

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



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

CASE NO: 81640/2017

(1) REPORTABLE: ~~YES~~/NO

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

(3) REVISED.

DATE: 06/05/2026

SIGNATURE:

In the matter between:

T[...] O[...] P[...]

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

LINK NO : 4121127

JUDGMENT

INTRODUCTION

[1] This is a delictual claim for damages as a result of a motor vehicle collision which occurred on the 17th September 2015. The matter appeared before court by a way of default judgment application on the 03rd of February 2026.

PARTIES

[2] The Plaintiff is **T[...]** **O[...]** **P[...]** an adult female person with full legal capacity, who was born on **19th of April 2003** ("the Plaintiff") and who is currently twenty three (23) years of age. At the time of the collision, the Plaintiff was twelve 12 (twelve) years old.

[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] Future medical expenses

[6] Loss of earnings (Past and Future)

[7] General damages will have to be postponed sine die, as the Defendant has not made a determination about the seriousness of the injuries in terms of the RAF 4 forms.

APPLICATION TO ADMIT EVIDENCE BY WAY OF AFFIDAVIT IN TERMS OF

RULE 38 (2) OF THE UNIFORM RULES

[8] 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 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.

This included:

8.1. The Plaintiff's quantum evidence and collateral witness evidence; and

8.2. 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.

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

¹ 1995 (2) SA 319

“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.”

- 8.4. In ***Mnisi v The Road Collision 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

² [2022] ZAMPMBHC 23

nature of 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 sent 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.

8.5. The Plaintiff served all information and documentation on the Defendant.

8.6. This is a quintessential example of a matter that can be disposed of by way of affidavit to save time and costs.

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 ...”*

8.7. The Plaintiff requested that the expert affidavits and the affidavits in respect of the quantum evidence of the Plaintiff be admitted as evidence.

8.8. 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.

8.9. The application in terms of Rule 38 (2) was granted by the court.

8.10. The court also granted the application to set aside the notice of intention to defend, as it was considered to be an abuse of the court process.

[9] THE MERITS:

9.1. The issue of liability is resolved as follows:

Accordingly, the Defendant is held liable for hundred percent (100%) of the Plaintiff's proven or agreed damages. The Plaintiff was at all material times a passenger in a motor vehicle with registration numbers and letters FHX 442 NW. The Plaintiff's version is contained in the section 19 (f) affidavit. The names of the Plaintiff appear in the accident report.

[10] QUANTUM:

10.1. 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 to be incurred by the Plaintiff in the future.

10.2. In quantifying its claim, the Plaintiff obtained medico-legal reports from the following experts in support of her claim:

10.1.1. Dr J P Marin (Orthopaedic Surgeon);

10.1.2. Dr Schalk Van Heerden (Plastic and Reconstructive Surgeon);

10.1.3. Dr Jameel Desai (Maxillofacial and Oral Surgeon);

10.1.4. Dr Michael B Huth (Neurologist);

10.1.5. Dr Ian Erasmus (Dentist);

10.1.6. Dr Aloshna Naicker (Educational Psychologist);

10.1.7. Ms Shailendra R. Senzere (Occupational Therapist);

10.1.8. Ms Voula Samouris (Clinical Psychologist);

10.1.9. Ms Michelle Baig (Industrial Psychologist); and

10.1.10. Mr Johan Sauer (Actuary).

[11] The Defendant did not appoint any medico-legal reports.

[12] The Plaintiff's reports are unchallenged, it was correctly submitted by the Plaintiff's counsel that they remain uncontested, and they should be admitted as evidence in terms of Rule 38(2). An application in terms of the said rule was granted.

Herewith follows a summary of the Plaintiff's claim based on the aforementioned reports.

QUANTUM

[13] EXPERT MEDICO-LEGAL REPORTS:

There are ten (10) experts for the Plaintiff. No expert reports were filed by the Defendant. Consequently, there are no joint minutes, as only the Plaintiff's expert opinions are on record.

[14] Past medical expenses

The Plaintiff attended a public hospital, hence there are no past expenses that were incurred. The court was not referred any medical vouchers incurred.

[15] FUTURE TREATMENT AND ASSISTIVE DEVICES:

Future treatment and assistive devices have been indicated. This should be covered from an undertaking to be awarded to the Plaintiff.

TREATMENT ENVISAGED IN THE FUTURE:

15.1. The Neurologist recommends conservative treatment. Total cost per annum for comprehensive pharmacological and non-pharmacological treatment of chronic post –Traumatic Headaches_Migrane Type including treatment for sequela and complications that are in private sector of RSA is R70 000-00 (seventy thousand rand) per annum conservatively. This includes pharmacological and non – pharmacological treatment, doctor's visits, and medication expenses and is a comprehensive sum.

15.2. The Plaintiff will require non –pharmacological treatment options. Education on lifestyle changes. Environmental stimulus control and sleep hygiene. Stress management. Exercise. Acupuncture. Hydration.

Relaxation training. Biofeedback. Massage. Hot compress/cold compress.

15.3. The Plaintiff will require pharmacologic treatment option.

15.4. According to the Orthopaedic Surgeon the Plaintiff will require conservative with NSAIDS (NONSTEROIDAL ANTI-INFLAMMATORY DRUGS) and ANALGESICS

15.5. The Plaintiff will require a treatment by a physiotherapist.

15.6. The Plaintiff will require a referral to the headache clinic, which will cost approximately R50 000.00 (fifty thousand rand).

As a result, the Plaintiff is awarded future medical expenses in terms of Section 17 of the Road Accident Fund Act. In the matter of **Knoetze obo Malinga and Another v Road Accident Fund (77573/2018; 54997/2020 [2022 ZAGPPHC 819; [2023] 1 All SA 708 (GP)**, the CEO of the Defendant offered a blank undertaking for all proven future medical hospital and related expenses in all cases before the court where such are proven and therefore it is held that the Plaintiff is entitled to such an undertaking.

[16] The expert opinions.

(a) Dr JP Marin (Orthopaedic Surgeon)

THE INJURIES SUSTAINED BY THE PLAINTIFF:

According to the expert the Plaintiff sustained soft tissue injury to the head and face, including a loose teeth, chewing difficulties, dizziness, loss of balance and long-term memory loss.

The Plaintiff had no prior history of injuries, operations, pain and or neurological problems.

Post accident, she has symptoms that include daily headaches, jaw pain, loose teeth, forgetfulness and difficulty concentrating.

The chronic headaches, reduced concentration and fatigue may limit her ability to perform in high pressure clinical environments.

(b) Dr Jameel Desai Maxillofacial and Oral Surgeon:

She was diagnosed with a soft tissue injury of the upper lip.

She complains of frequent headaches.

(c) Dr Michael B Huth Neurologist:

The Plaintiff sustained a head injury and left facial nerve palsy, lost consciousness and woke up at the hospital the same day.

Symptoms of headache, cognitive and behavioural disturbances began five (5) days after the accident.

She complains of post traumatic behavioural disturbances, post cognitive disturbance and memory loss.

She sustained a mild head injury and it has caused chronic symptoms and impairment.

(d) Dr Ian Erasmus Dentist:

The Plaintiff will not suffer any loss of earnings or earning capacity due to injuries sustained in the accident, from a dental perspective.

(e) Dr Alohna Naicker Educational Psychologist:

Her mother has a matric and an N4 in business Management and her father's history is unknown.

Pre-accident, her language development and medical history were normal, with no significant illness or head trauma.

Pre- accident she passed all her grades with strength in Mathematics and English.

Post-accident her performance declined with weaknesses in Mathematics and Physics.

The expert concluded that Pre-accident without the accident, she likely would have achieved a stronger matric pass and pursued a career in Medicine.

She is currently studying a Nursing degree at WITS University but struggles with course material. It is unlikely she will be able to switch to Medicine due to cognitive challenges.

The expert further compiled an addendum report.

Pre-accident, the Plaintiff was a healthy, high achieving student with strong intellectual abilities. She is likely to have pursued a career in Medicine without the accident.

Post-accident, she has excelled in her Nursing studies but struggles with memory, attention and emotional regulation due to the accident related sequelae.

(f) Occupational Therapist:

In her report opines that:

Pre-accident, the Plaintiff progressed through school without repeating grades, thus completing grade 12 in 2021.

Post accident, she is currently in her third (3rd) year of Nursing program. Academic performance has been impacted by attention, memory, anxiety, depression and verbal reasoning deficits.

In her addendum report opines that the Plaintiff's academic trajectory has been disrupted, requiring increased effort and support to maintain performance. Her educational capacity is below her pre-accident potential.

(g) Clinical Psychologist:

The Plaintiff shows signs of challenges in her immediate memory and verbal learning.

Chronic pain and restricted movement may hinder her ability to perform labour intensive task, making her an unfair competitor in the labour market.

Pain and memory issues may affect her ability to focus, learn and complete her Nursing degree within the standard timeframe.

The accident has caused significant physical, emotional, and cognitive challenges, affecting the Plaintiff's ability to study, work and socialize.

(h) Ms Michelle Baig Industrial Psychologist

(i) PRE-MORBID ASPIRATIONS:

Prior to the accident, the Plaintiff aspired to be a doctor and complete a degree in Medicine.

Post-accident, she aspires to become a Nurse and specialize in Paediatrics.

The Educational Psychologist opined that Plaintiff could have pursued a career as a doctor and risen to a specialist level in the health sector.

The Plaintiff's future earnings have been significantly compromised due to the accident sequelae.

Her career prospects and occupational functioning have been curtailed to a moderate to significant degree.

She has been rendered a vulnerable employee in the open labour market.

In the addendum report two scenarios are postulated:

Scenario 1: the Plaintiff may pursue a Masters and Doctorate in Nursing Science, optimizing career prospects in research, clinical work or academia.

Scenario 2: Plaintiff may gain entry into Medicine via the Graduate Entry Medical Programme (GEMP) and pursue a career as a medical doctor, though with significant challenges due to the accident-related impairments

(ii) **CONTINGENCIES:**

In assessing the value of the income allowance may be made for the various contingencies of life that occur such as sickness and unemployment. For the reason stated above, the industrial psychologist recommends a higher than normal post-accident contingency adjustment.

For illustrative purposes he deducted 20% from the accrued value had the accident not occurred, 30% from the prospective value had the accident not occurred.

It is the court's view that under the circumstances of this particular case, a 10% spread between pre- and post-morbid contingencies on future earnings is reasonable.

(iii) **THE CALCULATION:**

(a) **Limitation of Compensation (CAP):**

- The expert confirms that the CAP is applicable on these calculations. Thus, the loss of income does exceed the Statutory Limit during every year and the appropriate adjustment is set out in actuary's report.

(b) **SUMMARY OF LOSS:**

- **Loss of income** **Maximum Compensation**

Scenario 1: R 12 862 142 R 11 577 373

Scenario 2: R 12 320 999 R 11 036 229

Scenario 3: R 4 652 165 R 4 078 848

Scenario 4: R 4 621 897 R 4 048 579

As can be seen from the above, it does make a difference whether the loss is calculated on scenario 1, 2, 3 and 4 as the limited amount will be different.

The actuary made several postulations with respect to the loss of earnings as a result of the injuries sustained by the Plaintiff.

The average between the four (4) scenarios is appropriate under the circumstances.

I cannot disregard the other over another scenario.

All the scenarios are probable and are supported by evidence before the court.

It correctly argued by the Plaintiff's counsel Mr Nel, under the circumstances the average of all the scenarios should be considered.

For this reason, I am satisfied that the Plaintiff suffered a loss of earnings in the amount of **R 7 685 257.25** (*seven million six hundred and eight five thousand two hundred and fifty-seven rand and twenty five cents*).

[17] **LAW**

17.1. **LOSS OF EARNINGS**

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.

17.2. 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.

17.3. 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% (five percent) on the past income and 15% (fifteen percent) 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:”

17.4. 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...".

17.5. The percentage of the contingency deduction depends upon a number of factors and ranges between 5% (five percent) and 50% (fifty percent), depending upon the facts of the case.

17.6. 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.”

17.7. 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.

[18] APPLICATION OF LAW TO FACTS

18.1. 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.

- 18.2. The Plaintiff's case remains undisputed and remains unchallenged. The Defendant has not appointed a single expert to challenge and or contradict the Plaintiff's expert witnesses. There is also no evidence before me that prior to the collision the Plaintiff had any cognitive, neuro-cognitive and orthopaedic problems.
- 18.3. In so far as the injuries are concerned, it has not been disputed that the Plaintiff sustained a left facial nerve palsy, head injury (mild) and or injury which was consequent to the motor collision. It remains undisputed that the Plaintiff's chronic post traumatic headaches (migraine type) problems arising from the accident have caused the patient impairment and disability.
- 18.4. The occupational therapist opines that the Plaintiff's employment has been adversely affected and as result curtailed. Her injuries make her an unfair competitor in the open labour market. The claimant is capable of performing light work. However, due to her chronic headaches, which developed following the accident, she will require reasonable accommodations in the workplace to manage her symptoms. These headaches are not only physically debilitating but also affect her cognitive functions, such as concentration and focus, which are essential in her role as a Nursing student and future Nurse.
- 18.5. The occupational therapist opines that the Plaintiff's chronic condition creates a significant vocational prejudice, limiting her ability to perform

at her full potential in a demanding and time sensitive profession like Nursing. The unpredictability of her headaches, coupled with the physical and mental fatigue they cause, may lead to frequent breaks, reduced productivity, and difficulty meeting the demands of the profession, particularly in high stress environment like hospitals.

- 18.6. The occupational therapist opines that without formal accommodations, such as flexible work hours, reduced exposure to stressful situations, or a supportive work environment, the claimant's chronic condition may further hinder her career progression, placing her at a disadvantage compared to peers without such impairments. The accident has, therefore, introduced barriers to her full participation in her chosen profession, affecting not only her current academic performance but also her future vocational opportunities.
- 18.7. 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.
- 18.8. I accept that the Plaintiff would require an **understanding employer who will be willing to accommodate her 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.

18.9. 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.

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

[19] Plaintiff's counsel submitted that contingencies are to be applied as the actuarial calculations since *the Road Accident Fund Amendment Act 19 of 2005* cap does have an impact on this case. In this regard counsel argues the contingency deductions of 20% on uninjured earnings and 30% on uninjured future earnings should be applied. I agree with the contingencies applied in the past loss of earnings.

I hold a same view with respect to the contingencies as applied by the actuary (addendum report) and submitted by the Plaintiff's counsel.

COSTS:

[20] 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 she 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.

[21] 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’

[22] 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 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,

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)

B and C. These scales govern the recoverability by the Plaintiff of counsels' costs on taxation.

[23] 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..."

[24] 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:

24.1. 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 her compensation to sustain herself especially in the later years of her life. From her point of view the amount concerned is considerable.

24.2. 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 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 her life; who has a permanent loss of her earning capacity; who has therefore lost the ability to properly earn a living. The matter has obvious importance to the Plaintiff in that her 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.

24.3. 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. There are ten (10) experts which the plaintiff has appointed in order to quantify this matter.
- 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 expert disciplines. A proper understanding of the reporting requires special and specific knowledge by the legal practitioners.

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

- 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 special damages (loss of earnings , past and future).

[25] It is therefore held by the Court 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.

[26] The specific circumstances and the various factors attendant in this matter, rendered it wise and reasonable for the Plaintiff to have briefed a senior – Junior Counsel and or 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

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).

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

[27] It was the Defendant that obliged the Plaintiff to approach this Honourable Court for relief.

[28] 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 make 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.

- a. In the premises, it is held by the Court 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.
- b. 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

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

¹³ 1993 (4) SA 510 (T);

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.

- c. In this sense the normal practise for presenting argument in the High Court has become more similar with the practice in the Constitutional Court. In this the court with approval 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."*

[29] 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.

[30] 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'."

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

[32] **CONCLUSION:**

In the premises I make the following order:

1. The application to set aside the notice to defend is granted.
2. The application in terms of Rule 38(2) is granted.
3. The Defendant is liable hundred percent (100%) in respect of the Plaintiff's agreed and or proven damages;
4. Future hospital and medical expenses: Section 17(4)(a) Undertaking;

5. General damages

Postponed sine die;

6. Loss of earnings

R 7 685 257.25

7. Costs of counsel on scale C

Total

R 7 685 257.25 (seven million six hundred and eight five thousand two hundred and fifty seven rand and twenty five cents).

J. ZITHA AJ

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 03rd February 2026

Judgment delivered: 06th May 2026

APPEARANCES:

For the Plaintiff: Adv Piet Nell

Attorney for the Plaintiff: Corne Nell Incorporated

For the Defendant: None

Attorney for the Defendant: None