



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 2189/2020

In the matter between:

NESLYNNE UDEAN CANNON

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

LAING J

[1] This is a claim for damages arising from a motor vehicle accident that occurred on 29 March 2018 along the N10, between Gqeberha and Cradock.

Background

[2] The plaintiff alleged that she had been a passenger in a motor vehicle driven by her fiancé, Mr Devane Salter. It had collided with a truck and trailer, resulting in severe injuries to the plaintiff, including fractures of the right humerus and left clavicle, lacerations and abrasions, and psychological harm. She had been 23 years old at the time.

[3] The plaintiff pleaded that the cause of the accident had been the sole negligence of either Mr Salter or the other driver, alternatively it had been caused by their joint negligence. She claimed damages in the amount of R 10,741,161.

[4] The defendant defended the matter. Its plea amounted to a bare denial of the plaintiff's allegations.

History of litigation and issues to be decided

[5] On the day of trial, 27 July 2022, the defendant admitted liability. It agreed to pay an amount of R 700,000 to the plaintiff for general damages and gave an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to pay the costs of future hospital accommodation and medical treatment. An order was made to that effect, also incorporating the payment of interest and costs of suit to date. The question of whether the plaintiff was entitled to the costs of two counsel was reserved. The plaintiff's claim for past hospital and medical expenses, as well as her claim for past and future loss of income and earning capacity, were separated from the remaining claim for damages. The trial was postponed until 7 November 2022.

[6] The subsequent proceedings were marked by a considerable degree of acrimony in relation to the admission or otherwise of the joint minute of the parties' respective

industrial psychologists. The defendant eventually admitted the joint minute on 24 March 2023, shortly before the trial resumed on 27 March 2023.

[7] The main issue for determination, at the conclusion of the present proceedings, is the quantum of damages for past and future loss of income and earning capacity. This forms the basis of the enquiry to follow, beginning with an outline of the principles involved.

Legal framework

[8] The determination of damages for past and future loss of income and earning capacity is not a straightforward exercise. It involves considering the uncertainties inherent to a claimant's unique set of personal circumstances, as well as the influence of external factors on the possible contribution of his or her skills and abilities to the market. To that effect, the making of deductions from an award to accommodate the contingencies of life serves as a useful legal tool.

[9] Dendy observes as follows:

'In awarding damages for future loss courts usually make provision for contingencies. Contingencies include any possible relevant future event which might otherwise have caused the damage or a part thereof, or which may otherwise influence the extent of the plaintiff's damage. In a wide sense, contingencies are described as "hazards that normally beset the lives and circumstances of ordinary people".¹ This may, for example, imply that provision is made for the fact that the prospective loss which is possible at the time of assessment of damage might in any event possibly have occurred independently of the delict or the breach of contract in question.²

¹ *AA Mutual Insurance Association Ltd v Van Jaarsveld* (1) 1974 2 QOD 360 (A), at 367.

² M Dendy, 'Damages', in *LAWSA* (LexisNexis, vol 14(1), 3ed, 2018), at paragraph 27.

[10] Contingencies have also been described as ‘the vicissitudes of life, such as illness, unemployment, life expectancy, early retirement and other unforeseen factors’.³ The courts have recognised, however, that the fortunes of life are not always adverse; they may be favourable.⁴

[11] The court enjoys a discretion in its determination of the contingency deduction; it must decide what is fair and reasonable.⁵ The exercise is not an exact science. To that effect, Trollip JA observed in *Shield Insurance Co Ltd v Booyesen*,⁶ that the determination of contingencies involves ‘a process of subjective impression or estimation rather than objective calculation’. Similarly, in *Goodall v President Insurance Co Ltd*,⁷ Margo J remarked:

‘In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a certain type of almanack, is not numbered among the qualifications for judicial office.’⁸

[12] Practically, the determination of a contingency deduction has the result that damages are reduced by anything between 5% and 50%.⁹ The facts and circumstances of each case dictate how and where the line must be drawn.

[13] At this point, it is necessary to summarise the expert reports, and to record and evaluate the evidence of the witnesses called to testify.

³ *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA), at paragraph [3].

⁴ *Southern Insurance Association Ltd v Bailey* 1984 (1) SA 98 (A), at 117B.

⁵ *Fulton v Road Accident Fund* 2012 (3) SA 255 (GSJ), at paragraphs [95] to [96]; and *Nationwide Airlines (Pty) Ltd (in liquidation) v SA Airways (Pty) Ltd* [2016] 4 All SA 153 (GJ), at paragraph [147].

⁶ 1979 (3) SA 953 (A), at 965G.

⁷ 1978 (1) SA 389 (W).

⁸ At 392H-392A.

⁹ *Van der Plaats v SA Mutual Fire & General Insurance Co Ltd* [1980] 2 All SA 129 (A).

Expert reports

[14] The defendant admitted the facts and opinions contained in several expert reports. These are set out in the paragraphs that follow.

Dr Mark Tarboton

[15] In his capacity as a diagnostic radiologist, Dr Tarboton outlined his assessment of the plaintiff in a medico-legal report, dated 12 March 2020. His findings in relation to various x-ray examinations were described.

Dr Piet Olivier

[16] An orthopaedic surgeon, Dr Olivier, completed a serious injury assessment report, dated 22 April 2020. He recorded that the plaintiff had sustained a fractured left clavicle with a dislocation of the left acromioclavicular joint, a fractured right humerus, and facial lacerations. Dr Olivier also recorded, in a medico-legal report of the same date, the history of the injuries sustained, current complaints, and the outcomes of examinations made. He was of the view that the functional restrictions in relation to the plaintiff's left shoulder girdle were of a permanent nature; she would have trouble in performing overhead manual activities.

[17] Regarding employability, Dr Olivier stated that the accident had had a negative impact. Her physical endurance had been significantly compromised and she would be unable to compete with uninjured individuals in the future. She would be unable to perform the usual functions of a hairstylist. She would be limited to work that entailed light or administrative activities.

Dr Estelle de Wit

[18] A medico-legal report, dated 20 December 2021, was prepared by Dr de Wit in her capacity as a clinical psychologist. She recorded the history of the accident and injuries sustained, discussed post-accident management and adjustment, reviewed the available specialist reports and current complaints, set out the plaintiff's personal history, and described her clinical presentation. Dr de Wit diagnosed the plaintiff as suffering from persistent complex bereavement and post-traumatic stress disorders, accompanied by persistent orthopaedic pain and instability of the superior shoulder suspensory complex. Her prognosis for recovery was poor. This was because of the particularly tragic nature of the circumstances: the loss of her fiancé and mother, significant changes in the family structure, the brain injury suffered by her son, and her limited set of internal resources.

[19] In relation to future employment, Dr de Wit stated that this was highly speculative given the nature of the plaintiff's injuries. She noted that, in addition to severe orthopaedic injuries that had an impact on functionality, pain levels, endurance, and mobility, the plaintiff had also presented with severe psychological symptoms of post-traumatic stress disorder and depression. She had few protective factors, and the loss of family members would serve as a constant reminder of the accident. She had limited intellectual resources to secure employment. It was the view of Dr de Wit that the plaintiff was not employable in the open labour market.

Witnesses

[20] The plaintiff presented the evidence of several lay witnesses and experts who were called to testify, to be addressed sequentially below. The defendant presented no evidence.

Mr Lani Martiny

[21] The witness testified that he was an industrial and organizational psychologist and that he had been involved in medico-legal work since approximately 1997. He stated that he had prepared a draft joint minute on 9 November 2022, based on information obtained from the plaintiff and her attorneys.

[22] The minute recorded that, prior to the accident, the plaintiff had worked from home as a hairstylist, earning between R 6,000 and R 7,000 during the quieter months, increasing to between R 13,000 and R 15,000 when it was busier. She had also worked as a volunteer teacher, earning approximately R 2,165 per month.

[23] Mr Martiny indicated that he had prepared two pre-morbid career scenarios, postulating the paths that the plaintiff would probably have followed, but for the accident. The first scenario projected a career as a hairstylist had the plaintiff not succeeded in becoming a teacher. She would have increased her earnings from approximately R 10,000 per month to at least R 20,000 per month by the time that she was 45 years old, whereafter it would have increased at slightly higher than the inflationary rate, until she was 65 years old. The second scenario projected a career as a teacher after the plaintiff had completed a four-year degree in education. She would probably have commenced as an assistant teacher with a monthly salary of approximately R 23,417 after which it was likely that she would have been appointed to a permanent position as a junior teacher, earning a monthly salary of approximately R 39,167. Subsequently, the plaintiff, it was assumed, would have been promoted to the level of principal by the time that she was 45 years old, earning a monthly salary of approximately R 69,000. Her salary thereafter, until she was 65 years old, would have been subject to inflationary increases.

[24] The minute also recorded a post-morbid career scenario. To that effect, Mr Martiny indicated that it was probable that the plaintiff would not be able to work by reason of her injuries and state of mental health. Overall, stated Mr Martiny, the possibility that the plaintiff had residual earning potential and the risks associated with the career path envisaged under the second scenario, above, could best be addressed in the determination of contingencies.

[25] Mr Martiny went on to testify about a medico-legal report that he had prepared, dated 16 March 2022. It was based on several medical documents, and interviews with the plaintiff and other hairstylists. He described the plaintiff's injuries, the various expert opinions on her employability, her current complaints, family details, and personal history, and pre- and post-morbid career scenarios.

[26] Under cross-examination, Mr Martiny admitted that he had not obtained documentary proof of the plaintiff's earnings before or after the accident. He also admitted that the plaintiff was not a qualified hairstylist but could be described as semi-skilled.

[27] In his subsequent testimony, after having been recalled, Mr Martiny confirmed that he and the defendant's industrial psychologist, Mr Simon Nteso, had reached agreement on the draft minute. It was signed without amendment.

Ms Ansie van Zyl

[28] The plaintiff's next witness stated that she was an occupational therapist. She had previously worked at Aurora Hospital, specialising in the rehabilitation of people

with severe injuries and other medical conditions. She had been involved in medico-legal work since 2000.

[29] Ms van Zyl confirmed that she had prepared a report that was based on an interview with the plaintiff, medical records, and various other medical reports. She recorded the plaintiff's personal, medical, and work histories, outlined her current complaints, indicated the clinical observations that she had made, and described the physical, cognitive, and work assessments that she had carried out.

[30] In her summary of findings, Ms van Zyl stated that the plaintiff's loss of amenities had been significant. The plaintiff's scarring and functional limitations were permanent in nature. Dealing with residual working capacity, Ms van Zyl testified that the plaintiff had demonstrated that she could manage light physical demands or completely sedentary employment. Her load-handling ability meant that she could only work at waist level and would not be able to tolerate the use of her left arm above the level of shoulder height for the remainder of any career. The plaintiff's ability to work in the open labour market had been compromised significantly. It was unlikely, said Ms van Zyl, that she would be able to re-enter the market or resume activities as a self-employed hairstylist. The recommendations were those contained in Ms van Zyl's report.

[31] The witness testified that, in her opinion, it was highly unlikely that the plaintiff could become a teacher given the combination of the severe emotional consequences of the accident and the orthopaedic injuries suffered. It was improbable that she would be able complete her teaching studies and control a classroom of learners.

[32] Ms van Zyl confirmed, during cross-examination, that the plaintiff was an unskilled hairstylist, with no formal training.

Ms Leslie Cannon

[33] The next witness for the plaintiff was her sister. She testified that she had accompanied the plaintiff in some of the consultations with various experts, including Mr Martiny and Dr Estelle de Wit. The plaintiff's emotional state had not been good at the time.

[34] Ms Cannon went on to testify that she came from a closely-knit and supportive family. Her father was a retired captain in the South African Police Services, her mother was a hairstylist. She indicated that education was important to her family and that her uncles and aunts all held various qualifications. She, herself, had trained as a nurse.

[35] The witness stated that she and the plaintiff had been at school together. She said that the plaintiff had performed better academically, had earned several certificates, and had been appointed as a prefect at both primary and high school. The plaintiff was goal orientated and had achieved a B-aggregate. In her final year at high school, the plaintiff had informed her family that she very much wished to become a teacher. She had waited before commencing studies because her father had not had the financial means at the time and because she had fallen pregnant. The plaintiff had subsequently informed Ms Cannon that she and her fiancé, the late Mr Salter, had planned to allow him to complete his studies in education while the plaintiff looked after their son, Declan. As soon as Mr Salter had completed his studies, the plaintiff would commence with her own studies in 2019, also to become a teacher.

[36] Ms Cannon testified that the plaintiff had worked as a volunteer teacher on a part-time basis at the primary and high schools in Alexandria. After the accident, the plaintiff had worked as a hairstylist to earn an income. Ms Cannon confirmed that she had informed Dr de Wit that the plaintiff had been unable to continue working full-time

as a hairstylist because of persistent pain. She had worked from home and was supported by her family.

[37] In relation to the plaintiff's emotional state, Ms Cannon described her as a broken person. If the accident had never happened, said Ms Cannon, then the plaintiff would have been successful in her studies and become a teacher. She had a great deal of potential and family support. There were, moreover, other examples of teachers in her family: two of her uncles were school principals, and three of her aunts as well as a cousin were teachers. In relation to the plaintiff's late fiancé, Ms Cannon described him as a hard-working person who would have supported the plaintiff in her studies and career as a teacher.

[38] Under cross-examination, Ms Cannon stated that the plaintiff had never operated a hair salon prior to the accident. She had merely cut and styled family members' hair at their respective homes. Ms Cannon was not aware that the plaintiff had offered her services to the public. She was also not aware whether the plaintiff had already applied successfully to study education at the time that the accident occurred.

Ms Neslynn Cannon

[39] The plaintiff then testified on her own behalf. She confirmed that she was presently 26 years old and had a son, Declan, who had also been involved in the accident and had sustained a serious head injury.

[40] Regarding her education, the plaintiff confirmed that she had obtained a bachelor's pass at high school and had wanted to become a teacher. She had not been able to commence with her studies immediately because her parents had lacked the necessary resources. Consequently, she and her fiancé, the late Mr Salter, had agreed

that he would study first after which he would assist her to do the same. Mr Salter had graduated in 2017 and secured a permanent teaching post in 2018 at the primary school in Alexandria. The plaintiff had intended to register for studies in education later that year, which was also when she and Mr Salter had intended to marry. She had wished to secure a post as a teacher at the same school as Mr Salter.

[41] The plaintiff described Mr Salter as a very respectable person. They had known each other since primary school. He, too, had obtained a B-aggregate.

[42] Regarding the plaintiff's work as a hairstylist, she testified that she had cut and styled family members' hair. She had not done so with a view to becoming a hairstylist, she had done so to assist Mr Salter.

[43] The plaintiff indicated that she had matriculated in 2012. She had worked as a cashier in 2013 and 2014 at a building retail store, and as a casual receptionist in 2015 and 2016 at a medical practice. She worked as a volunteer teacher in 2017 at the high school in Alexandria. After the accident in 2018, the plaintiff had been unable to work for a period of seven months. She had subsequently opened a hair salon to cover some of the costs of caring for Declan, as well as to assist her parents financially. In 2019, she had earned a net amount of approximately R 8,000 per month but had become increasingly troubled by shoulder, arm, and back pain, causing her to employ her aunt to assist at the salon. In 2020, her net earnings had decreased to between R 3,000 and R 4,000 per month. In 2021, circumstances compelled her to close the salon and to operate, only on Fridays, from her father's home. The plaintiff had also employed her cousin. Currently, her net earnings were between R 2,000 and R 2,500 per month, but she had trouble in working, with constant lower back pain, and swelling and pain in the upper right arm. She battled to sleep at night. The plaintiff testified that she had been struggling to adjust to the death of her fiancé and had found it difficult to raise Declan on her own. She was unable to concentrate on tasks at hand.

[44] It was the plaintiff's evidence that, but for the accident, it would have been her intention to have entered and remained in the field of education until she was 65 years old. She saw no prospects of working at all in the future.

[45] The plaintiff confirmed, during cross-examination, that she had worked as a hairstylist before the accident to assist the late Mr Salter financially. She had cut and styled family members' hair. Most of her income at that time had been derived from her work as a hairstylist, rather than what she had earned as a volunteer teacher. In relation to Mr Martiny's description of her earnings as having been between R 6,000 and R 7,000 during the quieter months, increasing to between R 13,000 and R 15,000 when it was busier, the plaintiff pointed out that this had been the situation when she had operated the salon after the accident. She was adamant, when confronted with apparent discrepancies between what she had testified and what she had told to various experts, that she had mainly cut and styled family members' hair prior to the accident but admitted that she had also provided such services to members of the public, albeit on a limited scale. The plaintiff admitted, too, that she did not know whether she had supplied the various experts with all relevant information because she had been in an emotional state at the time.

[46] When asked whether she had applied for and had been accepted to study education at a university, the plaintiff stated that she and her fiancé had had an agreement. They would wait until the late Mr Salter had completed his own studies and commenced employment, after which he would assist her with the costs of registration. To the assertion, made by counsel for the defendant, that the plaintiff would have continued working as a hairstylist until the age of retirement, but for the accident, she was certain that she would have studied to become a teacher.

[47] In re-examination, the plaintiff confirmed that, in 2017, she had worked as a volunteer teacher in accordance with the usual school hours. She had only done hairstyling in the evenings and over weekends. When she opened the salon in 2018, after the accident, she had worked in the mornings from Tuesday until Saturday. This was when she had earned the amounts indicated in Mr Martiny's report.

Mr Colin Williams

[48] The plaintiff's evidence was followed by that of her final witness, Mr Williams, who stated that he had been a teacher since 1987 and was currently the principal at Bhongweni Primary School. He knew the plaintiff and her family well; his wife and the plaintiff's father were siblings.

[49] Mr Williams confirmed that numerous of the plaintiff's relations were teachers, some in leadership positions. He described the plaintiff as a dedicated volunteer teacher and a dedicated person in general. She came from a family of high achievers.

Evaluation of witnesses and reports

[50] Mr Martiny was a credible witness. There was no obvious bias in his testimony, besides his having been under the instructions of the plaintiff in relation to the preparation of a medico-legal report. The calibre and cogency of his performance were satisfactory. Inasmuch as apparent contradictions emerged later during the trial, in relation to what he had recorded about when the plaintiff first opened and operated her hair salon, he was never confronted with these during cross-examination. Ultimately, such contradictions proved to be inconsequential when the respective industrial psychologists reached agreement on the contents of the draft minute. As to reliability,

there was nothing to suggest that the quality, integrity, and independence of Mr Martiny's interactions with the plaintiff had been compromised. He was a recognised expert, with considerable medico-legal experience.

[51] The same could be said of Ms van Zyl. She was a credible and reliable witness whose testimony was never seriously challenged.

[52] Turning to the lay witnesses, both Ms Cannon and Mr Williams would have been affected by a bias towards the plaintiff by reason of their direct or indirect familial relationship to her. Their testimonies, nevertheless, were free of contradictions, and their performances were cogent and of a good calibre. Furthermore, their familiarity with the plaintiff's circumstances enhanced the quality, integrity, and independence of their evidence. The court is satisfied that they were credible and reliable witnesses, and that it was indeed probable that it had been the plaintiff's intention all along to pursue a career as a teacher, rather than continue as a hairstylist.

[53] The plaintiff herself was, understandably, not a star witness. Apart from her inherent bias, as would have been expected, she was unable to explain the apparent contradictions in relation to the nature, extent, and history of her work as a hairstylist both before and after the accident. She was also unable to reconcile her testimony with that of Mr Martiny. She was, notwithstanding, consistent in her assertion that she had only opened and operated her salon after the accident, which was corroborated by the evidence of her sister, Ms Cannon. The cogency and calibre of the plaintiff's performance was unremarkable, but should, nevertheless, be evaluated in light of the undisputed and lasting physical and psychological injuries that she has sustained. These could be said to have had an impact on her credibility and reliability as a witness, which were far from exemplary but nevertheless satisfactory overall.

[54] Considering all the evidence, including the facts and opinions contained in the expert reports that were admitted by the defendant, it is probable that the plaintiff was a dedicated learner and a high achiever during her primary and secondary schooling and matriculated with a B-aggregate. It is also probable that she came from a wide family of educators and that this aspect, together with her academic ability and career potential, influenced her decision to follow a path that would fulfil her ambitions in the field of education. This included her work as a volunteer teacher at the primary and high schools in Alexandria. It is, moreover, probable that the plaintiff's work as a hairstylist had been necessary purely to accommodate her needs at the time. Both she and her sister, Ms Cannon, testified that financial resources in her immediate family were scarce. The income that the plaintiff derived from her work as a hairstylist would also have supported her fiancé, the late Mr Salter, while he completed his studies in teaching. After the accident, the income was, tragically, required to care for her son, Declan, suffering from the head injury that he had sustained. There was no indication at all that the plaintiff had ever chosen the work of a hairstylist as her occupation. It was simply a means to an end. Teaching seems to have been her true vocation.

[55] Mindful of the legal framework, the summary of the expert reports, and the recording and evaluation of the evidence of the witnesses, the court is required to discuss and apply the relevant principles to the matter at hand.

Discussion

[56] As a starting point for purposes of the determination of a general contingency deduction, the *Quantum Yearbook* remains a useful guideline.¹⁰ The learned authors observe that a sliding scale of 25% for a child, 20% for a youth, and 10% in middle age, can serve as a basis for the deduction to be made. Moreover, the so-called 'normal

¹⁰ Robert Koch, *The Quantum Yearbook* (Van Zyl Rudd & Associates (Pty) Ltd, Port Elizabeth, 2021).

contingencies' of 5% for pre-morbid and 15% for post-morbid loss of earning capacity are still relevant.¹¹

[57] During argument, counsel for the plaintiff referred the court to several authorities pertaining to the subject. In *Krugell v Shield Versekeringsmaatskappy Bpk*,¹² Van Diykhorst J was prepared to depart from the application of the usual 10% deduction for a middle-aged claimant¹³ and to increase this to 35% to make provision for future earnings. Although the learned judge admitted that this was an unscientific approach, he held that this was the only way in which to do justice to the matter.¹⁴

[58] In this division, the same approach was adopted in *Van Eeden v Road Accident Fund*,¹⁵ where Huisamen AJ held that it would be fair to increase the deduction. This was because of the theoretical ability of the claimant to perform sedentary activities, the advantages that would accrue to him by reason of the possible stricter application of the Employment Equity Act 55 of 1998, and the fact that he had worked after the accident, albeit with difficulty. The learned judge, nevertheless, applied a 25% deduction on the basis that the facts of the matter were distinguishable from those in *Krugell* since the claimant in the latter was able to work again in the future.¹⁶

[59] Shortly afterwards, Roberson J considered the correct deduction to be applied in the matter of *Dolf v Road Accident Fund*.¹⁷ She referred to *Van Eeden* and took into consideration the fact that the claimant had studied further and gone on to secure a higher level of employment worked after the accident and also acknowledged the possibility that the claimant could obtain contract work as a truck driver beyond the age

¹¹ At 118.

¹² 1982 (4) SA 95 (T).

¹³ The claimant in *Krugell* was a 42-year-old telecommunications electrician, employed by the erstwhile Department of Post and Telecommunications at the time of the accident.

¹⁴ At 105E.

¹⁵ Unreported, ECG case number 2069/2011, dated 9 April 2013.

¹⁶ At paragraph [69].

¹⁷ (3038/2014) [2014] ZAECPEHC 99 (11 December 2014).

of 65. The learned judge did, however, accept that employment prospects in Beaufort West were limited. She applied a 20% deduction.

[60] In *Ngesi v Road Accident Fund*,¹⁸ Revelas J dealt with a set of facts not entirely dissimilar to those in the present matter. The claimant was a 32-year-old woman who had sustained lasting injuries in an accident. She had been 36 weeks pregnant at the time and had given birth to a stillborn baby the following day because of the trauma. She had also lost a close friend, who had been trapped in the wreckage. The claimant had been studying towards a diploma in public finance and resource management but had been unable to complete the course after the accident. The experts in the matter agreed that she had suffered severe emotional consequences. They were, nevertheless, of the view that she had residual earning capacity and had, in fact, secured employment subsequently, albeit not very successfully. The learned judge held that, based on the probabilities, the possibility could not be excluded that the claimant might work from time to time. However, the nature and duration of such work and the income to be derived therefrom depended on guesswork. Revelas J adopted the *Krugell* approach and applied a 35% deduction.

[61] Importantly, counsel for the plaintiff in the present matter drew the court's attention to the decision of the Supreme Court of Appeal ('SCA') in *Road Accident Fund v Kerridge*.¹⁹ In that matter, the claimant had been 23 years old at the time of the accident and had been studying engineering with a view to becoming a diesel mechanic. He had, at the same time, assisted his father in the operation of a laundry business and had also been a co-owner (with his brother) of a business that sold motor vehicle accessories and spare parts. After the accident, the claimant had been unable to continue assisting his father because of his injuries. He had, nevertheless, returned to operate the motor vehicle business.

¹⁸ Unreported, ECG case number 850/2016, dated 17 April 2018.

¹⁹ 2019 (2) SA 233 (SCA).

[62] Nicholls AJA, for the majority, found that the determination of the claimant's pre-morbid future earning capacity had been based on 'highly optimistic assumptions'. It was improbable that the claimant would have entered the labour market at such an early stage. The salary scales used for the above determination were, moreover, not compatible with the evidence. Furthermore, Nicholls AJA found that there was nothing to indicate that the claimant had no residual earning capacity whatsoever.²⁰ The learned judge went on to remark as follows:

'...we are faced with a situation where our only option is to apply random contingencies to the pre-morbid scenario on an *ad hoc* and uninformed basis to compensate for any possible post-morbid residual earnings capacity. This is precisely what was suggested in the final actuarial report- to apply higher general contingency deductions to allow for any residual earning capacity. This court in *Bee*²¹ increased the general pre-morbid contingency deductions for future loss of earnings to 25 per cent notwithstanding the claimant in that matter was 54 years old and therefore in the latter half of his working career. The court took into account various factors including that the claimant was diabetic and involved in adventure sports.'²²

[63] Consequently, Nicholls AJA found that there were three factors that militated against a general contingency deduction of 15%: firstly, the claimant was 23 years old when the accident occurred, which made him more subject to the 'vicissitudes of life', and which also created greater uncertainty in the assessment of his career path, especially in light of his limited employment history; secondly, his pre-morbid future earning capacity had been inflated, as discussed above; and thirdly, there was some residual earning capacity that had not been considered. The learned judge, in the circumstances, applied a 35% deduction.²³

[64] The *Kerridge* approach was subsequently adopted in the matter of *NDB obo JWK v Road Accident Fund*,²⁴ where Bands AJ dealt with a claim brought on behalf of a

²⁰ At paragraphs [45] to [53].

²¹ *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA).

²² *Kerridge*, at paragraph [54].

²³ At paragraphs [55] and [56].

²⁴ (1100/2020) [2023] ZAECQBHC 7 (10 February 2023). See, too, the recent decision of Govindjee J in *Krebs v Road Accident Fund* 2023 JDR 1464 (ECP), at paragraph [64].

minor child who had been seven years old at the time of the accident. The plaintiff had contended that a 25% deduction would have been appropriate, which would have considered both the age of the child and any remote residual earning capacity. The defendant, in contrast, had asserted that a 25% to 40% deduction was required. In reaching her decision, Bands AJ observed as follows:

'...[w]hat complicates the present matter is that JWK was only 7 years old at the time of the collision and is presently 12 years of age. Accordingly, and as set out in *RAF v Kerridge*... the younger the claimant, the more time he or she has to fall prey to the vicissitudes and imponderables of life, which are impossible to enumerate, but which in the context of future loss of earning capacity include inter alia, a downturn in the economy leading to reduction in salary; retrenchment; unemployment; ill health; death; and the myriad of events that may occur in one's everyday life. The court went on to comment that "the longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career." I remain mindful of this.'²⁵

[65] The court subsequently applied a 25% deduction, holding that this was fair in the circumstances. There was no reason why a higher deduction was necessary.²⁶

Application to the facts

[66] In the present matter, the defendant's legal representative contended that the most important issue that remained at the end of the trial was the plaintiff's uninjured, post-morbid career scenario. It was the defendant's case that the plaintiff had failed to lead sufficient evidence to support her claim that she had intended to become a teacher, alternatively she had failed to prove her loss in terms thereof. The case appeared to rest on several key arguments: the plaintiff had achieved no higher than a grade 12 education; she had been working as a hairstylist at the time of the accident and had

²⁵ *NDB obo JWK, op cit*, at paragraph [59]. Emphasis omitted.

²⁶ At paragraph [63].

continued to operate a hair salon; and there was no evidence to demonstrate what she had earned either as a volunteer teacher or as a hairstylist.

[67] The above argument, however, conveniently ignores the evidence that was presented. The reports and testimonies of Mr Martiny and Ms van Zyl, and the oral evidence of Ms Cannon, the plaintiff, and Mr Williams, indicate on a balance of probabilities that the plaintiff would have indeed registered for and commenced with her studies in 2019 before taking up employment as a teacher in 2023. The defendant failed to present any evidence to the contrary.

[68] The plaintiff was, admittedly, unable to substantiate her income as a volunteer teacher. She was also unable to substantiate what she had earned as a hairstylist either before the accident or afterwards, when she had opened the salon. Her testimony in relation to the quantum of her earnings, nevertheless, was not seriously challenged and the court is satisfied that, at the very least, it amounts to the best available evidence and cannot be excluded from the determination of the plaintiff's past and future loss of income and earning capacity. Any attendant uncertainties can be managed by application of the general contingency deduction.

[69] Crucially, the parties' respective industrial psychologists eventually reached agreement on the joint minute that had previously been prepared by Mr Martiny. The plaintiff's pleadings and evidence do not support the first scenario that was presented therein, i.e., that she would have continued working as a hairstylist. They support, however, the second scenario. It is probable, as the court has already found, that the plaintiff would have continued working as a volunteer teacher and hairstylist only until the end of 2018, after which she would have commenced studies in education in early 2019, and then entered the teaching profession in 2023.

[70] The joint minute and Mr Martiny's earlier medico-legal report, to which he testified during proceedings, informed the calculations carried out by the plaintiff's actuaries in relation to her past and future loss of income and earning capacity. There was no dispute about the accuracy and correctness of the calculations, which reflected the information provided by the plaintiff and the assumptions made.

[71] The actuaries in question, Arch Actuarial Consulting, presented a scenario where the plaintiff would have continued working as a self-employed hairstylist until retirement, and another where the plaintiff would have studied, qualified, and worked as a teacher. In the latter scenario, the actuaries assumed that the plaintiff would have entered the profession as an assistant teacher at Paterson B3 level, after which she would have obtained a permanent position at C1 level, advancing in time to become a principal at C5 level. The actuaries went on to apply the relevant contingency deductions. They implemented a uniform deduction of 5% to the plaintiff's past loss of income for both scenarios. They implemented a 15% deduction in relation to future loss of income and earning capacity under the hairstylist scenario, to arrive at a net loss of R 4,029,948. Furthermore, they implemented deductions of 25%, 30%, and 35%, as three distinct options under the teaching scenario, to arrive at net losses of R 8,996,161 and R 8,558,650 and R 7,967,860 respectively. In both scenarios (hairstylist and teacher), the actuaries considered the impact of the statutory cap.²⁷

[72] There is no reason to doubt the accuracy and correctness of the actuaries' calculations. The information relied upon, and assumptions made, correspond with the evidence presented during trial. The calculations display an underlying logic and line of reasoning that cannot be criticised. Mindful of the court's earlier finding to the effect that the pleadings and evidence do not support the hairstylist scenario, the court is satisfied that the actuarial calculations in relation to the teaching scenario can be accepted, subject to determination of the correct deduction.

²⁷ Section 17(4)(c) of the Road Accident Fund Act, 56 of 1996.

[73] The defendant's legal representative asserted that it would be fair and just to apply a considerably higher deduction (55%) to the plaintiff's pre-morbid future earning capacity. No authority was cited in direct support thereof.

[74] The plaintiff's youthfulness immediately invites the application of a higher deduction. She was 23 at the time of the accident, which was the age of the claimant in the *Kerridge* matter. The lack of substantiation for her earnings as a volunteer teacher and hairstylist, both before and after the accident, cannot be overlooked.

[75] Of some importance is the question of residual earning capacity. To that effect, Dr Olivier expressed the view that the plaintiff would be unable to compete with uninjured work-seekers and would be restricted to employment that entailed light or administrative activities. Dr de Wit stated that her future employment was highly speculative; she went so far as to assert that the plaintiff was not employable in the open labour market. Mr Martiny maintained that it was unlikely that the plaintiff would secure future employment, given her limited work experience in other capacities, lack of qualifications, the nature of her injuries, and the high rate of unemployment in general. In their joint minute, Mr Martiny and the defendant's industrial psychologist, Mr Nteso, remarked as follows:

'[i]n reference to the opinions of Dr Olivier, Dr de Wit and Mrs van Zyl she is probably not going to be able to work. She cannot do the kind of work she performed prior to the MVA. Her injuries and her mental state make finding suitable employment an unlikely event. In this regard, we agree with the other experts who are of the opinion that it is probable that she will not be employed in the future.'

[76] Ms van Zyl indicated that the plaintiff could manage light physical demands or completely sedentary employment; her ability to work in the open labour market had been compromised significantly.

[77] Whereas the various experts were clearly of the opinion that the plaintiff's earning capacity had been severely affected, only Dr de Wit was of the view that she was entirely unemployable. The remaining experts, while expressing significant misgivings, never unequivocally excluded the possibility of the plaintiff's securing employment, albeit of an undemanding nature. Considering the plaintiff's academic and leadership potential, her dedication to her personal development and advancement, and the values and support of her wider family, all of which having gone undisputed in the testimonies of Ms Cannon, Mr Williams, and the plaintiff herself, it would be fair and reasonable to find that the plaintiff had retained a measure of earning capacity. There remains a possibility that, over time, she could still obtain suitable employment. To attempt to say what such work would entail would amount to pure speculation.

[78] The above factors must be considered for purposes of arriving at the deduction to be made.

Relief to be granted

[79] When all is said and done, the determination of the general contingency deduction remains a frustratingly imprecise exercise. The opinions of industrial psychologists, occupational therapists, and other medical professionals, as well as the methods and calculations of actuaries, undoubtedly assist the court. It may well be that the task could be aided and enhanced in future by the benefits of artificial intelligence (dare it be spoken), provided that there is proper adherence to the principles of evidence and procedure. Nevertheless, the determination of the correct deduction remains, for now, more of an art than a science.

[80] Having had regard to the evidence led, the arguments presented, and the case law in question, the court is persuaded that the *Kerridge* approach finds application in

the present matter. The plaintiff's age, the lack of substantiation for her pre- and post-morbid income, and her residual earning capacity, create sufficient uncertainty to warrant a 35% deduction to the plaintiff's claim for past and future loss of income and earning capacity. This would seem to be fair and just in the circumstances. The court finds no basis upon which to implement the higher deduction proposed by the defendant.

Costs

[81] In relation to costs, counsel for the plaintiff set out a history of the litigation between the parties, drawing attention to the unacceptable level of tardiness that appears to have characterised the defendant's conduct in the matter. Counsel drew attention, especially, to the defendant's failure to have filed the report of its industrial psychologist in accordance with the order of court, only attempting to do so on the date of the trial itself without explanation and in the absence of any application for condonation. Furthermore, much was made of the defendant's refusal to accept the draft joint minute of the industrial psychologists in question, compelling the plaintiff to call Mr Martiny as a witness, at considerable expense, only for the defendant subsequently to accept the joint minute.

[82] The courts have previously criticised, heavily, the way the defendant has conducted itself in matters of this nature.²⁸ Counsel for the plaintiff referred to *Scheepers v Road Accident Fund*,²⁹ where Goosen J made the following remarks:

'...[a] consideration of the trial roll in this division indicates that the overwhelming majority of cases involve personal injury claims against the Fund. The judges of this division regularly encounter pleadings drafted on behalf of the Fund in which the defence consists of a bald denial or where the Fund pleads that it has no knowledge and the plaintiff is put to the proof of the

²⁸ See, for example, *Road Accident Fund v Klisiewicz* [2002] 9847 (A); and *Mlatsheni v Road Accident Fund* 2009 (2) SA 401 (E).

²⁹ 2013 JDR 2500 (ECP).

allegations, this feature- in which no substantive defence is raised- is more often than not carried through trial preparation. Rule 37 minutes too often reflect a litany of responses in which the Fund “will revert” in respect of crucial matters which parties are required to address in pre-trial conferences.

...The result of this state of affairs is illustrated in this matter where the defendant could offer no substantive defence at trial. Notwithstanding this, three days of valuable court time was wasted. Primary responsibility may well rest on the shoulders of those employees of the Fund whose duty it is to manage claims against the Fund but it is not their responsibility alone. Such is the nature of the duty that legal representatives owe to the court. For this reason it is appropriate, in my view, to extend Plasket J’s warning in *Mlatsheni* to legal practitioners. They should ensure that they act in accordance with the duty that they owe to the courts and are in no way party to the conduct of proceedings which result in the unnecessary waste of court time and resources. Such conduct, where it is established, may be dealt with by an appropriate costs sanction against them.³⁰

[83] The court in *Scheepers* ordered the defendant to pay costs on the scale of attorney and own client. Counsel for the plaintiff in the present matter urged the court to adopt the same stance.

[84] There is some debate about whether there is any real difference between costs on an attorney and own client basis and costs simply on an attorney and client basis.³¹ Nevertheless, Van Loggerenberg observes that:

‘An award of costs as between attorney and own client has been described as exceptional (“uitsonderlik”), very punitive and as indicative of extreme opprobrium. It must be seen as an attempt by the court to go a step further than the usual order of costs as between attorney and client, to ensure that the successful party is indemnified in respect of all the reasonable costs of the litigation. Taxation of a bill of costs as between attorney and own client will be on a more liberal and lenient basis, but exorbitant or unreasonable costs will not be sanctioned. In *Public Protector v South African Reserve Bank*,³² the majority of the Constitutional Court stated:

“The question whether a party should bear the full brunt of a costs order on an attorney and own client scale must be answered with reference to what would be just and

³⁰ At paragraphs [43] and [44].

³¹ See *Nel v Waterberg Landbouers Ko-operatiewe Vereniging* 1946 AD 597, at 607-8; *Hawkins v Gelb* 1959 (1) SA 703 (W), at 705C-F. See, too, the discussion in DE van Loggerenberg, *Erasmus: Superior Court Practice* (Jutastat, e-publications, RS 17, 2021), at D5-28.

³² 2019 (6) SA 253 (CC).

equitable in the circumstances of a particular case. A court is bound to secure a just and fair outcome.”^{33,34}

[85] From the above, an order for costs on an attorney and own client basis, to the extent that such a category exists independently, must be relied upon very sparingly.

[86] The defendant’s legal representative argued that the costs order sought by the plaintiff was too harsh. There was no evidence of *mala fides* on the part of the defendant and public funds were at stake. The defendant’s legal representative went on to explain that the defendant had been unable to agree to the draft minute because the report of its own industrial psychologist had not been properly before court. This had been brought about by the defendant’s failure to have complied with the previous order. Its attempt to file the report on the day of trial, without any explanation or application for condonation, had met with the court’s rejection thereof.

[87] The correctness of the defendant’s reasoning and decision not to agree to the draft minute are not issues for the court to decide. The defendant has, however, provided at least some account for its conduct in that regard.

[88] Nevertheless, it has not been able to explain why it never complied with the previous order. The defendant, moreover, failed to put up any meaningful resistance to the plaintiff’s case. No experts or lay witnesses were introduced to counter the evidence of those called by the plaintiff. For a claim of the scale and proportion brought by the plaintiff, running into millions of rand, the defendant offered a defence that was perfunctory at best.

³³ At 318B.

³⁴ Van Loggerenberg, (RS 20, 2022), n 31 above, at D5-30.

[89] It must be emphasized that the defendant has a duty to manage properly the public finances under its authority. This extends to the proper preparation and conduct of a defence against any claim for damages such as the one at hand. The court is not persuaded that an order for costs on an attorney and own client basis would be justified but is of the view that it would be remiss not to mark its disapproval of the way the defendant has conducted itself. An order for costs on an attorney and client basis would be just and equitable.

[90] The plaintiff has claimed the costs of two counsel. By reason of the complexity and nature of the matter, the court is satisfied that an order to that effect would be fair.

Order

[91] In the circumstances, the following order is made:

- (a) the defendant is directed to pay to the plaintiff the amount of R 7,967,860 as damages for the past and future loss of income and earning capacity, because of the injuries sustained by the plaintiff;
- (b) the defendant is directed to pay the plaintiff's costs on an attorney and client scale, from 28 July 2022 until and including 28 March 2023, including:
 - (i) the reasonable qualifying and travelling expenses, if any, for;
 - (aa) Dr A Landman;

(bb) Dr PA Olivier;

(cc) Dr M Tarboton;

(dd) Dr E de Wit;

(ee) Ms A van Zyl;

(ff) Mr L Martiny; and

(gg) Arch Actuarial Consulting;

(ii) the costs of all joint minutes and supplementary reports of:

(aa) Mr L Martiny; and

(bb) Arch Actuarial Consulting;

(iii) the attendance and testifying fees of:

(aa) Mr L Martiny, for 7, 8 and 9 November 2022; and

(bb) Ms A van Zyl, for 7 and 8 November 2022;

- (iv) the travelling costs, including flight tickets and accommodation, incurred by or on behalf of the plaintiff for Mr L Martiny's attendance at trial;
- (v) the reasonable costs of consultations involving the plaintiff's counsel, attorneys, and witnesses, in preparation for trial;
- (vi) the costs of the interpreter employed at trial; and
- (vii) the costs of trial for 7, 8, 9 and 11 November 2022, and 27 and 28 March 2023;
- (viii) the defendant is directed to pay the costs of two counsel, where so employed, including the costs reserved in terms of paragraph 7 of the order of 27 July 2022;
- (ix) the defendant is directed to pay interest on the above amounts, at the prescribed legal rate, calculated from:
 - (i) 14 calendar days after the date of this order until date of payment, in relation to paragraph (a), above; and
 - (ii) 14 calendar days after the date of *allocatur* or written agreement until date of payment, in relation to paragraphs (b) and (c), above;

- (x) the issue of the plaintiff's claim for past hospital and medical expenses be and is hereby separated in terms of rule 33(4) from the remainder of the plaintiff's claim for damages, the determination thereof being postponed *sine die*.

JGA LAING

JUDGE OF THE HIGH COURT

Appearance:

For the plaintiff:

Adv A Frost and Adv K Pask, instructed by Meyer
Incorporated, c/o Netteltons Attorneys, 118A High Street,
Makhanda (ref: Ms I Pienaar / Daisy)

For the defendant: Ms V Jeram, State Attorney, c/o Zilwa Attorneys, 41 African Street, Makhanda (ref: Cannon / 704 / VJ)

Dates of trial: 7 - 9 and 11 November 2022, and 27 - 28 March 2023

Date of judgment: 27 June 2023