessment injury report as contained in the RAF4 form dated 06 October 2021; a report by Ms L. Jackson, an occupational therapist ; a report by Ms M. Pretorius , an industrial psychologist dated 25 May 2023; a report by Ms Karin Trollip an educational psychologist dated 12 June 2024; actuarial reports by Munro Forensic Actuaries dated 02 April 2024 and 22 July 2024, respectively. The joint minutes between the respective educational psychologists dated 12 July 2024 and the industrial psychologists dated 03 July 2024, also served before this court.

[5] It was also agreed by the defendant that the actuarial report compiled by Munro Forensic Actuaries would be admitted and that the actuaries would not be required to attend the hearing. Defendant further admitted that the certificates of value are correctly calculated and further admitted the actuarial correctness and soundness of such certificates.

Amendment

[6] At the commencement of the hearing Ms Westerdale sought an amendment to the particulars of claim by the deletion of paragraph 9.3 and the substitution thereof with the following:

'9.3 Future loss of income/diminished earning capacity R2 450 210.00.

9.3.1 At the time of the collision the minor was a scholar in Grade 1.

9.3.2 At the time of the collision the minor was healthy and would have worked until age 65 years.

9.3.3 But for the collision 9.3.1 the minor would have obtained his Grade 12 by December 2030 and commenced his tertiary studies in January 2031. 9.3.2 would have earned R100 per day as a casual worker, 2-3 days a week was completing his studies for the period January 2031 to December 2034. 9.3.3 would have completed his tertiary studies by December 2034;

9.3.4 Would have commenced employment in January 2035 earning on a Paterson B2/B3 level of R296 500.00 per year increasing in a straight line to Paterson B4 in January 2039 earning R368 000.00 per year increasing in a straight line to Paterson B5 by January 2043 earning

R425 000.00 per year increasing in a straight line to Paterson C1 by January 2049 earning R519 000.00 per year enjoying earnings inflation until retirement.

9.4 Having regard to the collision the minor waste 1 (one) year schooling whilst recuperating from these injuries.

9.4.2 will earn similarly as in his uninjured scenarios save for a year's delay.

9.4.3 is limited from certain employment on the open labour market due to his injuries and sequalae.

9.4.4 has been rendered a vulnerable employee on the open labour market.

9.4.5 will not be able to perform casual work while studying.

9.4.6 is not suited to work of a medium to heavy nature.

9.4.7 will need accommodation with light work.'

[7] The defendant did not oppose the proposed amendment and it was accordingly granted.

Legal submissions

[8] Plaintiff contended that a contingency deduction of 25% to the uninjured earnings and 40 % to the injured earnings should be applied. Contrary to that contention, the defendant contended that a 30% pre-morbid and 30% post-morbid contingency should be applied.

[9] In support of the plaintiff's contention, Ms Westerdale referred the court to a decision of Bloem J of this Division in ***Neslynne Udean Cannon obo Declan***

Devane Cannon v Road Accident Fund[1] where the court applied a contingency deduction of 20% to the plaintiff's claim for loss income. Ms Westerdale submitted that a 40% contingency to post-morbid income is adequate and 25 % pre-morbid for a minor where there is no head injury would be adequate.

[10] Ms Futshane, on the other hand, submitted that the defendant applied a sliding scale of ½ % per year until retirement age hence it is contending for 30 % pre and post - morbidly. Plaintiff was seven years at the time of the accident and has about 53 years before he attains 65 years for retirement. She referred the court to the actuarial report and submitted that the progression pre and post- morbid is the same. She conceded that there is a year delay but the progression is the same as if the plaintiff was not injured. The court is dealing with someone who sustained orthopaedic injuries. Z[...] would progress as if the accident did not occur, and he would reach the Paterson C1. The court must take into account certain factors such as illness, death, the fact that not every graduate is assured employment and the country's current economic climate. There are many other careers that the plaintiff can venture into since he has a leg injury. There is no justification for applying higher contingencies to the injured earnings.

[11] She referred the court to the case of ***Kilian NO v Road Accident Fund***[2] where Legodi J (as he then was) applied 35% contingency to the injured income. She submitted further that the court must not simply rely on joint minutes. The court must take into account other factors such as unemployment, illnesses, statistics in relation to graduates who are entering the labour market, family background, the plaintiff's siblings and where they are at in life. Even factors that were not placed before court, she argued, must be taken into account.

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[1] ***Neslynne Udean Cannon obo Declan Devane Cannon v Road Accident Fund*** (2213/2020) [2023] ZAECGHC 101 (24 October 2023).
[2] ***Kilian N.O v Road Accident Fund*** Case No. 34116/2016 [2016] ZAGPPHC 844 (15 September 2016).

[12] Ms Futshane further submitted that people with disabilities are usually given preferential consideration within the labour market. Ms Futshane also relied on the *Quantum Yearbook*[3] for the submission that normal contingencies to be applied are 25% for a child and 20% for the youth. In this regard she referred the court to ***Goodall v President Insurance Co Ltd***[4] and ***Southern Insurance Association v Bailey***[5].

[13] In reply, Ms Westerdale submitted that the sliding scale that is proposed by the defendant is flawed because the defendant applies it from the time the child was injured and not at the time of employment. The industrial psychologists dealt with, amongst others, early death, retrenchment and all the factors that are usually regarded as normal. The defendant has not taken issue with any of the expert opinions. The evidence admitted by the defendant places this case in a different position to other cases.

Discussion

[14] It is trite that in determining a fair and reasonable compensation for loss of income or earning capacity, a court has a wide discretion. That discretion needs to be exercised judicially. In determining future loss of income or earnings capacity one has to compare what the claimant would have earned but for the incident with what he would likely to have earned after the incident. The future loss represents the difference between the pre-morbid and post-morbid earnings after the application of the appropriate contingencies.

[15] When courts make awards for potential or future losses, it is general practice to make use of contingency deductions to provide for any future events or circumstances which are possible but cannot be predicted with certainty such as longevity, loss of employment, early death, promotion prospects etc.[6]

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[3] Quantum Yearbook Koch 2024.
[4] ***Goodall v President Insurance Co Ltd*** 1978 (1) SA 389 (W) at 392 H – 393 A.
[5] ***Southern Insurance Association v Bailey*** NO 1984 (1) SA 98 (A).
[6] See article by Honey Attorneys application of contingency deductions in loss of earning claims dated 27 November 2019.

[16] Contingencies are risk factors which may affect an individual's earning capacity in future. They are applied to both the pre and post-morbid calculations. If a claimant is no longer an equal competitor in the open labour market, is a vulnerable employee or is enjoying an element of sympathetic employment, the chances of job loss or loss of income are significantly higher. It is customary in these circumstances to apply a higher post-morbid contingency deduction to cater for this vulnerability.[7]

[17] The suggested application of the sliding scale before Z[...] enters the labour market is not normal practice. The actuaries based their assumptions on Z[...]'s career and earnings as projected by industrial psychologists. This is evident from their report that they assumed that the claimant would have entered the labour market in January 2034. I am accordingly not persuaded that the defendant's submission in this regard is reasonable and I accordingly reject it. Allowances for contingencies is a process of subjective impression or estimation rather than an objective calculation that is positioned in the sole discretion of the court[8]. In order to achieve fairness when one applies contingencies, one must apply those contingencies to the particular proven facts of the case. That way the decision doesn't rest purely on speculation[9]. Some of the contingencies that the court would take into account are, inter alia, the possibility of illness which would have occurred in any event; inflation or deflation of the value of money in future; and other risks of life such as accidents or even death which would have become a reality sooner or later in any event[10]. There are no fixed rules with regards to general contingencies[11].

[18] The facts of this case are distinguishable from those in the *Kilian N.O* judgment. In that case the court was critical of the plaintiff's approach of relying on a stated case and joint minutes and his failure to place before court the medico- legal reports. The court was critical of that approach as there was dearth of evidence before it. The court stated:

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[7] See Road Accident Fund – Conflict Dynamics: Training & Dispute Resolutions Services: An Overview prepared by Attorney and Mediator Ms Leigh de Souza-Spagnoletti.
[8] ***AA Mutual Insurance Association Ltd v Maqula*** 1978 1 SA 805 (A).
[9] ***A.A. Mutual Insurance Association Ltd v. Van Jaarsveld*** 1974 (4) SA 729 (A).
[10] Corbett, in the Quantum of Damages Vol 1 page 51
[11] Robert Koch, 2017 Edition, Quantum Yearbook page 126.

> *'[28] This court was confined to the stated case and joint minutes of experts as outlined in paragraph 15 of this judgment, thus making it difficult for this court to cover a wide range considerations, which as we know vary from case to case. It was concerning for this court to hear a submission by counsel on behalf of the plaintiff stating that reports should not be made available to the court as there are disagreements in the reports and that witnesses have been excused due to the signing of stated case document.'* Those difficulties do not arise herein.

Admitted expert evidence

[19] It is common cause that as a result of the accident Z[...] sustained the following injury: a crush injury of the right foot and ankle with severe lacerations of the lower leg, ankle and foot and laceration of multiple tendons. This injury is described by Dr R. Jaffe as a severe crush injury to his foot. There were no fractures. He will at no stage be fully mobile and in fact would be very restricted in this area. This will affect him in that he is a Grade behind in school and once he has completed his schooling he will be restricted in what physical work he can apply when he decided on his future career. He certainly will not be able to manage work of a manual nature where he has to be on his feet all day and he has to negotiate uneven surfaces and generally be fully mobile.

[20] Ms Lise Jackson, an occupational therapist, who had assessed Z[...] on 07 March 2023 indicated that Z[...] will require frequent breaks and postural changes to alleviate pain in his right ankle, should he not receive successful treatment by the time he enters the open labour market. He will not be considered an equal competitor when he eventually enters the open labour market in an economic situation which already provides limited work opportunities. He will enter an open labour market a year later. Apart from the Covid19 pandemic it appears his long recovery time had caused him to fall behind of his age cohort at school.

[21] Dr Nokhanyo Rungqu-Mshumpela, the defendant's expert and an industrial psychologist, after assessing Z[...] found that there is no reason to doubt that pre-morbidly Z[...] would have attained a Grade 12 plus a Diploma/Bachelor's Degree resulting in NQF Level 6/7 from a recognised tertiary institution. Furthermore, he would have been able to compete in the open labour market as a semi-skilled and skilled worker until normal retirement age of 65 years should there be grounds to conclude that there was indeed an earning capacity without the event of the accident. She concluded that had the accident not occurred it seems reasonable to infer that Z[...] would have completed NQF Level 6/7 equivalent at the age of 22 years after taking into account the assessment results, information obtained during the interview and the opinions of other experts relevant to this matter. Based on Z[...]'s injuries sustained as a result of the motor vehicle accident it seems reasonable to infer that Z[...] although he would complete his schooling a year later would be able to complete his matric and possibly pursue a career of his choice within a sedentary category. She concurred with Ms Lesa Jackson, that Z[...] will not be considered an equal competitor when he eventually enters the open labour market.

[22] In the joint minute between the plaintiff and defendant's Industrial Psychologists Dr Nokhanyo Rungqu-Mshumpela and Ms Madeleine Pretorius agreed under the uninjured career prospects and earnings that Z[...] would probably commence working on a semi-skilled Paterson B2 and would progress to a skilled level at least Paterson C1 during the course of his career. They also agreed that he would have continued to benefit from average inflationary increases until the normal retirement of 65 years old. When dealing with injured career prospects in earnings they were *ad idem* that Z[...] has been rendered a vulnerable competitor in the open labour market. It is for that reason that they recommended a higher contingency based on, amongst others, these factors: the scarcity of accommodating employers, occupational narrowing, and spells of unemployment. They agreed that Z[...] might experience periods of unemployment in future due to his restrictions and a narrow range of opportunities available to him.

[23] A joint minute between the educational psychologists Dr Geeta M Prag and Ms Caren Trollip recorded that the plaintiff missed a year of schooling due to recovering from his injury and during the 2020 Covid 19 pandemic when the schools were closed. As a result of that he is now a year behind his age cohort. His mother reported that he was upset about that fact. They found that it was difficult to discern what would have occurred in terms of his marks had he completed Grade 2 in 2021.

[24] Dr R Jaffe regarded the crush injury on the right foot of Z[...] as a most severe injury to cause significant skin and soft tissue damage as well as mobility restrictions. He did not suggest any further treatment and there appeared to be no other orthopaedic treatment for this injury. With regard to the extensor tendons of the ankle and foot there is no further treatment for this and these injuries have contributed to Z[...]'s functional impairment in that there is weakness of extension of the foot and the ankle for which there is no further treatment. He concluded that Z[...] has sustained a severe crush injury to his right foot that has left him with functional mobility's restriction that will not improve at any stage in the future. His mobility will be restricted from a moderate to moderately severe degree on a permanent basis. Z[...] is self-conscious of the scars and keeps them covered at all times. He walks with a definite limp and is not able to crouch or kneel. He walks with a heel inverted.

[25] Dr Keith Cronwright, found that, as a young boy Z[...], with many years of life ahead of him, has been left with a serious scar of his right lower limb which negatively impacts his functional abilities and activities of daily living. As he grows older the situation will only deteriorate and he will benefit significantly from certain procedures to improve function of the foot. He will still be left with serious scarring of the right lower limb which will be noticeable and attract negative attention and comments when wearing certain types of clothing. He found that children can be cruel and the unsightly scar is almost certain to attract negative attention from his peers. The location of the scarring may prevent Z[...] from ever being able to work in a position that requires the mandatory wearing of safety boots.

[26] Plaintiff relied on the assessments of the industrial psychologists and their agreement as contained in their joint minutes matters such as career path liked to be followed by Z[...], his probable remuneration, prospects of promotion, working life span, retirement and other factors that would have a bearing on his income over the years. Mr Munro in his calculations found that the capital value of loss of earnings after contingencies would be an amount R2 450 210. He took into account the fact that Z[...] as a minor had not suffered past loss of earnings due to the accident. Relying on the information provided by, *inter alia,* the industrial psychologists, he interpreted and made assumptions that if Z[...] passed each grade he would have completed Grade 12 in December 2030. He allowed for 4 years of tertiary studies and Z[...] entering the labour market at the age of 22. In interpreting future uninjured earnings, he described Z[...]'s career and earnings progression had the accident not occurred, that, he would have completed Grade 12 in December 2030. In January 2031 he would have received R100 per day, 2 to 3 days per week during tertiary studies. In January 2035 he would reach the Paterson B2/B3 at R296 500 per year, on a straight line to Paterson B4 at R364 000 per year in January 2039. In January 2043, he would reach Paterson B5 at R425 000 per year on a straight line to January 2049 on Paterson C1 at R519 000 per year. He allowed for earnings inflation until retirement at age 65.

[27] In relation to future injured earnings Z[...] would complete Grade 12 in December of 2031, he would receive no earnings during tertiary studies. He would reach Paterson B2/B3 at R296 500 per year straight line in January 2036 and in January 2040 he would reach PatersonB4 at R368 000 per year straight line to January 2034 where he would reach Paterson B5 at 425 000 per year straight line to January 2050 Paterson C1 at R519 000 per year.

[28] Looking at all the body of evidence which has been accepted by the defendant, Ms Futshane's submissions that progression is the same as if Z[...] has not been injured must be viewed in context, by taking all the evidence in its totality and not piece meal. There is the one-year delay attributed to the

period of recuperation of Z[...] from the injuries. He is going to lose earnings during tertiary studies. Ms Futshane also submitted that a person with disability like Z[...] would receive preferential treatment within the labour market. That may be so, but unfortunately this submission is not supported by the various experts whose evidence has been admitted by the defendant. All the experts whose findings are summarised above, had examined and assessed Z[...]. Most importantly the industrial psychologists are also privy to what occurs within the labour market. As aforementioned they agreed, inter alia, that "*Z[...] will not be considered an equal competitor when he eventually enters the open labour market in an economic situation which provides limited work opportunities."* Had preferential treatment been a factor that would have been favourable to Z[...], they would have mentioned it. In this regard the defendant is bound by the admissions made.

[29] The educational psychologists Dr Getta M Prag and Ms Karim Trollip found that Z[...] excels in drawing cartoons and shows artistic talent. He has an interest in becoming an artist. His mother was in the military police and had a Diploma NQF Level 6. She progressed up the ranks to become an Officer and later a Commander. She is currently a business owner. Z[...] loves to read about animals. He is a year behind his peers and it was reported to the professionals by his mother that he was very upset about that position. He is performing well at school and passed well in Grades 3 to 5 (first term) when the assessment was done. The educational psychologists assumed that Z[...] would probably be able to complete Grade 12 with endorsement to tertiary higher certificate diploma or degree studies. As aforementioned, the industrial psychologists agreed that Z[...] might experience periods of unemployment in future due to his restrictions and narrow range of job opportunities available to him.

[30] Z[...] has poor concentration and as a result his performance is not as it was before the incident. He has intermittent pain in the toes. He has unsightly scars as described by the orthopaedic surgeon. The factors alluded to by the defendant were taken into account by Munro Actuaries when they compiled their calculations and assumptions. In the circumstances of this case, given

the fact that the defendant, not only admitted the reports that they should form part of the evidence but accepted the facts, findings together with all the opinions expressed by the various professionals as indicated earlier in this judgment. There is accordingly no basis to find that a 30% contingency should be applied to earnings pre and post – morbidly.

[31] Based on the opinions of the industrial pychologists this court will be justified in finding that Z[...] must be adequately compensated because, as a result of the injury, he will be disadvantaged on the labour market such that, were he to lose a job, it would take him longer to secure alternative employment and / or he would struggle to secure similarly paid employment.

[32] Nicholas JA in ***Southern Insurance Association Ltd v Bailey NO***[12] stated:

> *'Any enquiry into damages for loss of earnings 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. It has 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 guess work, a blind plunge into the unknown. The other is try to make an assessment, by way of mathematical calculations, on the basis of 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 guess work to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award.'*

[33] I am accordingly persuaded that the contingency deductions of 25% pre-morbid and 40% post- morbid proposed by the plaintiff are reasonable and

[12] ***Southern Insurance Association v Bailey NO*** 1984 (1) SA 98 (A) at 113 F– 114 A.

consistent with the proven facts and the risk factors relevant to this case. The defendant did not object to the proposed draft order sought by the plaintiff. In the draft order plaintiff took into account the contingency deductions proposed by him. That resulted in the amount of R915 925.00 in addition to the interim payment of R350 000.00 referred to, above, being in full and final settlement in respect of the plaintiff's claim for loss of income. It follows that the plaintiff has been successful in its argument for justification of higher contingencies on the injured income. Defendant must accordingly bear the costs occasioned by the hearing of 31 July 2024.

Order

[34] I accordingly make the following Order:

1. **Defendant shall pay an amount of R915 925.00 (in addition to the interim payment of R350 00.00 made in terms of Court Order dated 24 April 2024) in full and final settlement in respect of the Plaintiff's claim for loss of income.**

2. **Payment of the aforesaid amount shall be made directly to Plaintiff's attorney of record, De Vries Shields Chiat Inc's trust account, details of which are as follows:**

Name	**:**	**De Vries Shields Chiat Inc.**
Bank	**:**	**First National Bank**
Branch	**:**	**Portside**
Branch code	**:**	**21065**
Account	**:**	**6[...]**

3. **Defendant shall pay interest on the aforesaid amount in paragraph 1 above at the prevailing prescribed interest rate calculated from a date 14 days after granting of this Order, in accordance with Section 17(3)(a) of the Road Accident Fund Act 56 of 1996 as amended.**

4. The amounts awarded to the Plaintiff are to be retained in Plaintiff's Attorney's trust account, save for payment of disbursements, pending the outcome of an application to be made for the appointment of a *curator bonis* to the minor.

5. Defendant shall pay Plaintiff's taxed costs of suit from 25 April 2024 up to and including date of this order, including the costs of counsel to be taxed on scale B (as stipulated in Rule 69(7)), such costs are to include but not limited to:

5.1 The costs of the supplementary reports (if any) of the experts for whom the Plaintiff has given notice in terms of Rule 36(9)(a) and (b);

5.2 The qualifying fees, expenses and reservation costs (if any) of the experts for whom the Plaintiff has given notice in terms of Rule 36(9)(a) and (b);

5.3 The costs of the joint minutes of:

5.3.1 K. Trollip; and

5.3.2 M. Pretorius.

5.4 The costs of consultations between Plaintiff's counsel, Plaintiff's Attorney, Plaintiff and witnesses in preparation for trial;

5.5 The costs of the trial for 31 July 2024;

5.6 The costs of the application to be brought for the appointment of a *curator bonis* to the minor, on a party and party scale.

6. **Defendant shall pay interest on Plaintiff's taxed costs at the prevailing prescribed interest rate per annum calculated from a date 14 days after allocator to date of payment.**

7. **Defendant shall furnish Plaintiff with a section 17(4)(a) Undertaking for 100% of the costs of future expenses, future accommodation in a hospital, or treatment of or rendering of a service to him or supplying of goods to him, and as further detailed in the reports filed by Plaintiff to date, arising out of the injuries sustained in the collision on 19 December 2019, after such costs have been incurred and upon proof thereof, such costs to include the costs of a *curator bonis*, if any, as well as the costs of security, if required.**

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T.V NORMAN

JUDGE OF THE HIGH COURT

APPEARANCES:

For the PLAINTIFF	:	ADV WESTERDALE
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For The DEFENDANT	:	MS FUTSHANE
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Matter heard on	:	31 July 2024
Judgment delivered	:	13 August 2024