REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case Number: 22118/2019

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE SIGNATURE

In the matter between:

GIDIGIDI THOBEKA obo B[…] M[...] **PLAINTIFF**

AND

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MABASA, AJ:

Introduction

[1] This is an action for damages arising out of personal injuries sustained in a motor vehicle accident.

Parties

[2] The Plaintiff is Adv. Zinhle Buthelezi as *curator ad litem* on behalf of the minor M[...] B[…] ("M[...]''). The Defendant is the Road Accident Fund, a juristic person established by Section 2(1) of the Road Accident Fund Act 56 of 1996 as amended ("RAF").

The facts

[3] On 22 January 2017, at N17 East, Heidelburg road, Brakpan, Gauteng Province. M[...] (age 10) was a passenger in a car involved in an accident. She lost both her parents and younger sibling in the accident.
She suffered a severe traumatic brain injury, loss of consciousness, and a Glasco coma scale(GCS) of 7/15. She had bruising and oedema around her eyes and a fractured left femur. She was airlifted to Sunshine Hospital, spent ten days in the intensive care unit, then moved to High Care for management for seven days, and then to a general ward where she stayed for two days before being released.

The issues

[4] The RAF conceded liability, and the merits were settled 100% in favour of M[...].

[5] With regard to quantum, the issue of general damages has been postponed *sine dies* pending determination by the HPCSA. The RAF has tendered a Section 17(4)(a) undertaking for future medical expenses. The only issue for determination in this action is the amount of compensation for future loss of earnings.

[6] The plaintiff also sought to amend her particulars of claim in terms of rule 28(1) to increase the amount claimed after receiving an updated actuarial report.

The Plaintiff's case

[7] The plaintiff provided eight (8) expert reports, three (3) of which were accepted by the defendant. The defendant did not submit any expert reports. The reports of three experts—Neurosurgeon Dr. Mazwi; Orthopaedic Surgeon Dr. Breytenbach; and Psychiatrist Dr. Miles were submitted into evidence without requiring them to testify. These reports confirmed that M[...] sustained the following injuries and their sequelae;

- a moderate head injury (Dr. Mazwi), with a risk of epilepsy and permanent cognitive effects.
- Orthopaedic injuries (Dr. Breytenbach), causing mobility restrictions that affect employability.
- Severe psychological trauma (Dr. Miles), including major depressive disorder and PTSD, requiring ongoing psychiatric intervention.

These reports are uncontested.

[8] The following four experts testified on behalf of the Plaintiff;

- Industrial Psychologist, Ms. Hako testified that pre-accident, M[...] was expected to graduate with an NQF 7 degree, secure professional employment, and progress to senior levels of employment. Post-accident, she faces limited job prospects, intermittent unemployment, and career stagnation. At best, she might attain an NQF 5 certificate, followed by a low-income learnership and unstable employment until age 45, with a high likelihood of unemployment thereafter. Her psychological and cognitive impairments make career advancement unlikely.
- Occupational Therapist, Ms. Sivhabu is of the view that physical pain and cognitive challenges will affect M[...]'s daily functioning. She is emotionally withdrawn, and this withdrawal impacts her social and professional development, leaving her at a disadvantage in the open labour market. Future work for her will likely be limited to medium-level, domestic, or administrative roles, where she will struggle to compete with uninjured peers.
- Neuropsychologist, Ingrid Jonker testified that M[...] suffers from mild neuro-cognitive and neuro-behavioral difficulties, PTSD, and chronic

depression. Her cognitive impairments impact concentration, memory, and overall productivity, limiting her career progression. She has reached Maximal Medical Improvement (MMI)with no expectation of further recovery. She lacks financial means to access necessary neuropsychological treatment, exacerbating her condition.

- Educational Psychologist Mr. Kubheka testified that pre-accident, M[...] was an above-average student expected to achieve a Bachelor's degree (NQF 7). Post-accident, her academic performance declined significantly, particularly in core subjects, leading to low APS scores. Despite a Bachelor's pass obtained in Grade 12 in 2024, her university applications for Diplomas were rejected, confirming her limited educational progression. She is now most suited for a lower-level NATED certificate (NQF 5), constraining her career opportunities.

The Jacobson actuarial report

[9] The actuarial findings compare two scenarios regarding M[...]'s future earnings based on different assumptions about her medical intervention and support. Basis I assumes that M[...] receives no medical intervention, completes Grade 12, attains an NQF 5 qualification, and earns at the Paterson A1 lower quartile salary level with inflationary increases until retirement at 65. Basis II assumes that M[...] receives medical intervention, secures employment, and earns at the Paterson A3 median salary level with inflationary increases until retirement at 65.

[10] The actuary applied contingency deductions of 20% and 30%, respectively.

[11] Despite M[...] not having received meaningful medical intervention and her difficulties becoming permanent over time, the plaintiff has considered the more optimistic Basis II. Under this scenario, the total loss of future earnings is **R8,181,631.00**, which is R506,110.00 less than Basis I.

The Defendant's case

[12] The defendant argues that M[...] is not excluded from the open labour market despite her physical and cognitive difficulties resulting from the accident. She is still capable of working in occupations requiring medium strength and sedentary tasks. This is confirmed by the experts. While she experiences cognitive challenges and grief, medical interventions exist to help her manage these difficulties. The defendant contends that the RAF has committed to covering her medical expenses, allowing her to receive necessary support.

[13] The fact that M[...] completed her matric with a Bachelor's pass without ongoing therapy, demonstrates resilience and determination. The defendant argues that she can continue to manage her challenges into adulthood.

[14] Counsel for the Defendant argues that the court is not bound by expert opinions, and while experts foresee challenges, the plaintiff's achievements contradict overly pessimistic projections.

[15] The defendant submits that the claimed amount is excessive given the plaintiff's circumstances. They propose higher contingency deductions of 50% and 60% reducing the total amount of compensation to **R5,266,168.00**. The Defendant did not provide an actuarial report.

Analysis

[16] The testimony provided by all the plaintiff's experts collectively demonstrates that M[...]'s injuries have permanently altered her academic, professional, and financial future. It is undisputed that M[...]'s cognitive, psychological, and physical impairments have significantly reduced her future career prospects and earning potential. She suffers from major depression and experiences physical pain, further limiting her ability to compete in the open labor market.

[17] However, there are inconsistencies in the expert opinions. Whereas, Ms. Hako, contends that M[...] would have progressed to a professional career with an NQF 7 qualification and is now limited to a Nated Certificate, the Educational Psychologist, Mr. Kubheka, acknowledges that M[...] achieved a Bachelor's pass in

Grade 12, despite her injuries. This contradicts the assumption of severe academic decline and stagnation.

[18] With regard to her medical prognosis the Neuropsychologist (Ingrid Jonker) states that M[...] has reached Maximal Medical Improvement (MMI) and will not recover further. However, the Occupational Therapist (Ms. Sivhabu) suggests that treatment could improve her functional capabilities. If there is potential for improvement, the assumption that her career will stagnate indefinitely lacks justification. The plaintiff cannot simultaneously claim permanent impairment and assume an optimistic employment outcome in Basis II of the actuarial report.

[19] The defendant argues that M[...] is still capable of work within medium-strength and sedentary occupations. Many individuals with similar injuries successfully engage in meaningful employment, provided they receive reasonable accommodations.

[20] The plaintiff's assertion that M[...] will face inevitable and prolonged unemployment is overly deterministic. Economic vulnerability does not equate to complete exclusion from the workforce, and the lack of ongoing therapy does not preclude future recovery with appropriate interventions.

Contingencies

Pre- morbid scenario

[21] I accept thar M[...]'s position is extremely vulnerable, exacerbated by her post-morbid emotional and physical condition and that she would not be an equal competitor in the open market.

[22] In *Goodall v President Insurance Co Ltd*[1]*,* the court established that the longer the period over which a plaintiff's income is projected, the higher the contingency deduction should be. Koch's standard approach recommends a 0.5% contingency

[1] Goodall v President Insurance Co Ltd 1978 1 SA 389 (W)

deduction per year over the applicable earning period to account for the inherent uncertainties in career progression.

[23] M[...] was 10 years old at the time of the accident, her anticipated working life expectancy would typically span from 18 to 65 years, amounting to approximately 47 years. In addition to applying the 0.5% per year sliding scale in determining the appropriate contingency deduction for the pre-morbid scenario the court must consider factors such economic conditions affecting employment prospects, and M[...]'s family background and socio-economic status. Accordingly, a higher pre-morbid contingency (25-30%) may be more appropriate given these factors.

Post-Morbid scenario

[24] The plaintiff applies a 30% deduction, but this does not fully reflect the increased risks of unemployment, career stagnation, and dependency on external assistance.

[25] The defendant's proposal of 50-60% contingency deductions is more aligned with precedents where severe impairments significantly limit earning capacity. Courts have routinely applied higher post-morbid deductions in cases involving both cognitive and physical impairments.

[26] A balanced approach would be to adopt a midpoint of 40-50%, ensuring that both potential employment and significant career challenges are accounted for.

[27] *Ndzundzukani v Road Accident Fun*d[2], the court acknowledged the plaintiff's increased vulnerability in the labor market due to accident-related injuries, which limited her to less strenuous tasks and necessitated time off for treatment. Recognizing these challenges, the court applied a 35% contingency deduction in the post-accident scenario to account for the heightened risk of unemployment and reduced career prospects.

[2] Ndzundzukani v Road Accident Fund (532/2022) [2024] ZAMPMBHC 19

[28] in my view, a settlement figure should consider a slightly higher pre-morbid contingency (25-30%) and a significantly higher post-morbid contingency (40-50%),

[29] I apply the following contingencies:

Adjusted Pre-Morbid Income Projection

- Pre-Morbid Income: R13,128,668.00
- Pre-Morbid Contingency **(27%)**: R3,544,740.00
- Adjusted Pre-Morbid Income: R9,583,928.00

Adjusted Post-Morbid Income Projection

- Post-Morbid Income: R3,245,415.00
- Post-Morbid Contingency **(45%):** R1,460,437.00
- Adjusted Post-Morbid Income; R1,784,978.00

Revised Future Loss Calculation:

-Net Future Loss Calculation: R7,798,950.00

-Final Adjusted Claim (after RAF Act Limitation): R7,700,000.00

Conclusion

[30] This amount recognizes that M[...]'s injuries permanently impact her earning capacity and acknowledges her significant future loss while ensuring that the contingencies applied remain within a reasonable range.

The Rule 28 Amendment

[31] The amendment only seeks to adjust the quantum of the claim. It does not introduce a new cause of action. It does not unfairly prejudice the defendant and is therefore allowed.

Order

In the premises, the following order is made;

[1] The defendant is ordered to pay the sum of R7 700,000.00 (Seven Million, Seven Hundred Thousand Rand) in respect of the plaintiff's claim for future loss of earnings.

[2] The defendant is ordered to pay the taxed or agreed costs on the appropriate scale including costs of Counsel including preparation; consultations; pre-trial attendances; interlocutory applications; heads of argument and trial court appearances for three (3) days.

[3] Reasonable costs of all Plaintiff's 8 expert witnesses including costs of the filed reports; and the expert's reservation fees and attendance of the 4 experts that testified.

[4] Interest of the capital is to be calculated from 14 days of the Order of Court until the date of payment, in terms of Section 17(3)(a) of the RAF Act 56 of 1996.

MABASA AJ

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of hearing: 11- 13 February 2025

Date of judgment: 14 February 2025

For the Plaintiff: R. Sempe instructed by Zwelakhe Mgudlandlu Attorneys

For the Defendant: L. Mtshemla instructed by the State Attorney