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**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case no: **2587/2021**

In the matter between:

NKHOLISENG REGINAH GEDU
[NEé **RABOKO**]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Coram: De Kock, AJ

Heard: 11 February 2025

Delivered: This judgment was handed down and released to SAFLII. The date for hand-down is deemed to be 21 February 2025.

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Summary: Road Accident Fund – loss of income – general damages.

ORDER

1. The defendant shall pay the plaintiff the sum of R2 400 000.00 (two million four hundred thousand rand) in terms of quantum, set out as follows:

1.1 Loss of earnings R1 600 000.00

General damages R 800 000.00

SUBTOTAL R2 400 000.00

1.2 The defendant shall pay the amount of R2 400 000.00 (two million four hundred thousand rand) within one hundred and eighty (180) days of date hereof into the plaintiff's attorneys trust account. The plaintiff's trust account details are as follows:

Account holder	:	Van der Spuy (Cape Town)
Branch	:	Nedbank
Branch code	:	118 602
Type of account	:	Trust account
Account number	:	118[...]
Reference number	:	LW/MAT32944

1.3 Interest shall accrue on such outstanding amount as per the Prescribed Rate of Interest Act 55 of 1975, as amended, per annum, calculated from due date, as per the Road Accident Fund Act, until the date of payment.

2. The defendant will pay the plaintiff's taxed or agreed party and party costs including but not limited to the costs as set out herein below:

2.1 The reasonable qualification and reservation fees of the plaintiff's following experts:

- (i) Dr Anton van den Bout, Orthopaedic Surgeon;
- (ii) Dr N Kruger, Radiologist;
- (iii) Dr Keith Cronwright, Plastic Surgeon;
- (iv) Ms Frizelna Steyn, Occupational Therapist;
- (v) Dr Leon Bezuidenhout, Industrial Psychologist;

(vi) Wim Loots (Actuarial Consulting, Actuary).

2.2 The fees of counsel in terms of rule 67A(3)(a) read with rule 69(7) on Scale B which costs shall include, but is not limited to, the drafting of heads of argument and trial date of 11 February 2025.

2.3 In the event of default on the payment of costs, interest shall accrue on such outstanding amount at the statutory *mora* rate on the date of taxation/settlement of the bill of costs, as per the Prescribed Rate of Interest Act 55 of 1975, per annum, calculated from due date until the date of payment.

JUDGMENT

De Kock, AJ

Introduction:

[1] On 27 October 2010, the plaintiff was involved in a motor vehicle collision that resulted in injuries. The plaintiff instituted action against the defendant in terms of the Road Accident Fund Act 56 of 1996.

[2] In the plaintiff's particulars of claim, she claimed as past loss of earnings the amount of R1 180 000.00, such amount being inclusive of an illustrative contingency deduction of 20%. The plaintiff, in respect of future loss of earnings, claimed the amount of R550 000.00 inclusive of an illustrative contingency deduction of 35% in respect of the plaintiff's uninjured and injured future loss of earnings. Further, the plaintiff claimed as general damages the amount of R900 000.00.

[3] On 15 October 2013, the defendant's liability was settled on the basis that it undertook to pay the plaintiff 100% of her proven damages. As such, the claim for

past and future of earnings, relating contingency deductions and claim for general damages stands to be adjudicated.

[4] On 19 December 2024, the plaintiff brought an application to admit the affidavits, with incorporation of the medico-legal reports filed on behalf of the plaintiff of the following experts into evidence in terms of Uniform Rule 38(2):

4.1 The affidavit by Dr Anton van den Bout, Orthopaedic Surgeon, (Van den Bout) with inclusion of:

4.1.1 RAF 4 – Serious Injury Assessment Report, dated 24 May 2021;

4.1.2 Narrative and medico-legal report, dated 25 May 2021, inclusive of the X-ray report of Dr N Kruger.

4.2 The affidavit by Dr Keith Cronwright, Plastic Surgeon (Cronwright) with inclusion of:

4.2.1 RAF 4 – Serious Injury Assessment Report, dated 25 May 2021;

4.2.2 Narrative and medico-legal report, dated 25 May 2021.

4.3 The affidavit by Ms Frizelna Steyn, Occupational Therapist, (Steyn) with inclusion of her report dated 18 January 2023.

4.4 Affidavit by Dr Leon Bezuidenhout, Industrial Psychologist, (Bezuidenhout) with inclusion of his report dated 1 February 2023.

4.5 Affidavit by Mr Wim Loots, Actuary, (Loots Actuaries) with inclusion of his report dated 10 October 2024.

[5] The order in terms of Uniform Rule 38(2) was granted on 19 December 2024.

[6] The legal representative for the defendant indicated that she holds no instructions, but that she is not withdrawing as attorney of record.

[7] At the onset, the legal representative on behalf of the plaintiff requested that the prayers of the application in terms of s 3(1) of the Law of Evidence Amendment Act 45 of 1998 be granted. I granted such orders, essentially admitting the collateral documents into evidence.

Oral evidence:

[8] The previous employer of the plaintiff, Mr Nkosinathi Mtwanambi and the plaintiff herself, testified on behalf of her case.

The evidence of Mr Nkosinathi Mtwanambi:

[9] He testified that the plaintiff was one of his employees. He recruited her in 2009 and she started working in February 2010. He testified that she worked for his previous company, Ihlathi Construction. He testified that he was the General Manager of Ihlathi Construction, which closed in 2012. Furthermore, in 2010, the Plaintiff was a first-aider, and she already received her training. He indicated that she earned R5 000.00 per month with the applicable sliding scale and that there had not been any issues with her performing her duties. His testimony included reference to the toll first-aid work could exert on a person, thereby requiring a person to be 100% fit.

[10] On account of the injuries sustained during the collision, she was airlifted to Pelenomi Hospital in Bloemfontein. He testified that after the collision, the plaintiff never returned to work as she was no longer fit to do so; she is limping as is physically unwell. He testified that, in his view, if it had not been for the accident, the plaintiff would have had other opportunities, like becoming a Health officer, training other first-aiders. By now she should have been in a higher position in the previous company or even in his current company and would have been entitled to a better salary. He testified that the take-home salary of the next position after a first-aider is between R25 000.00 and R30 000.00.

The plaintiff's evidence:

[11] She testified that she did not have any illnesses prior to the accident. She sustained injuries to her right leg including her right hip and right knee. She also indicated that she now has a scar on her face on account of the accident.

[12] She testified that after the collision she was transported to Smithfield Coetzee Hospital and transferred to Pelonomi Hospital. While she was admitted, she underwent an operation to her right hip and was referred to a physiotherapist to help

her walk with crutches. She was admitted on 27 October 2010 and discharged on 23 November 2010. Lastly, she was also referred to a nearby clinic for X-rays.

[13] She testified that she is unable to walk long distances. Sitting causes pain and when it is cloudy or rainy, she has difficulty standing. She can no longer bend her body properly is unable to exercise, as she was an avid jogger before the motor vehicle collision. She testified that post-accident, she gets angry easily and suffers from bouts of depression when she thinks that she will no longer be able to provide her children what they want.

[14] She testified that the highest grade that she passed was her Grade 12 Senior Certificate, which she obtained in 2004. After Grade 12 she stayed home for a few years and managed to complete a course in Basic Ambulance Assistant Training. This led to her obtaining her first job in 2015.

She further testified that at the time of the accident she worked at Ihlathi Construction. She was employed as a Safety Representative and earned R5 000.00 per month. Her duties as a first-aider included taking care of the other employees and to perform safety checks of the work site. However, on account of the injuries sustained during the motor vehicle collision, she did not return to her employment.

[15] In 2015 she was contractually employed at Wongalethu for a year, to cook for children. She earned an income of R1 100.00 per month but once her employment ended upon the expiry of the contract, she was unemployed. She gained similar employment at Wongalethu in 2021 and earned R1 600.00 per month but suffered the same fate once the contract expired.

[16] In 2023, she obtained a job at Driefontein Abattoir, working as a laundry girl and is earning R4 500.00 per month. She is currently employed in this role but testified that the injuries interfere with her job. When she does not feel well, she reports at the office and they allow her to do work seated. However, sometimes there is nothing that can be done as she is often required to use stairs during the course of her duties, which is painful.

The plaintiff's expert evidence and medical evidence:

[17] The uncontested medical evidence pertaining to the nature and extent of the injuries sustained by the plaintiff's is as follows:

- i) A fracture of the right femur;
- ii) Patella-femoral joint injury of the right knee;
- iii) Facial abrasions;
- iv) Head injury – GCS 15/15;
- v) Flexor tendon laceration of the right arm;
- vi) Resultant post-traumatic stress disorder (PTSD).

[18] The uncontested medical evidence pertaining to the plaintiff's treatment is as follows:

- i) She was injured and taken by ambulance to Smithfield Hospital, where she was seen, stabilized and thereafter transferred on the same day to Pelonomi Hospital, where she was seen, admitted and treated for a period of about one month.
- ii) She received an intramedullary locking nail fixation on 1 November 2010. She was mobilized by the physiotherapist with crutches. She apparently lost a significant amount of blood and she had to receive blood transfusions.

Dr van den Bout's uncontested evidence:

[19] Dr van den Bout's uncontested evidence is:

- i) the plaintiff presents with surgical scarring of the right hip and right knee;
- ii) the plaintiff's right knee was swollen, and crepitation's could be felt. The patella-femoral joint was positive for damage;
- iii) The plaintiff presented with a Grade 1 instability of the right medial collateral ligament, and the anterior cruciate ligament was also lax compared to the left side;
- iv) The plaintiff's pain was usually the result of tearing of the muscles that healed by way of fibrosis;
- v) Due to the plaintiff's weaker quadriceps muscles and painful right knee, she is unable to stand for long periods, walk for distances, climb many stairs or carry heavy objects. The plaintiff also experiences pain when sitting for prolonged periods with

the right knee in a bent position. These impairments will affect the plaintiff's earning capacity;

vi) The accident was a life-changing event for the plaintiff who is now an unequal competitor in the open labour market and is dependent on a sympathetic employer;

vii) In his opinion, the plaintiff requires the removal of the internal fixation of the right femur as well as an arthroscopy and debridement of the right knee. It is further his view that the plaintiff requires a consultation, evaluation and treatment by a psychologist for PTSD, if needed.

The uncontested evidence of Ms Steyn:

[20] Ms Steyn's uncontested evidence is:

i) The plaintiff presented with decreased movement in the right knee, pain in the right knee with all associated movements, slightly decreased muscle strength in the right knee, mild swelling of the right knee and moderate swelling of the right thigh and right calve;

ii) The plaintiff's functional residual capacity is limited to mid-range medium work. She can occasionally stoop but no more than one third of the day. Her ability to engage in sitting, standing, kneeling, stairclimbing, walking and repetitive trunk movement should not exceed more than two thirds of the day;

iii) The plaintiff's work as safety representative at the time of the accident was light in nature, but there is a mismatch regarding constant walking. Considering the job requirements of the safety representative who constantly walks over uneven terrain on building sites, the plaintiff will struggle to sustain the inherent requirements of such a job. She will require reasonable accommodations by an employer, which may not be feasible;

iv) She may also be a safety liability. In the circumstances, the plaintiff is unable to compete against uninjured individuals and will probably struggle to maintain work as a safety representative;

v) The plaintiff is able to work as a cook, as she works in a seated position for most of the day. As a contract worker, she will always be at risk of her contracts not being renewed. The plaintiff is limited to sedentary, light and mid-range medium work, provided that she does not do prolonged walking, standing, stairclimbing, walk

over uneven terrains, kneeling or squatting. Although the plaintiff may cope with work demands of sedentary, light and mid-range medium work, her productivity will be negatively affected by her pain, which pain is compounded by her mood difficulties. She remains at risk of losing her job due to her inability to compete fairly against her healthy counterparts;

vi) Her working ability will be further affected negatively is her psychological challenges of short-temperedness, irritability, depression and motivation are not well-managed;

vii) The plaintiff is no longer able to attend a gym, which is a permanent loss to her.

The uncontested evidence of Dr Cronwright:

[21] Dr Cronwright's uncontested evidence is that:

i) His examination revealed surgical scarring of the right hip and right knee. Due to the plaintiff's high body mass, plastic surgery is not indicated due to the associated high incidents of complications. The internal fixation may require removal, and should this happen, it will be possible to improve the appearance of the surgical scarring at the same time by approximately 40%.

ii) The accident was significant for the plaintiff; before the accident she was employed, but now has problems with standing and walking for long periods and her functional problems will almost certainly negatively affect her future prospects. Added to this, the plaintiff has been left with significant scarring of the right leg that bothers her. This level of scarring in women is often problematic as it is often a source of emotional distress.

Uncontested evidence of Dr Bezuidenhout:

[22] The uncontested evidence of Dr Bezuidenhout is:

i) Had it not been for the accident, the plaintiff could have continued to work in her pre-accident position as a safety representative. She would have earned on the lower quartile of the Patterson A1 level (as she did at the time of the accident) and could have progressed to working on Patterson B1/B2 level. It is speculated that the she could have progressed at three to five years intervals and would have reached

her earning ceiling at the age of 45 years. Thereafter, she would have earned annual inflationary increases until her retirement age of 65 years;

ii) Including the accident, the plaintiff is able to work as a general worker on the Patterson A1 level, but she will probably only progress to a Patterson A2/A3 level. She will reach her career ceiling at the age of 45 years, whereafter she will earn annual inflationary increases until her retirement age of 65 years;

iii) The plaintiff's IQ testing revealed that she has low IQ abilities. She seemed to be more introverted than an extrovert, and the plaintiff informed Dr Bezuidenhout that she became short-tempered, irritable and impatient after the accident. She also experiences negative feelings about herself;

iv) In ideal economic and employment circumstances, the plaintiff, at the age of 39 years, should have found herself in her adult life stage and in terms of her career, she should have found herself moving from the advancement to maintenance stage of the general career development stages.

Uncontested report of Wim Loots Actuarial Consulting dated 10 October 2024:

[23] The uncontested report of Loots Actuaries:

i) The actuary took into consideration the report of Dr Bezuidenhout and calculated the past uninjured income as R1 516 303.00 while the uninjured future income amounted to R3 341 829.00, both totalling R4 858 132.00. The injured past income was calculated as R32 400.00 and the future injured income was calculated as R2 489 966.00, thereby totalling R2 522 366.00. The total past loss of earnings is calculated to be R1 483 903.00 and the total future loss of earnings is R851 863.00. The total loss of earnings is calculated to be R2 335 766.00. No contingencies were applied in the calculation.

ii) The calculation was based on the assumption that the plaintiff remains unemployed from 2022 and that she will secure employment mid-2025.

[24] Upon my request, an updated report of Loots Actuaries, taking into account the plaintiff's employment in 2023 and 2024, was handed in. The actuaries applied contingencies of 5/25% in respect of past and future uninjured income and

contingencies of 5/35% in respect of past and future injured income. The actuaries calculated the total loss of earnings to be an amount of R1 614 597.00.

Loss of earnings:

[25] It is my considered view that the plaintiff succeeded in proving her claim for past and future loss of earnings, with due regard to the uncontested evidence of Dr Bezuidenhout and Loots Actuaries. The remaining issue pertaining to the plaintiff's claim for loss of income is the contingency deductions.

[26] Counsel for the plaintiff submitted that I may take cognisance of the following positive and negative factors when deciding the appropriate contingency deductions:

- i) The plaintiff being 27 years old at the time of the accident;
- ii) That the plaintiff's job at the time of the accident in 2010 as a safety representative at Ihlathi Construction was her first job since completing matric in 2004;
- iii) The plaintiff has no documentary proof of her reported income at Ihlathi Construction in the sum of R5 000.00 per month;
- iv) The plaintiff, in her injured condition, attempted to mitigate her damages by working as a cook, which is testament to her work ethic;
- v) The opportunistic nature of the assumptions regarding the plaintiff's uninjured income;
- vi) The opportunistic nature of the assumptions regarding the plaintiff's injured income;
- vii) The possibility of mistakes having been made in the determination of the life expectancy or earning life expectancy of the plaintiff;
- viii) The likelihood that the Plaintiff could have worked beyond the age of 65 was it not for the accident;
- ix) The effects of the COVID-19 pandemic;
- x) The likelihood of illness, inflammation and adjustment for cost-of-living allowances;
- xi) Accidents that may affect the plaintiff's earning capacity and life expectancy;
- xii) Circumstances that would increase or decrease the plaintiff's cost of living;

- xiii) Transportation cost, pension fund contributions, tax liability, loss of pension and disability benefits;
- xiv) The possibility that the plaintiff's annual increases may have been more than the CPI increases.

[27] Counsel for the plaintiff submitted that given the aforementioned factors and in particular the plaintiff's limited pre-accident work history, lack of documentary proof regarding her pre-accident earnings as a safety representative and the opportunistic nature of the plaintiff's uninjured and injured career paths and earnings, that a higher than normal contingency deduction will be justified in the circumstances. I pause to mention that the latter submissions were made with due regard to the actuary report of 10 October 2024 which did not take into consideration the income derived at Driefontein Abattoir.

[28] It was further submitted that a 25% contingency deduction in respect of the past loss of earnings, a 35% contingency deduction in respect of uninjured future loss of earnings and a 35% contingency deduction in respect of the injured future loss of earnings will be appropriate.

[29] It was submitted that applying the aforesaid proposed contingency deductions to the figures in Loots Actuaries report dated 10 October 2024 will render a total post-contingency deduction loss of a rounded-off sum of R1 660 000.00. It was further submitted that the plaintiff's income at Driefontein Abattoir of approximately R60 000.00 ought to be deducted from the amount of R1 660 000.00 and that an amount of R1 600 000.00 be granted in respect of the plaintiff's claim for loss of earnings.

[30] Taking counsel's able submissions pertaining to the actuary report dated 10 October 2024 into consideration, as well as the updated actuary report, I am satisfied that the amount of R1 600 000.00 be awarded as loss of income.

General damages:

[31] In terms of the pre-trial minute dated 6 June 2024 and signed by the defendant's legal representative, the defendant undertook to provide the plaintiff with

an interim offer in respect of general damages and future medical expenses on or before 16 February 2024.

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[32] With reference to *MEC for Economic Affairs, Environment and Tourism v Kruizenga*¹ it was submitted that the admissions of fact made at the rule 37 conference constitutes sufficient proof of those facts and that the rule 37 is thus of critical importance in the litigation process and is the reason why a party in the absence of any special circumstances is not entitled to resile from any agreement deliberately reached at a rule 37 conference.

[33] I was also referred to the decision of *AMCU obo Wayise and Others v Sibanyane Gold (Pty) Ltd*² where it was held that:

‘A signed pre-trial minute is a consensual document which binds the parties and the Court in the same way as pleadings. It obliges the Court to decide only the issues set out therein. This is particularly so in that the positions deliberately taken by the parties in their respective pleadings are taken to have been reconciled or compromised in the Minute. It is against the purpose and legal consequences of pre-trial minutes that the Courts ordinarily take a dim view of parties attempting to resile from them. . .’³

It was further held:

‘To the extent that a party seeks to resile from an agreement deliberately reached at the pre-trial conference, special circumstances would have to be placed before Court.’⁴

[34] It was submitted by counsel for the plaintiff that the defendant accepted that the plaintiff sustained a serious injury, thereby entitling her claim to general damages. With due reference to the above cited case law, I agree with the latter’s submission and it is my considered view that the plaintiff is entitled to claim general damages. Counsel for the plaintiff assisted the Court with case law⁵ applicable to the

¹ *MEC for Economic Affairs, Environment and Tourism v Kruizenga* [2010] ZASCA 58; [2010] 4 All SA 23 (SCA) para 6.

² *AMCU obo Wayise and others v Sibanyane Gold (Pty) Ltd* [2024] ZALCJHB 355.

³ *Ibid* para 20.

⁴ *Ibid* para 21.

⁵ *Sefuthi v Road Accident Fund* [2022] ZASFSHC 268 (*Sefuthi*); *Litseo v Road Accident Fund* 2019 ZAFSHC 52; *Khumalo v Road Accident Fund* [2010] ZAKZDHC 5; *Mpondo v Road Accident Fund* [2011] ZAECGHC 24; *Kaduku v Road Accident Fund* [2017] ZAGPPHC 432 (*Kaduku*); *Ncama v Road Accident Fund* [2014] ZAECPEHC 74; *Fekenisi v Member of the Executive Council for the Department of Health* [2020] ZAECBHC 16; *Daniels v Road Accident Fund* 2000 QOD C3-1 (C).

facts of this case. I will not repeat the totality of it here, but will highlight two cases that stood out for me.

[35] In *Sefuthi v Road Accident Fund*⁶ the plaintiff sustained a right femur fracture, 5 cm laceration of the forehead, facial abrasions, abrasions of the left arm, long contusion, rib fracture and a fracture of the right knee. The plaintiff underwent an open reduction and internal fixation. She suffered from chronic pain of the right hip and right knee, and she struggled with prolonged standing and walking. The plaintiff had unsightly disfiguring scarring, most notably on her face and right hip. The experts noted an antalgic gait and that she would require orthopaedic built-up shoes to address the discrepancy. The experts also established that there were signs of post-traumatic osteoarthritis and that she would require a total knee replacement and subsequent revision knee replacements. The court awarded a present-day value of R763 000.00 in respect of general damages.

[36] In *Kaduku v Road Accident Fund*⁷ the plaintiff sustained a moderately severe head injury (from which he recovered without any *sequelae*), a laceration of the scalp and a fracture of the left tibia and fibula. He was treated for the head injury and underwent an open reduction and internal fixation of the left tibial fracture. The plaintiff had difficulty standing for long periods, walking far distances or do any prolonged weight bearing and strenuous exercise. Before the accident, he worked as a tiler, but after the accident, struggled to perform all aspects of his work. The court awarded a present-day value of R916 000.00 in respect of general damages.

[37] With due regard to the law applicable to the facts in *casu*, the conclusion must be that the amount of R800 000.00 for general damages will restore justice to the plaintiff.

Costs:

[38] It is my considered view that there is no reason to deviate from the standard practice to award a successful party – party and party costs. It is further my considered view that the High Court scale B is the appropriate scale in view of the

⁶ Ibid.

⁷ *Kaduku* fn 5.

complexity and magnitude of issues and documentation, including the extent of the Plaintiff's injuries as well as actuarial principles and contingency deductions.

Orders:

[39] In the result the following orders are granted:

1. The defendant shall pay the plaintiff the sum of R2 400 000.00 (two million four hundred thousand rand) in terms of quantum, set out as follows:

1.1	Loss of earnings	R1 600 000.00
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General damages	<u>R 800 000.00</u>
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SUBTOTAL	<u>R2 400 000.00</u>
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1.2 The defendant shall pay the amount of R2 400 000.00 (two million four hundred thousand rand) within one hundred and eighty (180) days of date hereof into the plaintiff's attorneys trust account. The plaintiff's trust account details are as follows:

Account holder	:	Van der Spuy (Cape Town)
Branch	:	Nedbank
Branch code	:	118 602
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1.3 Interest shall accrue on such outstanding amount as per the Prescribed Rate of Interest Act 55 of 1975, as amended, per annum, calculated from due date, as per the Road Accident Fund Act, until the date of payment.

2. The defendant will pay the plaintiff's taxed or agreed party and party costs

including but not limited to the costs as set out herein below:

2.1 The reasonable qualification and reservation fees of the plaintiff's following experts:

- (vii) Dr Anton van den Bout, Orthopaedic Surgeon;
- (viii) Dr N Kruger, Radiologist;
- (ix) Dr Keith Cronwright, Plastic Surgeon;
- (x) Ms Frizelna Steyn, Occupational Therapist;
- (xi) Dr Leon Bezuidenhout, Industrial Psychologist;
- (xii) Wim Loots (Actuarial Consulting, Actuary).

2.2 The fees of counsel in terms of rule 67A(3)(a) read with rule 69(7) on Scale B which costs shall include, but is not limited to, the drafting of heads of argument and trial date of 11 February 2025.

2.3 In the event of default on the payment of costs, interest shall accrue on such outstanding amount at the statutory *mora* rate on the date of taxation/settlement of the bill of costs, as per the Prescribed Rate of Interest Act 55 of 1975, per annum, calculated from due date until the date of payment.

De Kock, AJ

Appearances:

For Plaintiff: A Heerink
Instructed by: Van der Spuy Attorneys
Cape Town

For Defendant: M Booysen
 c/o Office of the State Attorney
Bloemfontein