

Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates	NO



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

CASE NUMBER: 2013/33288

In the matter between:-

MNISI LINAH MATHARA obo MNISI KATE FIKILE Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

This judgment is handed down by electronic circulation to the parties email addresses. The date of hand down is deemed to be 25 August 2025.

JUDGMENT

REID J

Introduction

- [1] This is a personal injury claim for specific damages for the plaintiff's future loss of earnings / loss of earning capacity (collectively hereinafter referred to as 'loss of income').
- [2] The plaintiff was a minor pedestrian when she was injured in a motor vehicle collision with the registered driver on 9 January 2005 at approximately at 13h00 in Tswelopele, Midrand, Gauteng. The registered driver is a ML Kgala and the registration particulars are XPV 742 GP. The plaintiff was a pedestrian at the time of the collision.
- [3] Of importance is that the plaintiff was **3½ years old** when the **collision** occurred. She is **currently 19 years old**.
- [4] In 2015 general damages were awarded by the defendant (RAF) to the plaintiff in the amount of R850,000.00. The value of the general damages is equated to R1,300,000.00 in 2024.

[5] An undertaking to pay future medical expenses of the plaintiff has been given by RAF, and a trust has already been created in protection of the monetary amount received by the plaintiff.

[6] The defendant conceded 100% liability in favour of the plaintiff's injuries. I will be derelict in my duties if I do not *obiter dictum* raise my concern around this concession. I would expect that a 3 year old baby would be kept away from roads where she may be injured, by an adult in whose care the baby is. Be that as it may, the facts on the merits are not at my disposal. I am bound by the concession of the defendant of 100% negligence.

[7] The only issue before this Court is the plaintiff's loss of income.

Material factual background

[8] The plaintiff is a female child born on 22 July 2005 and the collision in which the plaintiff was injured, occurred on 9

January 2009.

[9] During the trial, the plaintiff was represented by Adv Buthelezi and the defendant was represented by Adv Makatini.

[10] The plaintiff is the only party that filed expert reports in support of the damages suffered by the plaintiff.

[11] The plaintiff sustained cerebral and neurological damage as a result of the collision, as well as a fractured femur for which she was hospitalised for a month.

Plaintiff's case

[12] The plaintiff applied, and this Court so ordered, that the expert evidence reports will be accepted supported by affidavits of the experts. The expert evidence was consequently accepted on affidavits in terms of Rule 38(2) of the Uniform Rules of the High Court.

[13] At the onset of the trial, the parties were informed by this Court that the court will not thrall through the affidavits to establish the parties' case. The parties were informed that the oral arguments and arguments in their respective heads of argument, as presented by the parties, would be the total of the expert evidence that the court will consider in coming to its conclusion.

The expert reports

[14] The first expert statement and report were that of the **neurosurgeon**. The neurological damages of the plaintiff is not in dispute. The plaintiff sustained cerebral edema. The neurosurgeon classified the injury as a "severe traumatic injury" which results in remaining headaches and memory problems for the plaintiff.

[15] The next expert report placed before this Court was that of the **clinical phycologist**. The clinical psychologist confirmed her observation of severe neurosurgical damages of the plaintiff. The areas affected by the collision, is the

plaintiff's concentration, mental speed and verbal non-communication. The clinical psychologist identified signs that would support a diagnosis of PTSD suffered by the plaintiff.

[16] The plaintiff then referred to the report of the **occupational therapist**, who stated the negative impact of the collision on the plaintiff to be able to manage her life and her career choices. It was evident that the plaintiff had a slow process speed, and as soon as she entered the employment market, she would have difficulties retaining jobs.

[17] The **educational therapist** stated that the plaintiff's father is formally educated to Grade 11 and there is no evidence of the mother's education. The plaintiff has an elder sister who is currently 24 years old and has a Bachelors Degree in Education. The plaintiff's sister is currently working as teacher. On the basis that the plaintiff's sister is educated and possesses a Bachelors Degree, it is argued on behalf of the plaintiff that the plaintiff herself would have been

educated, had it not been for the collision, to have a Bachelors or Honours Degree.

[18] The collision having occurred, the plaintiff failed matric last year and passed grade 10 on condonation. She is currently enrolled in a course that is equivalent to Grade 11. It is argued on behalf of the plaintiff that the plaintiff would probably achieve Grade 11 as her highest academic qualification.

[19] The **Industrial psychologist** on behalf of the plaintiff stated that the plaintiff's intellectual average indicates that the plaintiff functions on a low and below average intellectual score. The industrial psychologist avers that the plaintiff would probably have, had it not been for the collision, entered the labour market after obtaining an Honours Degree. The industrial psychologist speculates that the plaintiff would have probably worked as a casual worker at shops while she was trying to find permanent employment. Within 2 – 3 years she would probably have reached

Patterson C level, which is managerial capacity.

[20] The **actuary** on behalf of the plaintiff stated that, had it not been for the collision, the plaintiff would have entered the labour market at approximately 23 years old would, from which age the plaintiff would receive inflationary rate increases in her income. The following information derived from the actuarial report is significant:

- 20.1. The actuary applied a 20% contingency pre-morbid on the basis that the plaintiff was a toddler when the morbidity (collision) occurred.
- 20.2. The actuary further applied a 25% post-morbidity contingency.
- 20.3. More than 40% of the amount is devalued due to the cap placed on the calculations by the RAF.

[21] The plaintiff's actuary substantiated the calculations as

follows:

“Ms Talmud is of the opinion that, but for the accident, Ms Minisi would have completed Grade 12 in 2023. Thereafter, she would have completed an Honour's Degree within 4 years. With this qualification, she would have initially functioned in temporary/contract/freelance employment, carrying on par with the Paterson BI lower quartile basic salary. After 2 to 3 years, she would have secured employment earning in line with the Paterson CI lower quartile basic salary. Thereafter, she would have progressed to a career ceiling by the age of 45, earning on par with the Paterson D4 median package. Annual inflationary increases would have been applicable thereafter until retirement at age 63.

...

Having regard to the accident, Ms Talmud concluded that Ms Mnisi will enter the labour market between the ages of 23 and 25, earning R23,301.00 per annum in January 2025 monetary terms. Annual inflationary increases will be applicable thereafter, until retirement at the age of 65. In addition to the above, Ms Talmud recommended that an applicable pre-morbid contingency deduction and an appropriately higher past-morbid contingency should be applied to account for the factors as set out and discussed in her report.”

[22] The following is an extract from the auditor's report:

“6. SUMMARY OF LOSS OF INCOME

On the assumptions set out above Ms Mnisi's loss of

income is therefore:

Future Loss

Value of Income but for accident:	R14,976,252
20% Contingency Deduction	<u>R 2,995,250</u>
	R11,981,002

Value of Income having regard to accident	R 526,372
25% Contingency Deduction	<u>R 131,393</u>
	R 394,779

NET FUTURE LOSS: **R11,586,223**

*This claim is however affected by the **Road Accident Fund Amendment Act 19 of 2005**. The annual loss at the time of the accident amounted to R 166 667 per annum. This limit was accounted for throughout the calculations. Due to the limitation of the losses, the loss of income reduces to the following:*

NET FUTURE LOSS: **R 6,818,443**

*The interpretation of the **Road Accident Fund Amendment Act 19 of 2005** is based on the opinion delivered by the Honourable Judge C.H. Lewis. See **RAF v Sweatmon** (162/2014) [2015] ZASCA 22 (20 March 2015). The judgment interprets Section 17(4A)(b) as follows: "The effect of the amendment to the **Road Accident Fund Act 56 of 1996** in 2008 in so far as the limitation on the liability of the Road Accident Fund for loss of income or support, suffered as a result of a motor vehicle collision, is concerned: the correct approach is to determine the present value of the actual loss suffered, as actuarially calculated, taking into account all contingencies, including mortality, and*

then compare it with the annual loss (the limit or cap) as determined on the date of the accident. The annual loss is that determined by notice in the Government Gazette. And the quantum of the annual loss, provides s 17(4A)(3), is that 'set out in the last notice issued prior to the date on which the cause of action arose' - that is, the date of the accident.

An adjustment to allow for interest between the date of calculation and the date of settlement should be made."

- [23] It is argued on behalf of the plaintiff that the contingency deductions calculated above should not be increased, but accepted as the maximum deductions.

Defendant's case

- [24] It is argued on behalf of the defendant that there is no indication, *alternatively* that there is not sufficient evidence, that the plaintiff would have studied further than matric.

- [25] The defendant argues that, in this instance and due to the age of the plaintiff when the morbidity occurred, the pre-morbid and post-morbid amounts would be the same.

[26] The defendant argues further that the plaintiff is still studying at college for Grade 10 to 12 and would probably be able to pass Grade 12. After passing Grade 12, so the argument goes, the plaintiff would probably be able to function in an employment position.

[27] The defendant proposes a contingency deduction of 43% which would bring the claim amount down to R4,193,000.00.

[28] The defendant argues that the plaintiff has a normal life expectancy and is expected to work until the normal retirement age of 65.

Analysis

[29] The defendant is liable to the plaintiff for compensation of loss of earning capacity or future loss of income (loss of income), in terms of section 17(4)(b) and (c) of the **Road Accident Fund Act** 56 of 1996, as amended. The claim for future loss of income is limited by section 17(4A) of the RAF Act. This is commonly referred to as “the cap” placed on a

claim for loss of future income.

- [30] The relevant parts of section 17 of the Road Accident Fund Act read as follows:

“17 Liability of Fund and agents

(1) The Fund or an agent shall —

. . .

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver

. . .

(4) Where a claim for compensation under subsection (1) —

. . .

(b) includes a claim for future loss of income or support, the amount payable by the Fund or the agent shall be paid by way of a lump sum or in instalments as agreed upon;

(c) includes a claim for loss of income or support, the annual loss, irrespective of the actual loss, shall be proportionately calculated to an amount not exceeding —

(i) [Rx] per year in the case of a claim for loss of income; and

(ii) [Rx] per year, in respect of each deceased breadwinner, in the case of a claim for loss of

support.' [My emphasis.]

[31] In terms of section 17(4A)(a) the amounts referred to in section 17(4)(c)(i) and (ii) are determined by notice in the *Government Gazette* and adjusted quarterly to counter the effect of inflation. Section 17(4A)(b) provides that:

'In respect of any claim for loss of income or support the amounts adjusted in terms of paragraph (a) shall be the amounts set out in the last notice issued prior to the date on which the cause of action arose.'

[32] The effect and application of “the cap” have been dealt with in **Road Accident Fund v Sweatman** 2015 (6) SA 186 (SCA). In paragraph the Supreme Court of Appeal found that:

*[6] This issue has been determined in different ways by various courts, and I shall deal with these decisions in due course. Mr Morris, who gave evidence for Ms Sweatman, explained the conventional method of determining future losses when establishing a claim for loss of income or support. The matter is not without difficulty, especially where one is dealing with an injury to a young person or the death of a young breadwinner. Nicholas JA put the problem as follows in **Southern Insurance Association Ltd v Bailey***

NO 1984 (1) SA 98 (A) at 113F – 114A:

'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 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 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. But the Court cannot for this reason adopt a non possumus attitude and make no award...'

- [33] *In casu*, I repeat that the plaintiff was 3½ years old when the collision occurred, and she currently is 19 years of age. Any, and all calculations of what the future would hold for the plaintiff, had the collision not occurred, is by the very nature thereof, highly speculative.

[34] The plaintiff submits that the defendant is liable to the plaintiff in the amount of **R 6,818,443**. This is the maximum amount after the limitation in the cap of future earnings have been applied.

[35] The defendant applies a contingency deduction of 43% which brings the amount down to **R4,193,000**.

[36] I have regard to the following in determining an appropriate amount as compensation for loss of income:

36.1. Neither the plaintiff's father nor mother have any formal education.

36.2. The plaintiff's 24 year old sister has obtained a Bachelors Degree in Education.

36.3. The plaintiff's sister is currently working as a teacher.

36.4. The educational therapist postulates that the plaintiff

would have, had the collision not occurred, obtained a Degree and be employed.

36.5. According to Ms. Linah Mnisi, the plaintiff's biological mother, the plaintiff presents with mood disturbances characterized by irritability, frequent outbursts of anger, and social withdrawal.

36.6. The brain functioning and psychological functioning of the plaintiff leads to a conclusion that the plaintiff will probably not be able to obtain and maintain employment other than basic manual work.

[37] In relation to the contingencies applied, the pre- and post-morbid scenario's are extremely difficult to apply as the plaintiff was a mere 3½ years of age when the collision occurred. To my mind, the age of the plaintiff at the time of the collision, in itself, warrants the application of a much higher contingency than that of the plaintiff's proposed 20% and 25%.

[38] Further, the young age of the plaintiff when the collision occurred, renders it impossible to determine with certainty that the characteristics displayed by the plaintiff (mood disturbances, irritability, frequent outbursts of anger, and social withdrawal) came about as a direct result of the collision. It takes no stretch of the imagination to postulate that these characteristics may have been present as part of the plaintiff's personality, had the collision not occurred. This also supports the application of a high contingency.

[39] In determination of the reasonable and fair amount for compensation, I am going to use a combination of the two approaches followed by Nicholas JA in **Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A)**. As quoted above, these approaches are:

39.1. To make a round estimate of an amount which seems to be fair and reasonable, which is entirely a matter of guesswork and a blind plunge into the unknown; and

39.2. To try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The assumptions may vary from the strongly probable to the speculative.

[40] My approach is to use the application of the 43% contingency of the defendant and apply a higher contingency due to the fact that the assumptions on which the calculation rests, are highly speculative.

[41] In these circumstances where assumptions are highly speculative, I regard it as reasonable and fair to make a round estimate of an amount which seems to be a fair amount to compensate the plaintiff for future loss of income.

[42] The defendant submits that an amount of **R4,193,000** would be a reasonable and fair amount of future loss of income for the plaintiff. It is trite law that the plaintiff is not bound to the amounts submitted by the parties. The amounts submitted

by the parties are to serve as guidelines, where the court has to apply its mind judicially to the facts presented to it.

[43] Having regard to the age of the plaintiff when the collision occurred and the low grade of the academic education of most of the plaintiffs family members, I hold the view that an amount of **R4,193,000** would be too high.

[44] Based on the above, I hold the view that the plaintiff has made out a case that she is entitled for compensation in the loss of income, in the amount of **R3,8000,000**.

Cost

[45] The established legal principle in relation to costs is that the successful party is entitled to be compensated for the costs incurred in the action.

[46] I find no reason to deviate from this established principle.

[47] The defendant is to pay the costs of the plaintiff.

Order

[48] In the premise, I grant the following order:

(i) The defendant shall make payment to the plaintiff in the amount of **R3,800,000.00 (Three Million Eight Hundred Thousand Rand)** in respect of loss of earnings, within a period of 180 days of this order.

(ii) Payment of the amount referred to hereinbefore shall be made into the trust account of the plaintiff's attorneys, details as follows:-

Zwelakhe Mgudlandlu Attorneys FNB Trust

Cheque Account Acc no: 62112331971

Our ref: ZM/MVA/11647

(iii) The plaintiff's attorneys shall transfer the said amount to ABSA trust account that has already been created for the benefit of Ms Mnisi once the agreed fees and disbursement have been debated by the attorneys.

- (iv) The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs on the High Court scale, subject to the Taxing Master's discretion, such costs to include:-
 - a. the reasonable costs of obtaining the medico-legal reports, as well as any addendum medico-legal reports of all the expert witnesses of the plaintiff relating to the issue of quantum, of whom due notice was given in terms of Rule 36(9)(a) and
 - b. the reasonable qualifying and reservation fees, if any, of all the expert witnesses of whom notice had been given by the Plaintiff in terms of Rule 36(9)(a) and
 - c. the reasonable costs pertaining to consultations of the legal representatives with the Plaintiff and the aforementioned experts.
- (v) The costs of counsel recoverable at scale B for 22, 23, 24 and 25 April 2025.

(vi) The party and party costs referred to hereinbefore, as taxed or agreed, shall be paid by the defendant directly into the Trust account of the plaintiff's attorneys of record for the benefit of the minor child. After deduction of the legal costs, disbursements and the consultant's fee for drawing the bill and attending to its settlement or taxation, the balance shall be paid into the Trust unless same has not yet been created, in which event, such balance shall be invested in terms of Section 86(4) of the **Legal Practice Act 28 of 2014**.

(vii) The plaintiff shall cause a notice of taxation to be served on the defendant's attorneys of record and the defendant shall make payment of the taxed costs within 30 (thirty) days from of service of the bill of costs.

(viii) It is recorded that:-

a. the plaintiff has concluded and signed a written Contingency Fee Agreement whereby the plaintiff at

no stage carried any risk for fees or any portion thereof;

- b. in terms of the Contingency Fee Agreement, the plaintiff shall be liable for fees equal to or higher than the plaintiff's attorney's normal fee on an attorney and own client scale, provided that such fees which are higher than the normal fees (hereinafter referred to as a "success fee") shall not exceed such normal fees by more than 100 per cent and provided further that, as the claim is one sounding in money, the total of any such success fee payable shall not exceed 25% of the value of the claim, **whichever amount is the lesser of the two amounts** which amount shall not, for purposes of calculating such excess, include any costs.



FMM REID
JUDGE OF THE HIGH COURT
GAUGENG DIVISION JOHANNESBURG

Date of argument: 25 April 2025
Date of Judgment: 26 August 2025

APPEARANCES:

For the plaintiff: Adv. Z. Buthelezi

For the defendant: Ms P. Makhathini