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

CASE NO: 35777/21

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 21/04/2026

SIGNATURE:

In the matter between:

X[...] L[...]

PLAINTIFF

Id NO: 0[...]

and

THE ROAD ACCIDENT FUND

DEFENDANT

CLAIM NO: 560/1287976936/1043/0

LINK NO: 5067724

JUDGMENT

CORAM:	ZITHA, AJ
Heard on:	11th December 2025
Delivered:	21st April 2026

INTRODUCTION

[1] This is a delictual claim for damages as a result of a motor vehicle collision which occurred on the 07th July 2020. The matter appeared before Court by a way of Default Judgment application on the 11th December 2025.

PARTIES

[2] The plaintiff is **X[...]** **L[...]** an adult female, currently unemployed born on the 18th June 2004 and who is currently 21 (twenty-one) years of age. At the time of the collision, the plaintiff was sixteen (16).

[3] The defendant is the **ROAD ACCIDENT FUND**, a juristic person established in terms of section 2(1) of the Road Accident Fund Act 56 of 1996 ("*the Act*") with full legal personality and of address 3[...] I[...] Street, Menlo Park, Pretoria, Gauteng.

ISSUES TO BE DETERMINED

- [4] Liability/ merits of the matter
- [5] Past medical expenses
- [6] Future medical expenses
- [7] Loss of earnings (Past and Future)
- [8] General damages will have to be postponed sine die, as the Defendant has not made a determination about the seriousness of the injuries.

The Plaintiff made an application in terms of Rule 38(2), in order to lead evidence by a way of an affidavit. Such application was properly served and accompanied by the expert affidavits. The application was granted. For future medical expenses the Plaintiff is awarded an undertaking in terms of section 17 of the Road Accident Fund Act.

In this regard the Plaintiff's evidence is unchallenged and uncontested as the Defendant's plea was struck off by the Court.

The Plaintiff applied that his quantum evidence be admitted by way of affidavit.

**[9]. APPLICATION TO ADMIT EVIDENCE BY WAY OF AFFIDAVIT IN TERMS OF
RULE 38 (2) OF THE UNIFORM RULES**

- 9.1. The Plaintiff's quantum evidence;
- 9.2. Any collateral witness evidence; and
- 9.3. In terms of the Judge President's Practice Directive 1 of 2021 (paragraph 29), evidence may be tendered by affidavit and the Trial Judge may

exercise his/her discretion to accept such evidence.

9.4. In the matter of ***Abraham v City of Cape Town***¹, the Court held:

“It was common cause before me that where an application for default judgment serves before a Court, it has a clear and unfettered discretion in terms of the relevant Rule of Court to decide whether or not to hear oral evidence on any of the issues which may require to be decided in order to determine whether or not to grant the relief claimed.”

9.5. In ***Mnisi v The Road Accident Fund and Seven Similar Matters***², the court held and quoted the following at paragraph 52:

“The subrule provides a mechanism whereby the court may on application and if sufficient reason is shown, allow that evidence be given on affidavit. Firstly, there must be an application to adduce evidence by affidavit. Secondly, there must be sufficient reason for doing so and thirdly, the court may lay down the terms and conditions for the evidence to be adduced. In Madibeng Local Municipality v Public Investment Corporation Ltd 2018 (6) SA 55 (SCA) at 25, the Supreme Court of Appeal expressed itself over subrule 38(2):

“The approach to rule 38(2) may be summarised as follows. A trial court has a discretion to depart from the position that, in a trial, oral evidence is the norm. When that discretion is exercised, two important factors will inevitably be the saving of costs and the saving of time, especially the time of the court in this era of congested court rolls and stretched judicial resources. More importantly, the exercise of the discretion will be conditioned by whether it is appropriate and suitable in the circumstances to allow a deviation from the norm. That requires a consideration of the following factors: the nature of the proceedings, the nature of

¹ 1995 (2) SA 319

² [2022] ZAMPMBHC 23

the evidence, whether the application for evidence to be adduced by way of affidavit is by agreement, and ultimately, whether, in all the circumstances, it is fair to allow evidence on affidavit.

And at paragraph 53:

“Plaintiffs in RAF matters often request the court to accept evidence upon affidavit. Especially now where in most RAF matters there is no appearance by the RAF or where the RAF has not participated in the pre-trial proceedings or where the RAF has not defended the action and/or failed to deliver and file a plea. Of course, where the RAF does not appear at the trial, there will be no request for cross-examination as provided for in the subrule. Therefore, subject to what I set out in paragraphs 61³ and 62⁴ below, I see no reason why Rule 38(2) may not actually be used to contribute to the speedy and cost-effective delivery of justice in RAF matters.

- 9.6.** The Plaintiff served all information and documentation on the Defendant.
- 9.7.** This is a quintessential example of a matter that can be disposed of by way of affidavit to save time and costs.
- 9.8.** The Plaintiff requested that the expert affidavits and the affidavits in respect of the quantum evidence of the Plaintiff be admitted as evidence.
- 9.9.** Insofar as any of the experts in their reports rely upon hearsay evidence the Honourable Court was respectfully requested to admit the said hearsay evidence as an exception to the hearsay rule.
- 9.10.** The application in terms of Rule 38(2) was granted.

³ Paragraph 61 of the judgment: “In my view, the approach in RAF matters in circumstances set out above where there is no participation by the RAF at all or only limited participation or there is no appearance when the trial is called for hearing, the approach to be adopted should be on basis of what is set out by *Froneman J Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC)”

⁴ Paragraph 61 of the judgment: “In my view, the approach of Froneman J applies to RAF actions where the circumstances set out in this judgment apply. The court should be extremely astute and consider all the information before it which includes the pleadings, documents that were discovered, all reports by the experts and all affidavits (if filed) before the trial commences to determine the way to approach the trial. The pleadings, the facts that appear from what is in the court file and the expert reports, (especially whether the findings therein) tally with the rest of the information ...”

[10]. THE MERITS:

10.1. The issue of liability is resolved as follows:

The plaintiff's version was based on the section 19(f) affidavit and the accident report. Accordingly, the defendant is held liable for hundred percent (100%) of the plaintiff's proven or agreed damages.

[11]. QUANTUM:

11.1. The issues to be decided in this matter are what should be the fair, reasonable and appropriate amount for special damages (loss of earnings), the contingencies to be applied to the calculations and future medical expenses.

11.2. In quantifying it's claim the plaintiff obtained medico-legal reports from the following experts in support of her claim:

- 11.2.1. Dr P.M. Mpanza (Neurosurgeon);
- 11.2.2. Dr H.N Masipa (Orthopaedic Surgeon);
- 11.2.3. S.F. Mphuthi (Clinical Psychologist);
- 11.2.4. Dr. R.E. Mnisi (Gynaecologist);
- 11.2.5. Prof. R. Chauke (Cardiothoracic Surgeon);
- 11.2.6. Dr. Z. Gumede (Educational Psychologist);
- 11.2.7. L. Mashishi (Occupational Therapist);
- 11.2.8. Dr. T. Kalanko (Industrial Psychologist);
- 11.2.9. Wim Loots (Actuary).

[12]. The defendant did not appoint any medico-legal experts.

[13]. **INJURIES SUSTAINED:**

13.1. According to the neurosurgeon:

13.1.1. The plaintiff sustained a moderate to severe brain injury with residual sequelae, with a history of loss of consciousness GCS of 13/15 on arrival at the hospital.

13.1.2. It is unclear whether she suffered the hypotension due to pelvic fracture or the pregnancy.

13.1.3. She was 17 weeks pregnant and was confirmed via an ultrasound which she requested a termination of pregnancy.

13.2. Post-accident

She suffers neurocognitive deficits, with personality changes which might be related to the severity of the head injury. She forgets tasks and she suffers from post-traumatic headaches and she is short-tempered.

[14]. **According to the Orthopaedic Surgeon:**

14.1. The plaintiff sustained a right clavicle fracture, head injury and multiple rib fractures with a left pneumothorax.

14.2. **Occupation and future employability**

With the recommended treatment, the plaintiff symptoms are expected to improve.

[15]. According to the Clinical psychologist

15.1. Conclusions and recommendations

15.1.1. Brain connectivity measures show indicators of mild to moderate inefficient information processing (hyper coherence and increased phase) as well as inhibitory mechanism problems (decreased phase lag), in turn rendering her vulnerable to diminished social activity problems, such as irritability and aggression towards others.

15.1.2. We conclude that her lower-than-expected average performance can be attributed to neurocognitive deficits due to the traumatic brain injury (TBI) sustained, aggravated by chronic pain and stress response interfering with the allocation of cortical resources.

15.1.3. The three indicators were present when plaintiff sustained injury and thus, we conclude that her head injury contributed significantly to the neurocognitive deficits evident from her test results.

16.2. Clinical formulation

16.2.1. Impact of head / brain injury

Based on the foregoing, we conclude that the traumatic brain injury that the plaintiff sustained at the time of the accident has resulted in significant neurocognitive deficits. The negatively impact her ability to function both intellectually and socially.

16.2.2. Clinically psychologically status and recommended psychotherapy

The plaintiff's clinically psychologically status is characterised by symptoms of post-traumatic stress mood dysregulation associated with diminished neurocognitive capacity as well as persistent pain and changed social functioning and status.

16.2.3. Vocational consequences

From a neuropsychological perspective, her pattern of performances on cognitive testing and her clinical psychological profile have implications for her vocational functioning and prospects.

She now performs tasks at a slower pace than prior to the accident, forgets important details, requires more time to comprehend complex tasks and will have difficulty managing her levels of frustrations in the workplace.

[17]. Gynaecologist

The report of the above expert is not acceptable as it has factual and material contradictions.

[18]. Cardiothoracic Surgeon

Loss of work capacity

Work capacity was lost for at least three (03) months following the chest and clavicular injuries. Further loss of work capacity is to be expected as a result of chronic chest pains.

[19]. Educational psychologist

19.1. Premorbid School functioning

The effect of her head injury has stunted her cognitive potential and subsequently her vocationally / occupational prospects.

19.2. Intellectually

Pre-morbidly, the plaintiff would probably have managed to function at further up within the above average range of intelligence. This is indicated by the following factors:

19.2.1. Her global intellectual functioning according to the ISXSP and CPM are in the average range after being injured which suggest that she had sound intellectual functioning pre-morbidly.

19.2.2. She passed grade 1 to 10 pre morbidly and matriculated with Diploma endorsement after the accident with her deficits. The capacity to pass at school is consistent with at least an average intellectual functioning. This performance post injury using her residual ability and with her deficits suggests that she would have performed even better if she was not injured.

19.3. Educationally

19.3.1. Plaintiff pre-morbid estimates of above average intellectual ability are consistent with functioning at a level where she could have matriculated with Bachelor endorsement and proceeded to obtain a tertiary qualification, a university degree.

19.4. Had the accident not occurred

19.4.1. The plaintiff could have matriculated with a Bachelor pass and thereafter proceeded to obtain a tertiary qualification. She would then have been employed in the open labour market as a skilled or professional person.

19.5. Post injury school functioning

19.5.1. Intellectual ability

Her IQ deteriorated. Plaintiff is post-morbidly functioning in the average range in terms of global IQ. The neurosurgeon opined that the plaintiff

suffered a mild traumatic brain injury and hypotension secondary brain injury. It is thus probable that she suffered a degree of IQ deterioration.

19.5.2. Educational ability

She displayed a severe cognitive and scholastic deficits that impacted negatively on her classroom performance. She was only able to matriculate with a diploma endorsement with low marks and proceeded to TVET College, passed N4 to N5 and N6 in Human Resource Management.

19.5.3. Now that the accident has occurred

1. She performs within the average range of global intellectual functioning. However, they are indication of problems with her concentration and memory, and her scholastic and cognitive deficits will always act as impediments in any academic and vocational endeavour.
2. Her deficits impacted negatively on her classroom performance; she only matriculated with diploma endorsement and obtained N6 in Human Resources Management at TVET College in 2024. She is unemployed in 2025.
3. She was unable to become a chartered accountant as she aspired before being injured. It is a concern that she performed at the level of a nine years and three months old pupil. That is i.e. grade four level scholastically when assessed on 07/12/2021, however, she coped with the demands of TVET College up to N6.

4. Furthermore, her physical wellbeing will always compromise her work prospects and quality of life.

[20]. Occupational therapist

20.1. The writer is of the opinion that the plaintiff possessed the residual work capacity to execute sedentary to light strength requirement work load, with the exclusion of above shoulder and overheard level reach action.

20.2. She is suitable for unskilled to semi-skilled and trainable in skilled occupations, operating in an accommodative work environment, where reasonable accommodations can be provided for her physical challenges and cognitive deficits.

[21]. Loss of earning capital

21.1. The writer is therefore of the opinion that from a functional perspective, the plaintiff has suffered a declined in earning capacity.

21.2. Her vocational potential has been compromised by accident injuries.

21.3. Her need for reasonable accommodations will render her a vulnerable competitor in the open labour market, when compared to her uninjured counterparts.

[22]. Industrial Psychologist

Career and remuneration potential

Career aspirations

22.1. Pre-accident: the plaintiff aspired to become chartered accountant.

22.2. Post-accident: her aspirations remain the same.

Employment scenarios

In-school pre-morbid (had the accident not occurred)

22.3. The plaintiff was a grade11 scholar when the accident occurred.

22.4. The writer notes that none of her family members hold a post-matric qualification, however taking into account the above mentioned educational policies and learner support, with motivation and hard work she would have likely attained educational qualifications higher than those of her family members.

22.5. The writer believes that she is slightly to have persevered and achieved educational qualifications similar if not higher than those of family members.

Grade 12 with a degree (NQF 7) qualification

22.6. It is anticipated that the plaintiff would have continued with her schooling and would have completed her grade 12 in 2021 and thereafter pursue a degree in a field of her choice.

22.7. Upon successful attaining her degree in 2024/2025 (depending on the career of her choice) it is presumed that she would have proceeded to search for employment. However, due to the high unemployment rate in the country, she would have likely suffered from a period of

unemployment (six months to one year) before entering the open labour market with the corporate sector.

22.8. It is opined that upon obtaining employment, she would have first secured a preliminary/ internship position where she would have worked for one year before acquiring a permanent position / earning at B1/B2 basic salary.

22.9. STATSSA (Koch, 2025) indicates that Bachelor degree holders enter employment earning at R173 000 per annum. It is therefore assumed that she would have then secured permanent employment, (with a degree level of education), and she would have started earning within Paterson Level B4, basic salary, as obtained from the quantum year book (R.Koch, 2025).

22.10. Career growth through improving her skills, gaining more experience and further work-related training is herein assumed. Using the STATSSA upper quartile earnings for those with grade 12 with a degree as a guide (R1 053 000 per annum). It is presumed that she would have reached her earning career potential with her earnings in Paterson level C5/D1 (total packages) by approximately age of 45.

22.11. Thereafter, annual inflationary increases would have applied until retirement age of sixty five (65) years

22.12. The writer notes that workers generally retire at age of sixty five (65) when they qualify for a pension. It is therefore assumed that the most probably scenario for retirement for the plaintiff would have been sixty

five (65) years depending on her health, motivation and retirement policy of her employer at the time.

Unemployed post-morbid (situation due to the accident)

22.13. The plaintiff is searching for an internship where she can do her practical's. Her occupational freedom has been restricted due to the injuries emanating from the accident under discussion. It is opined that she has been rendered a vulnerable contender in the open labour market.

22.14. It is further opined that she might be delayed into securing one seeing that she is now a candidate for accommodative employment, which the writer notes that is scared.

22.15. The writer opined that the noted behavioural issues would have a negative impact on the plaintiff's workplace.

22.16. It is opined that due to the noted psychological issues, she will have challenges interacting well with her peers and in the future, with her colleagues.

22.17. She will find it challenging to thrive when she has to be involved in a team. This will affect her as well a team member.

22.18. It is therefore accepted that this will have a negative bearing on her career in future as this has the potential to hinder her career growth, for instance, she will not be first choice candidate for supervisory roles.

22.19. The writer opines that the plaintiff's competitiveness in the open labour market will depend on the level of education that she will be able to attain.

22.20. It is accepted that the plaintiff's academic potential has been diminished due to the accident-related injuries. She will not be able to realize her pre-morbid potential. She has been disadvantaged as an academic and as a prospective competitor in the open labour market, as she will not be able to compete on par with her uninjured peers.

Grade 12 with the diploma

22.21. It is assumed that the plaintiff will complete her practical's likely in 2026/2027. Thereafter, it is opined that she will search again for gainful employment, within the corporate sector, although cognisance is taken that due to the high unemployment rate in the country, it is assumed that she will suffer from marked periods of unemployment (approximately 1 to 2 years) before entering into an internship/ preliminary, position, earning within the Paterson level A1/A2 (basic salaries), low quartile in the corporate sector.

22.22. Individuals with a diploma in their early career usually earn within the starting range of R114 000 per annum. It is therefore accepted that during the course of her preliminary/ internship position the plaintiff will likely be earning within the aforesaid range.

22.23. Considering residual challenges, she remains with, it is opined that she will likely reach her career plateau earning the average of the lower

quartile and median range of those with a diploma in their late career stage, (R292 500 per annum). These are earnings within Paterson level B2/B3, total packages by the approximate age of 45.

22.24. Upon reaching a career plateau, normal inflationary increases will apply until she reaches the standard age of retirement. The writer opines a 1-2 year delay should be anticipated.

22.25. The plaintiff remains with a residual impairment that will have a negative impact on her future occupational endeavours she will find it challenging to progress in her career due to said challenges.

22.26. It therefore reads that she will not be likely to reach her pre-morbid career plateau. Hence, she has been disadvantaged in the future.

[23]. LAW

Loss of Earnings

23.1. It is accepted that earning capacity may constitute an asset in a person's patrimonial estate. If loss of earnings is proven the loss may be compensated if it is quantifiable as a diminution in the value of the estate. It must be noted, a physical disability which impacts on the capacity to an income does not, on its own, reduce the patrimony of an injured person. It is incumbent on the plaintiff to prove that the reduction of the income earning capacity will result in actual loss of income.

23.2. In quantifying such a claim an Actuary is often used to make actuarial calculations based on proven facts and realistic assumptions regarding the future. The role of the Actuary is to guide the court in the calculations to be made. Relying on its wide judicial discretion the court will have the final say regarding the correctness of the assumptions on which these calculations are based. The court should give detailed reasons if any assumptions or parts of the calculations made by the actuary are rejected. It must be borne in mind that the actuary depends on the report of the Industrial Psychologists, who in turn are dependent on the information provided by the claimant.

23.3. The learned author Dr R.J. Koch in *The Quantum of Damages Year Book* states at page 118 that the usual contingencies which the Road Accident Fund accepts is 5 % on the past income and 15 % on the future income. The aforesaid is only a guideline, but it indicates the general approach adopted by the defendant in similar matters. The learned author continues on page 118 to suggest (based upon the authorities of *Goodall v President Insurance* and *Southern Insurance Association v Bailey N.O.* that as a general rule of thumb, a sliding scale can be applied, i.e. “1/2% per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in middle age.”

23.4. The court, in the case of *Road Accident Fund v Guedes* at paragraph [9] referred with approval to *The Quantum Yearbook*, by the learned

author Dr R.J. Koch, under the heading '*General Contingencies*', where it states that:

“...[when] assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court...”.

23.5. The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%, depending upon the facts of the case.

23.6. The importance of applying actuarial calculations and its advantages was discussed in the case of *Southern Insurance Association v Bailey* NO, the court referred with approval to the case of *Hersman v Shapiro and Company* at 379 per Stratford J where the following was said:

‘Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.’

“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."

- 23.7. Ultimately, the award for future loss of earnings or earning capacity must be based on good medical evidence and corroborating facts. There must be some reasonable basis for arriving at a particular figure. In the event of a mathematical approach, one has to first work out what the third party's earnings would have been but-for the accident (that is, if the accident had not occurred), and secondly, one has to calculate what the plaintiff's earnings are now that the collision has occurred (having regard to the accident) and the difference between these two amounts will then represent the loss.

[24]. APPLICATION OF LAW TO FACTS

- 24.1. The plaintiff's future loss of earnings or capacity to earn has been actuarially calculated and the basis of such calculations, which is

discussed below are consistent with the facts and probabilities in the matter.

- 24.2 The plaintiff's case remains undisputed and remains unchallenged. The defendant has not appointed a single expert to challenge or contradict the plaintiff's expert witnesses. There is also no evidence before me that prior to the collision the plaintiff had any neurocognitive problems.
- 24.3. In so far as the injuries are concerned, it has not been disputed that the plaintiff sustained moderate to severe head injury (with 13/15 GCS) and fractured clavicle (orthopaedic injury) which was consequent to the motor collision. It remains undisputed that the plaintiff's neuropsychological, neurocognitive and neurobehavioral arising from the accident has been impaired.
- 24.4. The Clinical psychologist opines that the plaintiff's employment will be adversely affected. Her cognitive challenges including memory and attention deficits, make her an unfair competitor in the open labour market.
- 24.5. The occupational therapist opines that the cognitive deficits would have a negative impact on her work abilities and future employment. Her competitiveness in the open labour market has been compromised, especially for roles exceeding medium physical demands.
- 24.6. The industrial psychologist's uncontested postulations regarding the pre and post morbid future loss of earnings prior to and but for the accident is the only evidence that is before me which I must accept.

24.7. I accept that the plaintiff would require an understanding employer who will be willing to accommodate his cognitive limitation should she secure work in future. Her working environment would also need to be less cognitively demanding as she would struggle to perform with the pressures of work.

I have also considered that she is no longer performing at her pre-accident potential as a result of the accident. The plaintiff is therefore likely to suffer a future loss of earnings to be calculated as the difference between her pre-accident earning potential and her post-accident earning potential.

24.8. I am mindful that the plaintiff will be an unequal competitor at the open labour market compared with her healthier peers and that she will not be able to perform functions efficiently and effectively as compared to her counterparts. The injuries sustained from the accident will hinder her career and future employability. The plaintiff has suffered a medically justifiable loss of earnings or work capacity as a direct result of the accident.

24.9. I find that the plaintiff's expert witnesses remain the only evidence before me. The submissions made by industrial psychologist is clear, reasonable and persuasive. I therefore find that the evidence before me credible and I accept it as reliable and plausible.

[25]. According to the actuarial calculations by Wim Loots dated 22nd July 2025, there were no contingencies applied.

[26]. Plaintiff's counsel submitted that contingencies are to be applied as usual since *the Road Accident Fund Amendment Act 19 of 2005* cap does have an impact on this case. The cap was equal to R294 300 at the date of the accident. The cap was applied in accordance with the interpretation of the ruling in *RAF v Sweatman 2015 (SCA)*. In this regard counsel argues the contingency deductions on uninjured earnings 25% and 25% on injured earnings should be applied.

I hold a different view:

40% deductions for future pre-morbid income;

40% deductions for future post-morbid income.

	Pre-morbid	Post-morbid	Loss (difference)
Future earnings	<u>R13 524 934</u>	<u>R4 608 240</u>	
Minus contingency	<u>40% -(R5 409 973.60)</u>	<u>40% -(R1 843 296)</u>	
	<u>R8 114 960.40</u>	<u>R2 764 944</u>	
<u>Total loss of earnings</u>			<u>R5 350 016.40</u>

[27]. The loss of earnings after the above-stated contingency deductions amount to **R 5 350 016.40 (Five Million Three hundred and Fifty thousand and Sixteen Rand and Forty Cents)**. The calculations were on the basis that the

plaintiff is not expected to reach the suggested pre-accident career potential and that she might suffer losses that are not directly quantifiable and should be address via contingencies. The retirement age is at 65 years.

[28]. It is trite that in considering what damages to award in damages claims, the court exercises discretion. In doing so, the court has to ensure that the award for damages made is fair and reasonable. This is usually achieved through judicial precedent. The actuaries recommend the so-called normal contingencies apply as discussed above.

[29]. When considering the contingency deductions to be applied on actuarial calculations of loss of earnings, allowance for contingencies involves, by its very nature, a process of subjective impressions or estimations rather than objective calculations. The so-called normal contingencies referred to takes into account that a plaintiff might ordinarily sustain some loss in his future income by virtue of: falling sick from time to time; the prospect of unemployment and an inability to secure alternate employment in the future; the prospect of being injured in circumstances where the plaintiff would receive no compensation from any source; the saved costs of unemployment. I applied my mind to the plaintiff's circumstances. I have considered the plaintiff's background and family history, the lack of collateral information from the plaintiff's class teachers. I have considered the plaintiff's school reports before the accident, the plaintiff was an average performing learner. I am not satisfied that the plaintiff would have obtained the projected pre-morbid postulations. Generally, a D1 with full

packages is attained by a small segment of the population. Few graduates are admitted and/ or qualify as Chartered Accountant. I have also taken into account the minimum entry requirements and examinations into the said profession. As a result, I am of the opinion that higher contingencies should be applied in this case.

[30]. ACTUARIAL CALCULATIONS IN RESPECT OF LOSS OF EARNINGS:

Wim Loots compiled an actuarial calculation report dated 22nd July 2025. Plaintiff's projected income is based on the information and reports of the industrial psychologist.

30.1. Assumptions

Pre-morbid retirement age: 65 years.

Post-morbid retirement age: 65 years.

Accident date: 07/07/2020

Calculation date: 2025/07/22.

Contingency Deductions

Pre-morbid deductions:

Future earnings: 40% deduction.

Post-morbid deductions:

Future earnings- 40% deduction.

- [31]. The calculations are submitted to be fair and reasonable in the circumstances, and the Court is satisfied to grant the total nett loss of income in the amount of **Five Million Three Hundred and Fifty Thousand and Sixteen Rand and Forty Cents (R5 350 016.40)** as set out in the contingency scenario above.
- [32]. The plaintiff is currently unemployed, and she has obtained N6 certificate in Human Resource Management.
- [32]. Her career progression is therefore significantly compromised.
- [33]. She suffers from significant cognitive fallouts for immediate memory and verbal learning, making it difficult for her to learn and retain new work skills.
- [34]. She is unlikely to reach her pre-MVA occupational potential. Her occupational functioning has been negatively impacted by the sequelae of the injuries sustained in the MVA and resulted in a loss of productivity and efficiency.
- [35]. She has been compromised from a physical, neurocognitive and psychological perspective by his MVA-related injuries and their sequelae.
- [36]. In general, it is acknowledged that employees with impairments would be disadvantaged, to a greater extent or lesser extent, in their competitiveness in the open labour market, especially in comparison with uninjured peers.
- [37]. Her ability to seek and secure other suitable sympathetic accommodative employment has been significantly curtailed by her physical neurocognitive and psychological sequelae.

Having regard to the aforementioned cases, it is respectfully submitted that special damages in the amount of **Five Million Three Hundred and Fifty Thousand and Sixteen Rand And Forty Cents (R 5 350 016.40)** is fair and reasonable under the circumstances.

[38]. Costs:

[39] In ***Bauer v Bauer & Another***⁵ it was re-affirmed that the principle in awarding costs to a successful litigant is to strive to indemnify insofar as possible that litigant for the expenses he has incurred to initiate or defend litigation. These principles were also confirmed in ***Zeelie v General Accident Insurance Co Ltd***,⁶. This purpose of an award for costs has been acknowledged for a very long time, authoritatively ever since ***Texas Co (SA) Ltd v Cape Town Municipality***⁷.

[40] In ***Society of Advocates of KwaZulu - Natal v Levin***⁸ the Court also stated as follows in respect of Counsel fees:

"[19] A useful guide, which would find application in most cases where the reasonableness or otherwise of counsel's fee had to be determined on the taxation, was formulated in City of Cape Town v Arun Property Development (Pty) Ltd and Another:

'(a) Consideration should have been given to the importance of the matter, its financial value to the parties and the complexity of the issues raised and/or required to be canvassed'.

[41] Pursuant to the recent amendment of Rule 69 and 70 (effective 12 April 2024) in terms of which Rule 67A was also introduced, it is incumbent upon a Court

⁵ (361104) [2008] ZAEHC 2008 (17 April 2008)

⁶ 1993 (2) SA 776 (EJ at 779 D-F)

⁷ 1926 AD 467 at 488. (See Cilliers, Costs, par 1.03 at 1-4/5)

⁸ 4564/13) [2015] ZAKZPHC 35; 2015 (6) SA 50 (KZP); [2015] 4 All SA 213 (KZP) (6 July 2015)

to make a ruling on the applicability of the new scales introduced for the employment of counsel. The scales listed in the amended Rule are Scales A, B and C. These scales govern the recoverability by the Plaintiff of counsels' costs on taxation.

[42] In ***Buhle Waste (Pty) Ltd v MEC for Health Gauteng & Others***⁹ Cajee AJ held as follows regarding the abovementioned Rule amendment.

"28. While I am cognizant of the fact that the new taxable costs regime no longer considers seniority of counsel, but rather complexity of the matter and value of the claim or importance of the relief sought to be the deciding factors, in my view a court should be wary not to grant or approve costs on a scale which counsel of a certain seniority would not ordinarily charge his or her own attorney and client. This would run counter to the intention of the new regime..."

[43] With regard to this present matter it is held by the court that the employ of a senior counsel was warranted and that counsels' fees on Scale C are appropriate for *inter alia*, the following reasons:

43.1. Value of the claims:

The value of the claim should be evaluated in the eye of the Plaintiff who was injured. It is apparent that the Plaintiff needs to rely on his compensation to sustain himself especially in the later years of his life. From his point of view the amount concerned is considerable.

43.2. Importance of the relief sought

⁹ (*Gauteng Division Johannesburg, Case Number 2023-102560*)

The relief sought is for damages aimed at the compensation of the unfortunate Plaintiff and his family who was involved in a motor vehicle accident. The Plaintiff suffered severe bodily and psychological injuries. The Plaintiff will suffer physical and psychological for the rest of his life; who has a permanent loss of his earning capacity; who has therefore lost the ability to properly earn a living. The matter has obvious importance to the Plaintiff in that his entire remaining working lifespan has been blighted.

As trenchantly observed by His Lordship Baqwa J in ***Adv AJ Du Toit N.O. obo Cee-Jay Lee Johnson v The Road Accident Fund***¹⁰ the Plaintiff has only one shot at obtaining due compensation from the Defendant and the Plaintiff's whole life depends on obtaining a proper award.

43.3. Complexity of the matter

This case involves the input by various experts of different disciplines. It involves an Orthopaedic surgeon to assess the functional *sequelae*; Psychologist in respect of neurological *sequelae*; an Occupational psychologist regarding the impact on his occupation; an Industrial psychologist regarding employment prospects; and the Actuary regarding the calculation of the loss of earnings/earning capacity.

The reporting of all the experts is not in plain layman's language, but in more complex and specific language and terms used in the respective

¹⁰ 20147/2021) Gauteng Division, Pretoria (23 April 2024)

expert disciplines. A proper understanding of the reporting requires special and specific knowledge by the legal practitioners.

- the matter involves preparation in regard to several different expert disciplines and expert witness reports; the drafting of heads of argument on the issue of the loss of earning capacity; and the research of the case law regarding awards of general damages.

43.4. It is therefore submitted that the value of the total claim is substantial, that the relief sought is of great importance to the Plaintiff; and that the matter involves issues of a high degree of complexity.

43.5. The specific circumstances and the various factors attendant in this matter, rendered it wise and reasonable for the Plaintiff to have briefed a more senior counsel.¹¹ There can be no justification for any contention that it was not necessary, or that it was wrong to employ a senior counsel; or that it is unfair to Defendant that it should be required to bear the costs incurred in the employment of a senior counsel. The Defendant could have settled this claim a long time ago had it complied with its statutory duties timeously.

"In an unreported judgment of this Court, Road Accident Fund v Roman Klisiewicz, case No 192/2001, handed down on 29 May 2002, Howie JA set out the extent of the respondent's responsibilities, saying in para [42]: 'The [Road Accident Fund] exists to administer, in the interests of road accident victims, the funds it collects from the public. It has the duty to effect that administration with integrity and efficiency. This entails the thorough investigation of claims and, where litigation is

¹¹ it was certainly a wise and reasonable precaution to employ the services of two counsel (compare *Newman v Prinsloo and Another* 1974 (4) SA 408 (W) at 411A; *Zweni v Minister of Law and Order* (1) 1991 (4) SA 166 (W) at 170A). The disputes involved potentially wide-ranging issue of both fact and law. It is not by any means a minor matter. The case was sufficiently difficult to justify the engagement of two counsel. (compare *DE NMMLOZE VENNOOTSCHAP ALINTEX v VON GERLACH* 1958 (1) SA 13 (T) at 16-7).

responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence. These are not exacting requirements. They must be observed'." ¹²

43.6. It was the Defendant that obliged the Plaintiff to approach this Honourable Court for relief.

43.7. It should be borne in mind that by awarding counsels' costs on scales A or B the Honourable Court will effectively be penalizing the Plaintiff. Counsel are entitled to mark and recover reasonable fees for their work done (**Algemene Balieraad van Suid-Afrika v Burger en 'n Ander** ¹³LPC Code of Conduct 15.1 and 23.1). That is not affected by the particular scale under Rule 67 A. Rule 67 A merely restricts the ability of the Plaintiff to recover more than the specified amounts on scales A, B or C, respectively, from the unsuccessful Defendant. The balance of counsels' fees unfortunately have to be paid by the successful Plaintiff out of the capital awarded. This impinges on the trite principle set out in paragraph 3 above.

43.8. In the premises, it is respectfully submitted that Plaintiff is entitled to an order that the fees consequent upon the employment of a senior counsel are allowed; and for a direction that such fees are granted on scale C.

43.9. Since the advent of the Covid pandemic and the consequential change that it had on the normal Court and trial procedures, the Court has placed more and more emphasis on comprehensive heads of argument to be filed by the representatives of litigants to assist the Court. Presiding judges rely more and more upon the written submissions of counsel to assist them rather than entertaining hours of oral argument.

¹² (*Madzunye and Another v Road Accident Fund 2007 (1) SA 165 (SCA) par [17] at 171*).

¹³ 1993 (4) SA 510 (T);

43.10. In this sense the normal practise for presenting argument in the High Court has become more similar with the practice in the Constitutional Court. The court in ***Society of Advocates of KwaZulu - Natal v Lev*** matter ***supra*** held as follows:

“ii) In President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another^[41] Kriegler J drew a distinction between the practice in the Constitutional Court and the SCA in respect of the heads of argument and the associated appearance of counsel at the hearing. He pointed out that ‘in the SCA the emphasis is on the oral presentation of argument by counsel in open court with heads of argument serving largely as a preliminary guide to the Court, while in the Constitutional Court, the emphasis is on written submissions, which are not regarded as succinct heads of argument forming the basis of the argument to be presented, but the argument itself together with all the supporting material.’

And further that ‘In an appropriate case, therefore, it may be reasonable to make some special allowance for counsel’s fees for preparing written argument for this court. This is expressly contemplated by sub rule (2) of the CC Rule 21.’

iii) There is no reason why a similar consideration should not apply to the assessment of counsel’s fees in this matter.

iv) I have perused the relevant heads of argument and having considered the submissions of Ms Annandale on the general and specific purpose and content of heads of argument, I am of the view that the taxing mistress misdirected herself in assessing the fee at R600 per page, as such an assessment even on a per page basis, is disproportionate to the effort involved in drafting the heads and fails to take into account the issues dealt with therein.

v) I have already commented on the need for a uniform practice in accordance with the generally accepted computation of fees on a time spent basis, which will provide fair and reasonable remuneration for the service rendered.”

43.11 It has further become an acceptable practice that Counsel be allowed to ask for the drafting of his Heads of Argument premised upon the actual time (although must be reasonable) spent.

43.12 In the ***Society of Advocates of KwaZulu - Natal v Lev*** matter *supra* the Court stated as follows:

[17] Counsel's fees in the bill of costs under review were charged on a time spent basis. I share the view expressed by Sholto-Douglas AJ in City of Cape Town v Arun Property Development (Pty) Ltd and Another:

'The modern trend- if I may call it that- of charging a fee based on time actually expended is both acceptable and in the interest of transparency'."

43.13 In the premises it is held by the court that any order as to costs should include Counsel's time spent for drafting Heads of Argument as well.

[44] There is no reason why the costs are not to follow the outcome.

[45]. CONCLUSION:

In the premises I make the following order:-

1. The Defendant is liable hundred percent (100%) in respect of the plaintiff's agreed and or proven damages;
2. Future hospital and medical expenses: Section 17(4)(a) Undertaking;

3. General damages

Postponed sine die;

4. Loss of earnings

R 5 350 016.40

5. Costs of counsel on scale C

Total

R 5 350 016.40

J. ZITHA AJ

Judge of the High Court
Gauteng Division, Pretoria

Appearances:

On behalf of the plaintiff:

Adv. D. Thumbati

Instructed by:

AM Komane & Associates

On behalf of the defendant:

No appearance