

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

CASE NO: 2019/43653

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

DATE: 27/02/2023

In the matter between:

VAN DER MERWE, N O, obo NSINDISO Plaintiff

and

ROAD ACCIDENT FUND Defendant

In the matter between:

JUDGMENT

MOORCROFT AJ:

Summary

Only remaining dispute is contingencies to be applied in respect of future loss of earnings – action on behalf of patient who was 24 years old when he sustained very serious injuries

Order

[1] In this matter I make the following order:

1. *The Defendant is ordered to pay to the Plaintiff*

1.1. an amount of R 900 000.00 (nine hundred thousand rand only) in full and final settlement of the Plaintiff's claim for general damages;

1.2. an amount of R 238 733.95 (two hundred and thirty-eight thousand, seven hundred and thirty-three rand and ninety-five cents) in full and final settlement of the Plaintiff's claim for past loss of earnings; and R 3 856 807.71 (three million, eight hundred and fifty-six thousand, eight hundred and seven rand and seventy-one cents) in full and final settlement of the Plaintiff's claim for future loss of earnings, with link number: 4676403.

2. *Payment to be made to the Plaintiff's Attorneys of record, by payment into their trust account, details as follows:*

Mokoduo Erasmus Davidson Attorneys Trust Account

First National Bank, Rosebank Branch

Account Number: [...]

Branch Code: 253305.

3. *The Defendant is ordered to furnish the Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for the costs of the future accommodation of LINDANI NSINDISO MBOKAZI (hereinafter referred to as "the patient") in a hospital or nursing home or*

treatment of or rendering of a service or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision of 6 March 2018, after such costs have been incurred and upon proof thereof, limited to 90%.

4. In terms of the statutory undertaking referred to in paragraph 2 above, the Defendant shall pay:-

4.1. the reasonable costs of the creation of the Trust referred to in paragraph 5 below and the appointment of the Trustee;

4.2. the reasonable costs of the furnishing of security by the Trustee;

4.3. the costs of the Trustee in administering the patient's estate, as determined by Section 84(1)(b) of the Administration of Estates Act 66 of 1965, as amended, according to the prescribed tariff applicable to curators;

4.4. the costs of the Trustee in administering the patient's Estate and the costs of administering the Statutory Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, as determined by the Administration of Estates Act, 66 of 1965 as amended, limited to the prescribed tariff applicable to a Curator Bonis, as reflected in Government Notice R1602 of 1st July 1991, specifically paragraphs 3(A) and 3(B) of the schedule thereto.

5. That the Defendant will pay the agreed or taxed party and party High Court costs of the action up to and including the date on which this draft is made an order of the above Honourable Court, such costs to include:-

5.1. the costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 1 above;

5.2. the trial costs up to and including 21 and 22 February 2023;

5.3. the reasonable costs of the Curatrix ad Litem, inclusive of her report;

5.4. *the reasonable costs of obtaining the medico-legal reports of all the Plaintiff's experts. Such expert reports to include, but are not limited to Dr. Scher, Dr. Burger, Dr. Townsend, Dr. Makua, Ms. Da Costa, Ms. Mattheus, Ms. Fletcher, Ms. Leibowitz, and Mr. Loots, if any as may be agreed or allowed by the Taxing Master; and*

5.5. *the reasonable qualifying and reservation fees, if any, of the following expert witnesses of whom Notice had been given by the Plaintiff in terms of Rule 36(9)(a) and (b), namely Ms. Mattheus, Ms. Fletcher, and Ms. Leibowitz;*

6. *the Plaintiff's attorneys shall serve the notice of taxation on the Defendant's attorneys and shall allow the Defendant 30 (THIRTY) court days within which to make payment of such costs.*

7. *The requisite steps shall be taken by the Plaintiff's Attorneys with a view to forming a trust to, inter alia, administer and/or manage the financial affairs of the patient and that such trust shall be formed within 6 (SIX) months of the date of this order.*

8. *The trust instrument shall provide for the following as a minimum:-*

8.1. *there shall be a minimum of two trustees and a maximum of three, of which at least one shall be a qualified professional person; to the extent possible and practical, an adult family member of the Plaintiff, more particularly the patient's sister, NONHLANHLA MBOKAZI shall be appointed as one of the trustees and she shall be exempt from providing security to the satisfaction of the master;*

8.2. *if the number of trustees drops below the prescribed minimum the remaining trustees are prohibited from acting other than to appoint a replacement trustee;*

8.3. *the composition of the board of trustees and the voting rights shall be such that any single trustee cannot be outvoted in relation to management of trust assets by any other trustee who has a personal interest in the manner in which the trust is managed;*

8.4. *the powers and authority of the trustees shall not exceed those usually granted to trustees of special trusts;*

8.5. *procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Honourable Court;*

8.6. *the trust should be stated to have the purpose of administering the funds in a manner which best takes account of the interests of the patient;*

8.7. *the separation of the property of the trustee/s from the trust property;*

8.8. *ownership of the trust property vests in the trustee/s in their capacity as trustee/s;*

8.9. *the independent trustee/s (other than the family member above) shall provide security to the satisfaction of The Master in terms of Section 6(2)(a) of the Trust Property Control Act, 57 of 1988;*

8.10. *amendment of the trust instrument shall be subject to the leave of the above Honourable Court;*

8.11. *the trustee/s is authorised to recover the remuneration of and cost incurred by the trustee/s in administering the Section 17(4)(a) RAF undertaking in accordance with the undertaking;*

8.12. *the patient shall be the sole income and capital beneficiary;*

8.13. the trust property is excluded from any community of property in the event of the marriage of the patient;

8.14. the trust shall terminate on the death of the patient whereafter the trust assets shall devolve on the patient's estate;

8.15. the trust property and administration thereof is subject to annual reporting by an accountant;

9. The statutory undertaking referred to in paragraph 3 above shall be delivered by the Defendant to the aforesaid Mokoduo, Erasmus, Davidson Attorneys within 14 (FOURTEEN) days of the date of this Order;

10. Mokoduo, Erasmus, Davidson Attorneys will invest the capital amount less the reasonable attorney and client fees and disbursements in terms of Section 86(4) of the Legal Practice Act 28 of 2014, with First National Bank, Rosebank, for the benefit of the patient, the interest thereon, likewise accruing for the benefit of the patient which investment shall be utilized as may be directed by the trustee of the Trust, when created;

11. Mokoduo, Erasmus, Davidson Attorneys shall render an attorney and client statement of account to the trustee, of the trust to be formed, in terms of the fees contract entered into between the Plaintiff and Mokoduo, Erasmus, Davidson Attorneys.

12. The party and party costs referred to in paragraph 6 (SIX) above, as taxed or agreed, shall be paid by the Defendant directly into the trust account of Mokoduo, Erasmus, Davidson Attorneys for the benefit of the patient. After deduction of the legal costs consultant's fee for drawing the bill and attending to its settlement or taxation, the balance shall be paid into the trust unless same has not yet been created, in which event, such balance shall be invested in terms of Section 86(4) of the Legal Practice Act 28 of 2014, with First National Bank, Rosebank, for the benefit of the patient, the interest

thereon, likewise accruing for the benefit of the patient and shall be utilized as may be directed by the Trustee of the Trust, when created.

[2] The reasons for the order follow below.

[3] The plaintiff is the curatrix of the patient who was born in 1994 and who was injured when he was struck by a motor vehicle on 6 March 2018. He was a pedestrian. He suffered a traumatic brain injury, blunt force abdominal trauma, and a fracture of the right tibia and fibula.

[4] The parties have agreed that the defendant would be liable for 90% the patient's agreed or proved damages. They also settled the general damages claim on R900 000 (post - apportionment) and the past loss of earnings on R238 737.95 (also post-apportionment). It was furthermore agreed that the defendant would provide the usual certificate in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996. There were no past medical expenses.

[5] The outstanding claim was for future loss of earnings. The amount of the claim was not in dispute but the contingencies to be applied to the claim remained in dispute.

[6] The plaintiff called three expert witnesses, Ms L Liebowitz (industrial psychologist), Ms A Mattheus (educational psychologist), and Ms S Fletcher (occupational therapist). The defendant called no witnesses. The relevant expertise of the witnesses were quite rightly conceded and I am indebted to both counsel for the professional way they dealt with the matter.

[7] Ms Davidson who appeared for the plaintiff referred me to *Goldie v City Council of Johannesburg 1948 (2) SA 913 (W) 920* and *Southern Insurance Association v Bailie NO 1984 (1) SA 98 (A) 112E – 114F* in respect of the assessment of damages.

[8] The patient had a grade 12 qualification. Ms Mattheus described the patient's probable career progression "but for" the accident. She adopted a

conservative approach and said he would complete a higher certificate at pre-accident level.

[9] Ms Liebowitz indicated that at the time of the accident the patient was earning R300 to R400 per week as a general worker. She postulated that in time he would have been eligible for compensation at Paterson level A3/B1. He would likely have had the ability to attain a Higher Certificate (NQF level 5) and progressed to Paterson C1 level (median total package) by age 45-50, and thereafter he would receive only inflation related increases. She also adopted a conservative approach, starting his career path at minimum wage level. This is an important aspect in determining the correct contingency percentage to be applied.

[10] Ms Mattheus testified that the patient's overall cognitive functioning or cognitive potential was borderline. She concluded that he would not be able to complete any form of tertiary training. He was a vulnerable individual in the open labour market. His cognitive difficulties would not improve.

[11] Ms Fletcher classified the patient as a general worker and carpenter pre-accident falling in the medium category, but he is no longer suited to either of those employment options from a physical strength perspective.

[12] Ms. Liebowitz testified that the patient has not returned to any sort of employment or educational endeavours subsequent to the accident.

[13] Ms Davidson with reference to the uncontested actuarial calculations submitted that a 30% contingency "but for" the accident was appropriate. She referred to the accepted principle that 5% be applied to the calculation of the past loss of earnings, and that every year of a person's remaining working life represents a 0.5% contingency deduction insofar as the calculation of the future loss of earnings is concerned.

[14] The patient would have continued working for 37 years from age 28 to 65, this amounts to a contingency deduction of 18.5%.

[15] She referred to *Southern Insurance Association v Bailie* NO 1984 (1) SA 98 (A) where a 25% contingency was applied. The patient was a two-year old child rendered permanently disabled.

[16] Ms Davidson calculated future loss of earning at R 4 550 601.90 pre-apportionment or R4 095 541.71 post apportionment.

[17] Mr Ngomana who appeared for the defendant argued that the contingency should be 65% rather than 30%. This was the point of divergence between counsel. He submitted the following calculation of future loss of earnings:

R6 121 917
 Minus 65%
 = R2 142 670.95
 Less 10%
 = R1 928 403.86

[18] In *Mbokazi v Minister of Police and another* [2020] JOL 47640 (GP), Bhoola AJ said:

“[16] In this regard counsel submitted that the authorities are clear that where there is no proof of income a contingency deduction of up to 50% may be applied and also made reference in this regard to AA Mutual Insurance Association Ltd v Maqula 1978 (1) SA 805. The court also stated that the law is settled in that a trial court has a wide discretion to award what it considers to be a fair and adequate compensation to the injured party for his bodily injuries and their sequelae.

[17] Counsel submitted that since actuarial calculations were done without any proof of income whatsoever the court was required to bear this in mind when coming to a decision on how much the plaintiff should be compensated with. Hence, it was submitted that the amount should be R2 650 329.50 with 50% contingency”

[19] The Learned Judge also referred to *Southern Insurance Association v Bailey* NO 1984 (1) SA 98 (A) 113 G-I where Nicholas JA said the following:

“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. See *Hersman v A Shapiro & Co* 1926 TPD 367 at 379 per STRATFORD J:*

“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.”

And in Anthony and Another v Cape Town Municipality 1967 (4) SA 445 (A) B HOLMES JA is reported as saying at 451B - C:

"I therefore turn to the assessment of damages. When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss; see C Pitt v Economic Insurance Co Ltd 1957 (3) SA 284 (N) at 287 and Turkstra Ltd v Richards 1926 TPD at 282 in fin - 283."

[20] Mr Ngomana is of course correct that a court must be wary when future loss of earnings is claimed by or on behalf of a patient unable to prove actual income prior to the accident. There is however no dispute as to the fact that he was working and the experts adopted a conservative approach by starting his career path at minimum wage level.

[21] Under the circumstances I regard the 30% contingency deduction as appropriate and this is provided for in the order made above.

**J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **27 FEBRUARY 2023**.

COUNSEL FOR THE PLAINTIFF:
INSTRUCTED BY:

N DAVIDSON
M E D ATTORNEYS

COUNSEL FOR DEFENDANT:
INSTRUCTED BY:

T H NGOMANA
STATE ATTORNEY

DATE OF THE TRIAL: 22 FEBRUARY 2023
DATE OF ORDER: 27 FEBRUARY 2023
DATE OF JUDGMENT: 27 FEBRUARY 2023