REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Reportable: NO
Of interest to other Judges: NO
Revised: NO
Date: 08 June 2026 S.S Tebeile AJ
Signature: [redacted]

Case No: 2022-16713

In the matter between:

NONTOBEKO MAKHAYE Plaintiff

and

ROAD ACCIDENT FUND Defendant

Heard on : 19 March 2026

Decided on : 08 June 2026

JUDGMENT

TEBEILE AJ:

Introduction

[1] This is a default judgment application in terms of Rule 31(5) of the Uniform Rules of Court against the Road Accident Fund ("the defendant"). The application is unopposed.

Background

[2] The plaintiff, Ms Nontobeko Makhaye, instituted a claim against the defendant for damages suffered as a result of a motor vehicle accident which occurred on 12 October 2019. The plaintiff was a passenger in a taxi that rolled after the driver lost control. She sustained, inter alia, a complicated traumatic brain injury of at least a moderate degree, with subarachnoid haemorrhage and right temporal lobe cerebral contusion, as well as soft tissue injuries and disfiguring scarring.

[3] The defendant initially entered an appearance to defend and filed a plea and a special plea. However, the defendant failed to comply with court orders directing it to attend a pre-trial conference. On 16 September 2025, this court per Mfenyana J struck out the defendant's special plea and plea for non-compliance with orders directing attendance of pre-trial conference. Consequently, the plaintiff applied for default judgment. The defendant did not oppose the application.

[4] At the time of the accident, the plaintiff was 19 years old and in Grade 12. She had shown determination to remain in education, having previously failed and then repeated Grades 9 and 11. According to the expert opinion of Ms M A Gibson, the educational psychologist, the plaintiff was probably of average to above-average intellect before the accident. But for the accident, she would likely have passed matric and completed a qualification at NQF Level 5 or 6, entering the labour market at a semi-skilled to skilled level.

[5] Because of the accident, the plaintiff did not write her final examinations in 2019. She attempted to write matric in 2020 but failed. She has not obtained any further qualifications. She has since been employed as a packer and later as a machine operator at Koogan Plastics, earning approximately R5 500.00 per month. Her employment is of a casual, low-level nature, and she works in a structured, supervised environment.

[6] The expert reports, which are unchallenged, paint a clear picture. The neurosurgeon, Dr H J Edeling, found that the plaintiff suffers from a post-traumatic organic neuropsychological disorder, post-traumatic headaches, musculo-skeletal pain, and disfiguring scarring. He opined that her residual capacity to work is limited by the need for simplicity, structure and supervision. The industrial psychologists, Mr L Linde and Mr K Jooste, concluded that as a result of the accident the plaintiff will continue to function in the non-corporate sector as an unskilled worker for the rest of her working life, and that she has permanently lost the capacity to improve her functioning through further education or training.

Liability

[7] At the time of the accident the plaintiff was a passenger in a taxi that rolled after the driver lost control. This evidence was not challenged by the defendant, and consequently the defendant is held 100% liable for the proven or agreed damages as a result of the accident that occurred on 12 October 2019.

Loss of earnings and analysis

[8] The actuarial report of Mr G A Whittaker, read together with the supplementary report of the industrial psychologists, sets out the following figures. The past loss is adjusted using the same 5% contingency for both uninjured and injured earnings as the plaintiff requested and as is conventional. However, it was correctly conceded by the plaintiff's counsel during the hearing that there is no past loss of earnings given that the plaintiff was a Grade 12 learner at the time of the accident.

[9] The actuarial report provided two bases for the calculation of loss of earnings. The basis that the plaintiff ultimately relied upon is Basis I (pre accident ceiling at Paterson C1/C2 level). I am of the view that the court must apply a general

contingency deduction of 35% on future uninjured earnings and 15% on future injured earnings, instead of the 19.5% and 39.5% originally proposed by the actuary, on the ground that the higher deduction is justified by the plaintiff's extreme vulnerability in the open labour market, the permanent nature of her neurocognitive deficits, and the risk that any loss of her current job would render her virtually unemployable.

[10] In *Southern Insurance Association Ltd v Bailey NO*[1] the Court held that a court may apply a percentage deduction to future loss of earnings to allow for the ordinary vicissitudes of life and for the possibility that the plaintiff's pre accident career path might not have been followed exactly as planned. The deduction is a matter for the court's discretion, having regard to the circumstances of the particular case.

[11] In *Road Accident Fund v Guedes*[2], the Supreme Court of Appeal endorsed the approach that where a plaintiff has suffered a serious brain injury with permanent sequelae, a higher than usual contingency deduction on the uninjured leg may be appropriate because the "but for" career path is inherently more uncertain, and a lower deduction on the injured leg may be appropriate because the plaintiff's post accident earnings are already precarious and any further reduction would be unfair. The Court held:

> "Thus in my view there is no substance in the appellant's argument that the court a quo's contingency deduction of 30 per cent in the 'having regard to scenario' was incorrect. The uncontested evidence of the respondent's employer, and that of the medical experts, was that her working capacity, and therefore her earning capacity, had been severely compromised by her injuries and their consequences. The possibility that increased psychological intervention and further medical treatment might assist appears to me to have been taken into account in making the contingency deduction of 30 per cent rather than the 40 per cent suggested by the actuary.

[1] 1984 (1) SA 98 (A).
[2] 2006 (5) SA 583 (SCA).

> In the light of the misdirection in the 'but for scenario' it becomes unnecessary to consider the other alleged misdirections referred to by the appellant's counsel in regard to the contingency deduction of 10 per cent in the 'but for scenario'. In the circumstances this court is bound and indeed obliged to intervene and to correct the contingency deduction made by the court a quo in the 'but for scenario' and to make a deduction that it considers appropriate… In my view having regard to all of the relevant factors, a contingency deduction of 20 per cent and not 10 per cent in the 'but for scenario' of the value of the respondent's income of R7 954 150, is appropriate, namely R1 590 830."[3] (Footnotes omitted and emphasis added)

[12] In the present matter, the plaintiff's pre-accident educational trajectory, although promising, was not free of uncertainty. She had already failed two grades before the accident. This factor cannot be ignored in projecting her future loss of earning. Her "but for" career might not have progressed exactly as optimistically projected in the expert reports. A 35% deduction on uninjured earnings is therefore justified.

[13] On the other hand, the plaintiff's post-accident earnings are extremely vulnerable. Her current position as a machine operator is precarious: she works through a labour broker, is not a permanent employee, and earns close to minimum wage. Her neurocognitive deficits mean that if she were to lose this job, she would struggle to find or sustain any other employment. A deduction of only 15% on injured earnings (instead of the actuary's proposed 39.5%) is appropriate, as it gives effect to the principle that a plaintiff should not be under compensated for a loss that is almost certain to continue for the rest of her working life.

[14] Consequently, the court applies a 35% contingency to future uninjured earnings, and a 15% contingency to future injured earnings. The resulting total net loss of earnings is R3 851 759.00 as recalculated below.

[3] Id at paras 17-18.

Future loss

Value of income uninjured	R8,772,014
Less contingency deduction (35%)	R3,070,205
Value of income uninjured after contingency	**R5,701,809**
Value of income injured	R2,176,529
Less contingency deduction (15%)	R326,479
Value of income injured after contingency	**R1,850,050**
Net future loss = R5 701 809.00 – R1 850 050.00 =	R3,851,759

Total net loss of earnings = R3 851 759.00

[15] This court is satisfied that the above figures follow logically from the uncontested expert evidence and that the adjustments for contingencies are appropriate for the reasons set out above.

General damages

[16] The plaintiff claims general damages for pain and suffering, loss of amenities of life, and disfigurement. The RAF4 serious injury assessment reports confirm that the plaintiff qualifies for general damages under the narrative test. Dr Irsigler (general practitioner) found serious injury under paragraph 5.3. Dr Edeling (neurosurgeon) found serious injury of serious long-term impairment of brain function and permanent serious disfigurement. Dr Berkowitz (plastic surgeon) found serious injury under paragraph 5.2 (permanent serious disfigurement).

[17] However, the defendant, a statutory body charged with making decisions on the quantum of general damages, has not made any offer in this regard. Moreover, the Health Professions Council of South Africa ("HPCSA") has not been requested to make a final determination on the seriousness of the injuries, and no such determination has been made.

[18] Section 17(1)(a) of the Road Accident Fund Act 56 of 1996, provides that a claim for non-pecuniary loss may only be compensated if the injury has been assessed as "serious" in accordance with the prescribed regulations. The assessment can be done either by the defendant in its administrative capacity or, in the event of a dispute, by the HPCSA. The court itself cannot assess the seriousness of the injury for purposes of the threshold, nor can it usurp the function of the HPCSA. This was confirmed in *Road Accident Fund v Duma*[4] where the Supreme Court of Appeal held:

> "Consideration of the High Court's judgments in the four cases on appeal and those upon which they rely, all seem to set out from the premise that it is ultimately for the court to decide whether the plaintiff's injury was 'serious' so as to satisfy the threshold requirement for an award of general damages. Proceeding from that premise, these decisions assume that if the Fund should fail to properly or timeously reject an assertion to that effect by the third party, the rejection can be ignored. If the medical evidence before the court then shows that, on balance, the plaintiff was indeed seriously injured, the court can proceed to decide the issue of general damages.
>
> That approach, I believe, is fundamentally flawed. In accordance with the model that the legislature chose to adopt, the decision whether or not the injury of a third party is serious enough to meet the threshold requirement for an award of general damages was conferred on the Fund and not on the court. That much appears from the stipulation in regulation 3(3)(c) that the Fund shall only be obliged to pay general damages if the Fund – and not the court – is satisfied that the injury has correctly been assessed in accordance with the RAF 4 form as serious. Unless the Fund is so satisfied the plaintiff

[4] *Road Accident Fund v Duma, Road Accident Fund v Kubeka, Road Accident Fund v Meyer, Road Accident Fund v Mokoena* 2013 (6) SA 9.

simply has no claim for general damages. This means that unless the plaintiff can establish the jurisdictional fact that the Fund is so satisfied, the court has no jurisdiction to entertain the claim for general damages against the Fund. Stated somewhat differently, in order for the court to consider a claim for general damages, the third party must satisfy the Fund, not the court, that his or her injury was serious".[5]

[19] Because there has been no determination of the seriousness of the injury by the HPCSA and no agreement or offer by the defendant, it would be premature for this court to determine an award for general damages. The appropriate order is to postpone the determination of general damages *sine die*, with leave to the plaintiff to enroll the matter again once the seriousness has been finally determined by the HPCSA or once the defendant makes an acceptable offer.

Order

[20] Accordingly, I make the following order:

(1) Default judgment is granted in favour of the plaintiff against the defendant.

(2) The defendant shall pay to the plaintiff the capital amount of R3 851 759.00 (Three Million Eight Hundred and Fifty One Thousand Seven Hundred and Fifty Nine Rand) as compensation for future loss of earnings.

(3) The defendant shall provide an undertaking to the plaintiff in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for 100% of the costs of the future accommodation of the plaintiff in a hospital or nursing home, or the treatment of, or the rendering of a service to, or the supplying of goods to the plaintiff arising out of the injuries sustained by her in the motor vehicle accident on 12 October 2019.

[5] Id at paras 18-19.

(4) The defendant shall pay the amount of R3 851 759.00 to the plaintiff within 180 days from the date of this order and failure of which the defendant must pay interest on the amount of R3 851 759.00 at 10.5 % rate, calculated from 14 days after the date of this judgment to the date of payment.

(5) The defendant shall pay the plaintiff's taxed or agreed costs on party and party scale B, and such costs to include:

5.1. The costs of 17 March 2026.

5.2. The costs of counsel.

5.3. The costs of obtaining and preparing all expert medico legal reports.

5.4. The reservation fees, if any, of the plaintiff's experts.

5.5. The costs of preparing trial bundles and witness bundles.

(6) The amounts referred to in paragraphs 2 and 5 above shall be paid directly into the trust account of the plaintiff's attorneys, Renier van Rensburg Inc.

(7) The claim for general damages is postponed *sine die*.

(8) The plaintiff is granted leave to re-enroll the matter for the determination of general damages upon decision by the defendant to accept or reject seriousness of the injuries or receipt of an offer from the defendant that is acceptable to the plaintiff or upon production of a final determination of the seriousness of her injuries by the HPCSA

SHADRACK TEBEILE
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

For the Plaintiff: Adv AP Den Hartog instructed by Renier van Rensburg Inc

For the Defendant: Ms N Moyo