

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 21375/2019

- (1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED: **NO**

07/09/2022

DATE

SIGNATURE

In the matter between:

DLAMINI, MBALI GOMOLEMO NOHLANHLA

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

CORAM PULLINGER AJ

Summary:

Summary – action for damages arising from a motor vehicle accident – determination of past and future loss of earnings – no basis for application of court’s inherent jurisdiction in determining past and future loss of earnings – the wide discretion exercised by courts in the past, in determining past and future loss of earnings has been attenuated and narrowed by the practice of eliminating guesswork by the employment of actuarial scientists – a plaintiff must discharge the onus of proving pecuniary loss and the quantum thereof through appropriate expert evidence – where the factual assumptions underlying the expert opinions are unchallenged and harmonious with the facts, a plaintiff will succeed in discharging the onus in relation to the quantum of the loss and the appropriate contingencies to be applied subject to the computation of those contingencies being in accordance with established precedent.

Introduction

- [1] This is an action for damages arising from injuries sustained by Ms Mbali Gomolemo Nohlanhla Dlamini in a motor vehicle accident on 14 February 2018.
- [2] At the time that this action was instituted, Ms Dlamini was a minor and the action was instituted on her behalf by her mother as nominal plaintiff. Ms Dlamini was substituted as the plaintiff on 23 March 2020.
- [3] The facts concerning the collision, the immediate aftermath and *sequalae* are common cause.

- [4] At approximately 07h15 on 14 February 2018, and at the corner of Koma and Elias Roads, Johannesburg, a collision occurred between an unknown vehicle and a minibus taxi in which the plaintiff was a passenger. The minibus taxi in which the plaintiff was travelling was hit from behind. The identity of the driver of the vehicle that collided with the minibus taxi is unknown. The plaintiff was 16 years old at the time. She is now 20 years old.
- [5] As a result of the collision, the plaintiff suffered, *inter alia*, a traumatic head injury from her head being hitting the seat in front of her. She was rendered unconscious for 1 to 2 hours, suffered an epileptic seizure, and was transported to Bheki Mlangeni hospital where she was examined. The plaintiff was later transferred to Baragwanath hospital where she was treated for a further day.
- [6] The plaintiff has no recollection of the accident. She was told that she was found convulsing and frothing from the mouth at the scene of the collision.
- [7] Four days later, the plaintiff was again admitted to Baragwanath hospital following another epileptic seizure. She was again admitted on 27 April 2018 following a further epileptic seizure. As a result, investigations were undertaken and a diagnosis of generalised tonic-chronic epileptic seizures was made.
- [8] The plaintiff now suffers from epileptic seizures of varying intensities on an almost daily basis. The plaintiff's epilepsy is treated with a drug known as Epilim which is administered twice a day.

[9] Together with these epileptic episodes, the plaintiff suffers severe depression and has resorted to self-harming. She is suicidal and has attempted suicide at least once.

[10] The plaintiff is not receiving treatment for her depression at present.

[11] The plaintiff also complains of back pain and headaches which are treated with over-the-counter analgesics.

[12] The plaintiff's injuries are serious injuries that entitle her to an award of general damages. The injuries sustained by the plaintiff have a detrimental effect on her ability to acquire tertiary qualifications, and severely limit her employment prospects.

[13] On 26 March 2019, the defendant conceded liability for any damages that the plaintiff may prove.

[14] On 26 July 2022, the parties also settled the plaintiff's claim for general damages in an amount of R750 000.00, an amount that is reasonable in the circumstances of this case.¹

[15] There is no claim for past and future medical expenses, given that the plaintiff's historical treatment was received, but for three incidents, at State facilities. The

¹ **Tsoael v Road Accident Fund**, an unreported judgment of the Gauteng Division, Pretoria, under case number 2016/63013

defendant has undertaken to furnish an undertaking for the plaintiff's future medical expenses.

[16] It is against this factual backdrop that I am required to determine the only issue which remains in dispute between the parties, that being the plaintiff's past and future loss of income and the contingencies to be applied.

The plaintiff's case

[17] When the trial was called before me, Mr Naidoo of the State Attorney, on behalf of the defendant, indicated that he wished to cross-examine certain of the plaintiff's witnesses.

[18] I was, initially, disinclined to allow the defendant this opportunity because of its failure to have pleaded anything more than a bare denial of the plaintiff's case and had no witnesses to call itself. But, being mindful of a recent article in the South African Actuary periodical², and as pointed out in **Chakane**³ and, more recently, in **Maloney**⁴, on the importance of the veracity of expert evidence being tested, I permitted the defendant to cross-examine the plaintiff's witnesses on the proviso that it such cross-examination was pointedly directed at the remaining issue in the trial.

[19] It was agreed between the plaintiff's counsel, Ms van der Merwe and Mr Naidoo, that the expert reports, which had been confirmed by an affidavit,

² Gregory Whittaker, *Mere Conduits will not do*; South African Actuary, July 2022

³ **Chakane v Road Accident Fund** [2019] JOL 41825 FB at [20] to [27]

⁴ **Maloney v Road Accident Fund** [2022] 3 All SA 137 (WCC) at [101] to [104]

would and did stand as their evidence-in-chief, although Ms van der Merwe did lead the evidence of the plaintiff, the plaintiff's mother and those experts that the defendant wanted to cross examine.

[20] The plaintiff presented her evidence, that of her mother and a series of expert witnesses. The expert witnesses' reports are all confirmed under oath and, by agreement, are before me.⁵

[21] For purposes of this judgment, I only traverse the evidence of the witnesses who were called and cross-examined.

[22] The plaintiff's evidence was that, prior to the collision, she had no history of any epileptic seizures. Pursuant to the accident, she suffered from three to four seizures per week, with the last serious seizure taking place over the Easter weekend this year. To control her epilepsy, the plaintiff takes Epilim which she obtains from the neurology clinic at Baragwanath hospital. The clinic is only open on Wednesdays. On occasion, the queue was too long for her to see a doctor and obtain medication.

[23] The plaintiff testified, further, that she has different kinds of seizures. Some are less serious and she can feel them coming on. When his happens, she rests, drinks water and takes medication.

⁵ The expert witnesses are Dr M de Graad, an Orthopaedic surgeon, who examined the plaintiff on 25 March 2020, Dr Dharmesh, a Diagnostic Radiologist, who examined the plaintiff on 25 March 2020, Dr Ormond-Brown, a Clinical Neuropsychologist, who examined the plaintiff on 30 June 2019 and 23 June 2020, Dr J H Kruger, a Neurosurgeon, who examined the plaintiff on 12 June 2020, Dr Townsend, a Neurologist who examined the plaintiff on 23 September 2020, Dr Rossi, an Educational and Neuropsychologist, who examined the plaintiff on 9 September 2020 and 15 June 2022, Dr Naidoo, a Psychiatrist, who examined the plaintiff on 22 November 2019; Ms K Cumming, an Occupational Therapist, who examined the plaintiff on 20 March 2020, and Ms T Talmud, an Industrial Psychologist, who examined the plaintiff on 9 October 2020 and 11 July 2022

[24] Aside from the seizures, the plaintiff complained of headaches and back pain for which she uses over-the-counter analgesics.

[25] In regard to her future, the plaintiff expressed a desire to re-write her senior certificate exams to obtain better marks and admission into a law degree. The plaintiff expressed a fear, however, that she would not be able to obtain better marks.

[26] The plaintiff became emotional and tearful during her testimony when explaining her current emotional state, and disclosed that she had resorted to self-harm as a coping mechanism.

[27] The plaintiff's mother, a registered nurse (albeit currently unemployed), testified about the manifest change in the plaintiff's character pursuant to the collision. She said that, at the time of the collision, the plaintiff was a minor and a school going child, pursuing an academic programme and involved in sports with an active social life. Pre-accident, the plaintiff was physically, cognitively and psychologically normal. But she is no longer that person.

[28] Although the plaintiff managed to pass Grade 12, she did not gain entry at the University of Johannesburg into her preferred course of study, being the LLB Degree. Instead, the plaintiff enrolled for a diploma in Paralegal studies.

[29] The Paralegal Diploma is enormously less demanding than an LLB Degree, and comprises only four subjects in the first year. By year end, the plaintiff found the academic pressure overwhelming and suffered a nervous breakdown. These studies have not been pursued any further.

[30] Dr Townsend, a specialist neurologist, explained the effect of an epileptic fit on a person.

[31] Dr Townsend's evidence was that the plaintiff's injuries have resulted in a significant attenuation to her ability to learn. As such, Dr Townsend doubted the plaintiff's ability to better her senior certificate results, or sustain the academic vigour of obtaining an LLB degree. In regard to employment, Dr Townsend testified that if the plaintiff were able to obtain employment, she would struggle to sustain any such employment.

[32] Most relevant to the issue before me was her testimony under cross-examination that pursuant to an epileptic seizure, cognition is affected, results in fatigue and the inability to pursue academic endeavours for as much as a week on end. I would expect that this conclusion would hold true in relation to any employment that the plaintiff may obtain.

[33] Dr Rossi, an educational psychologist and neuropsychologist, delivered a report wherein she expressed the view that the plaintiff is severely depressed, psychologically overwrought and in urgent need of psychiatric care.

[34] Dr Rossi recorded that the plaintiff complains of seizures, headaches, lower back and neck pain, and fatigue. Psychological *sequelae* include anxiety and severe depression, cognitive and educational deficits include fluctuating attention, visual discrimination and reading comprehension.

[35] She recorded that, pre-accident, the plaintiff was physically, cognitively and psychologically normal. Although she passed all her grades at school, she was retained in Grade 7 to strengthen her English. Based on the mean of the three highest sub-tests of the WAIS-III (bearing in mind she was anxious and depressed when the tests were performed), Dr Rossi estimated that the plaintiff's pre-accident IQ was estimated at an average of between 90 to 109.

[36] Dr Rossi is of the opinion that, but for the accident, the plaintiff would have been expected to pass Grade 12 and obtain a degree (NQF 7).

[37] At the time of Dr Rossi's assessment of the plaintiff in September 2020, the plaintiff was in Grade 12 and her Full Scale IQ was measured at 87, which is low average (80-89).

[38] Dr Rossi concluded that:

[38.1] the accident has left the plaintiff physically, cognitively and emotionally compromised;

[38.2] while epilepsy is a permanently disabling condition that can be controlled by medication, it affects personality, cognitive and educational performance, and in the plaintiff's case, will affect her future academic development;

[38.3] even with medical and psychiatric intervention and psychotherapy, this will not change as the accident has rendered her a vulnerable person forthwith;

[38.4] post-accident, and if the plaintiff receives medical treatment and psychotherapy, and because she is hardworking, she may still achieve a tertiary education, but over a longer period of time, due to her emotional problems which will result in her failing subjects;

[38.5] if the plaintiff does not receive intervention, she will not succeed at university and will be left with a matric, as it is unlikely that she will attempt diploma study.

[39] In Dr Rossi's addendum report of 15 June 2022, delivered pursuant to a subsequent assessment, she recorded that the plaintiff, with reference to her school report, passed Grade 12 at the end of 2020 with the requirements for admission to a bachelor's degree, and that in 2021 the plaintiff attempted tertiary education but could not cope with the online lectures and independent university studies.

[40] Dr Rossi recorded that the plaintiff passed 4 out of the 5 assignments, but failed the June examinations. The plaintiff did not write November examinations as she suffered a breakdown from the stress of preparing therefor.

[41] The plaintiff's results are not available due to outstanding fees arising from financial constraints. These constraints led to the plaintiff dropping out of university.

[42] This was accords with the evidence given by the plaintiff.

[43] Dr Rossi recorded that the plaintiff had regressed in the time between the two assessments, is in urgent need of psychological intervention, and it is unlikely that she will return to study a bachelor's degree, and will be left with her current Grade 12 results. She noted further that, if the plaintiff receives intervention, she may be able to learn skills to obtain employment, otherwise she might be faced with permanent unemployment in the current economic climate.

[44] Ms Talmud, the plaintiff's industrial psychologist, stated in her first report that, but for the accident, the plaintiff would have completed Grade 12 in 2020, it would have taken her 1 to 3 years to secure permanent employment, during which time she would have been working in temporary positions, working at most 6 months per annum, earning in line with the National Minimum Wage. On securing permanent employment, the plaintiff would have earned in line with Paterson A3 level, lower quartile package. While working in such capacity, the plaintiff would have studied part-time towards a degree, and would have

completed same within 5 to 6 years. With a degree, her earnings would have increased to the Paterson B3 median package. The plaintiff would have reached her career ceiling at the age of 45, earning in line with the D2 median package, and thereafter annual increases would have been applicable until retirement age of 65.

[45] In Ms Talmud's addendum report dated 11 July 2022, delivered pursuant to a further assessment of the plaintiff, and on review of further documents received, including the plaintiff's National Senior Certificate (of 2020), the addendum report completed by Dr Rossi and a follow-up interview with the plaintiff's mother, concludes that the plaintiff's career prospects are, but for the accident, the same as stated in her initial report.

[46] Having regard to the accident, the plaintiff will secure employment within two years of the date of the report, when she will earn in line with the National Minimum Wage, working 50% of the time.

[47] With further training and work experience, she will progress to reach her career ceiling by the age of 45. Upon reaching her career ceiling, she will earn in line with the Paterson A2 median basic salary, plus an annual bonus equal to one month's salary. Thereafter, inflationary increases will be applicable until retirement age of 65.

The defendant's case

[48] The defendant's case was limited to a proposition that the plaintiff's injuries, and the detrimental effect thereof on her ability to acquire a tertiary qualification and secure employment and maintain employment, would improve consequent upon the improved medical care that would result from the undertaking aforesaid. This proposition is no more than a hypothesis.

[49] But, the defendant was unable to put any factual basis for its hypothesis to the witnesses and, as such, its case was predicated on mere speculation.

[50] Mr Naidoo put the defendant's proposition robustly put to each of the plaintiff's medical experts, and it was equally robustly rejected by them.

[51] The defendant was unable to mount any meaningful challenge to the evidence adduced by the plaintiff, or to the factual premise upon which the opinions of Dr Townsend, Dr Rossi and Ms Talmud were based.

[52] I must find, therefore, that the experts' conclusions are "*solid*" as contemplated in **Chakane**, in the sense of being independent and founded on the proved facts.

The actuarial calculation

[53] Gerard Jacobson Consulting Actuaries compiled a second report on 11 July 2022 (the first report having been rendered academic by Ms Talmud's addendum report), based on Ms Talmud's addendum report on the basis of the only post-accident scenario being that the plaintiff would be left with Grade 12, with a career ceiling in line with Paterson A2 median basic salary level.

[54] The plaintiff's past loss of earnings were calculated at R40 230.00 and, but for the accident, the plaintiff would have earned R10 869 410.00 until retirement age.

[55] Now, and as a result of the accident, the plaintiff's potential future earnings until retirement age are estimated at R1 930 610.00, having regard to the accident.

Determining the quantum of damages

[56] Mr Naidoo argued, with some vigour, that the court enjoys an "inherent jurisdiction" in determining what the extent of the plaintiff's future loss of earnings would be, and what contingencies to apply.

[57] I am unable to agree with that argument.

[58] The Court's inherent jurisdiction is derived from section 173 of the Constitution. It is a power afforded to the Court to regulate its own process and develop the common law, taking into account the interests of justice. But, there is nothing within that power that permits a court to deviate from established precedent,

save in very limited circumstances.⁶ This limited power gives effect to the *stare decisis*⁷ doctrine, a cornerstone of our law that serves to avoid uncertainty, confusion, protect vested rights and legitimate expectations.⁸

[59] Given developments in the law, I have some doubt the expansiveness of the discretion that a court enjoys in determining a claim for future loss of income in circumstances where the plaintiff's evidence is built on undisputed factual evidence and that of experts' whose opinions were left undisturbed by the defendant's cross-examination.

[60] Ms van der Merwe submitted that the court enjoys a "wide discretion" in determining a claim for future loss of earnings. This submission, was no doubt, predicated on those judgments that preceded **Sweatman**⁹, such as **Pitt**¹⁰, **General Insurance**¹¹ and **Guedes**.¹² But it does not answer the question of the extent of the court's powers where the expert evidence has been accepted as accurate and reliable.

[61] The distinction between a "wide" and "narrow" discretion was considered by the full court of this division in **Bookworks**.¹³

⁶ **Bwanya v The Master of the High Court and others** 2022 (3) SA 250 (CC) at [104] to [108]
⁷ "*Stare decisis*" is an abbreviation of the Latin maxim *stare decisis et non quieta movere*. The historical development of this doctrine is traced by Kahn 1967 SALJ 43 175 308. See also articles by Kotzé 1917 SALJ 280 315; McGregor 1946 SALJ 12; Kahn 1955 SALJ 6, 1965 SALJ 283 526, 1975 SALJ 105; Beck 1981 SALJ 353; Oelschig, Midgley and Kerr 1985 SALJ 370 374; Hahlo and Kahn, *The SA Legal System and its Background* 214

⁸ LAWSA, vol 10, 3rd ed at 520

⁹ **Road Accident Fund v Sweatman** 2015 (6) SA 186 (SCA) at [20]

¹⁰ **Pitt v Economic Insurance Co Ltd** 1957 (3) SA 284 (D) at 287

¹¹ **Southern Insurance Association Ltd v Bailey N.O.** 1984 (1) SA 98 (A)

¹² **Road Accident Fund v Guedes** 2006 (5) SA 583 (SCA)

¹³ **Bookworks (Pty) Ltd v Greater Johannesburg Transitional Council** 1999 (4) SA 799 (W)

[62] In a judgment that has been widely cited with approval by, *inter alia*, the Supreme Court of Appeal and the Constitutional Court, **Bookworks** considered the distinction between a narrow and wide discretion for purposes of appealability.

[63] The full court described a narrow discretion as relating to the scenario where the court is required to exercise a value judgment, usually, in relation to a question of procedure, such as granting or refusing an amendment, a postponement or costs, and usually involves a choice between alternatives.¹⁴ A “wide” or “loose” discretion is a power that obliges a court to have regard to a number of features in coming to a conclusion.¹⁵ Such cases are those where justice and equity play a role, and a court is enjoined to take a series of factors into account.¹⁶

[64] In each of **Pitt** and **General Insurance**, the courts pointed out the difficulty facing a trial court confronted with determining a claim for loss of earnings. Each of the courts identified that a degree of guesswork was involved. In **Pitt**, the court suggested that it would have to make do with such evidence as was before it.¹⁷ In the later decision of **General Insurance**, the two options available to a trial court were identified, the first involving guesswork, and the second, which was preferred, placing reliance on the evidence of actuarial scientists.¹⁸

¹⁴ At 805 G/H; 806 C to 807 G and 807 J

¹⁵ At 804 J to 805 A/B

¹⁶ See for example section 55A of the Magistrates Court Act, 1944

¹⁷ At 287 C to F

¹⁸ At 113 G to D/E

This problem was alluded to in **Sweatman** in dealing with actuarial opposing calculations for future loss of earnings.¹⁹

[65] In **Guedes**, the Supreme Court of Appeal referred to the trial court's "*discretion*" in attempting to achieve the best estimate of a plaintiff's loss²⁰ and that it was a "wide discretion" to "... award what it believes is just ...".²¹

[66] **Guedes**, much like the case before me, was determined on undisputed expert evidence. The decision of the High Court was, however, set aside on appeal on the basis of an incorrect application of the applicable legal principles surrounding contingencies.²² The Supreme Court of Appeal's approach to overturning the trial judge's exercise of his discretion points to a move from a wide discretion to something narrower and more defined by established legal principle.

[67] **Sweatman** concerned an appeal about the correct approach to the actuarial calculation undertaken in determining future loss of earnings arising from the cap imposed by section 17(4)(c) of the Road Accident Fund Act ("**the Act**").²³ It had before it two divergent views on the manner in which the calculation should be made.

[68] The Supreme Court of Appeal, preferring the traditional approach to the manner of calculation, concluded:

¹⁹ At [6] and [7]

²⁰ At [5]

²¹ At [8]

²² At [10], [17] and [18]

²³ Act 56 of 1996

“In my view there is no cogent reason to depart from the conventional, tried-and-tested actuarial approach that this and other courts have accepted over decades. The Fund argued that that method was not set in stone. That is true. But since it proceeds from a logical basis and there is no apparent reason to change it, this court will not suggest any departure from it.”²⁴

[69] Given the conclusion in **Sweatman**, it appears that there is little room, if any, for guesswork on the part of a court in determining the loss of income suffered by a plaintiff. In that respect, the loss must be determined by the evidence and, more particularly, that of appropriate expert evidence which must be evaluated by the trial court in accordance with established precedent.

[70] Notwithstanding the foregoing, any discretion a court may exercise must be exercised on consideration of the facts before the court, and on application of the applicable legal principles.²⁵

[71] Whether this is the exercise of a wide discretion as understood in earlier cases, or points to a narrower discretion, needs not be determined here because Mr Naidoo’s argument departs from an erroneous premise; a claim for damages (of which future loss of earnings are) is part of a delictual action under the *actio legis aquiliae*. The evaluation of and determination of damages (including loss of income) is one of onus.

[72] In **Krugel**²⁶, the Transvaal Court explained the question of onus thus:

²⁴ At [20]

²⁵ Compare **National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others** 2000 (2) SA 1 (CC) at [11], and **Benson v SA Mutual Life Assurance Society** 1986 (1) SA 776 (A) at 781 I to 782 B and the authorities therein cited

²⁶ **Krugell v Shield Versekeringsmaatskappy Bpk** 1982 (4) SA 95 (T) at 98 to 99

“Die vraag ontstaan dan of die eiser 'n mindere werk sal kan verrig. Die vraag het aanleiding gegee tot 'n betoog oor die bewyslas. Dit is nl namens die eiser betoog dat, sodra die eiser bewys gelewer het van sy ongeskiktheid en dat hy sy werk as gevolg daarvan verloor het, die beginsel van die plig tot vermindering van skade van toepassing kom, en dat die verweerder dus moet bewys dat die eiser wel 'n mindere werk sal kan doen. Die bewerings sal dan slegs bewys mag word indien dit gepleit is. In hierdie geval is dit nie gedoen nie. Steun vir die standpunt oor die bewyslas is namens eiser gevind in *Van Almelo v Shield Insurance Co Ltd* waar Vos R die volgende gesê het:

'There was some debate between counsel in regard to the nature of the onus resting on defendant if plaintiff has proved his disability to work at his previous employment but has some residual ability to take other employment. For defendant it was submitted that plaintiff carries at least an evidential onus to prove the full extent of his disability, that is the loss and the residue. (See Luntz Assessment of Damages 1974 ed at 66.) **In my view our law is clear: plaintiff must prove his disability and defendant must prove that plaintiff did not act reasonably to minimise his loss.** See the De Pinto case supra. **In other words, I am of opinion that plaintiff carries the onus of proving only his disability and defendant carries the onus of proving his residual ability.** The application of these principles is in my opinion that, plaintiff having proved his inability to continue as a cable joiner and that he is going to take the position of meter tester, the onus rests on the defendant to prove that plaintiff's attitude in regard to the position of meter tester is unreasonable; and the Court should not be astute to hold that this onus has been discharged.'

Die aanhaling moet gesien word teen die lig van die omstandighede van die saak. Daardie eiser was ongeskik vir sy werk. Hy wou 'n ander werk aanvaar en die debat was of die optrede redelik sou wees, dan wel of hy 'n beter betrekking met minder sekuriteit moes neem. Met die stelling dat 'n eiser slegs sy ongeskiktheid moet bewys en 'n verweerder dan die eiser se geskiktheid vir 'n ander werk, gaan ek nie akkoord nie, indien dit as algemene stelling aangebied word.” (Emphasis added, internal references omitted.)

[73] In **Rudman**²⁷, the Supreme Court of Appeal, in relation to a claim for damages for loss of income under the *actio legis aquiliae*, said that:

“There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss. Thus, in *Union and National Insurance Co Ltd v Coetzee*, which is referred to in the passage quoted above from Dippenaar's case and which deals with a lump sum award for loss of earning capacity, Jansen JA makes the point that:

“n (b)epaalde liggaamlike gebrek bring egter nie noodwendig 'n vermindering van verdienvermoë mee nie of altyd 'n vermindering van gelyke omvang nie – dit hang oa af van die soort werk waarteen die gebrek beoordeel word’.” (Emphasis added, footnotes omitted.)

[74] As a matter of substantive law, therefore, a plaintiff must prove his or her damages and the quantum thereof on a balance of probabilities. In particular, there must be evidence that the disability giving rise to the damages impacts detrimentally upon the work or occupation that a plaintiff would probably have pursued, had it not been for the accident.²⁸

[75] Thereafter, an actuarial calculation is made in which the loss (being the difference between the value of income but for the accident, and the value of the income having regard to the accident) is determined and an appropriate contingency applied. This is the approach approved by the Supreme Court of Appeal in **Sweatman**.²⁹

[76] In a case such as this where, notwithstanding the opportunity afforded to the defendant to challenge the factual conclusions upon which the expert opinions

²⁷ **Rudman v Road Accident Fund** 2003 (2) SA 234 (SCA) at [11]

²⁸ **Union and National Insurance Co Limited v Coetzee** 1970 (1) SA 295 (A) at 300 A

²⁹ *Supra* at [7] to [9]

rest, the conclusions reached by the plaintiff's experts in relation to the plaintiff's disability are cogent, well-grounded and unchallenged. They must be accepted as proved.

[77] I turn now to the assessment of the plaintiff's quantum and the contingencies to be applied.

[78] The facts lead ineluctably to a conclusion that, but for the accident, the plaintiff would have pursued tertiary education and qualified in the field of law.

[79] There is ample authority for the proposition that the contingency deduction is dependent upon the facts of the case.³⁰

[80] The purpose of the contingency deduction was explained in **Goodall**³¹, a judgment of this division, where it was said that:

"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. In *De Jong v Gunther and Another*, NICHOLAS, J., said, at p. 80, opposite the letter F:

"In a case where a plaintiff sues for his own future loss of earnings it is only contingencies which affect him personally which have to be considered. In his judgment in *Van Rensburg v President Versekeringsmaatskappy*, (W.L.D. 21.11.68), quoted in Corbett and Buchanan, *The Quantum of Damages*, vol. 2, at p. 65, LUDORF, J., referred to the fact that it has become almost customary, at any rate in this Division of the Supreme Court,

³⁰ **Goodall v President Insurance Co Limited** 1978 (1) SA 389 (W) at 393

³¹ *Supra* at 392 H to 393 G

for the Court to make a deduction for unforeseen circumstances of life of one-fifth. That is, it is true, a rough and ready approach, but the nature of the problem is such that one can do no better than adopt a rule of thumb of this kind."

In *Van Rensburg's* case the plaintiff was 25 years old, and in *De Jongh's* case, which was a claim by dependants for loss of support, NICHOLAS, J., adopted the figure of 20 per cent of contingencies in relation to the deceased's earning power, the deceased having been approximately 25 years of age at the time of his death. *Van Rij, N.O. v Employers' Liability Assurance Corporation Ltd.*, but reported on this point only in Corbett and Buchanan, vol. 1 at p. 618, is another instance of 20 per cent being allowed for contingencies, the plaintiff in that case being a minor who had not yet embarked on a firm career. In the well known case of *Sigournay v Gillbanks*, SCHREINER, J.A., at p. 569, made provision for contingencies in an amount equal to approximately 16 per cent. The plaintiff in that case was 33 years of age, a fact which appears from the report of the case in the Appellate Division, or in the Court of first instance, or Corbett and Buchanan." (Internal references omitted.)

[81] The authorities indicate that a sliding scale approach of 0.5% per annum for every year over the period that income must be determined should be applied, to achieve the best estimate of the plaintiff's damages.³²

[82] Ms van der Merwe advanced an argument based on the approach taken by the Supreme Court of Appeal in **Guedes** that a 20% contingency is appropriate in the circumstances. This accords with the opinion expressed by Gerard Jacobson Consulting Actuaries.

[83] The riposte from Mr Naidoo was that a contingency of no less than 30% would be appropriate. The two-prong argument, as I understood it, was:

³² **Guedes** at [5]

[83.1] first, that given the defendant's undertaking in terms of section 17(4)(a) of the Act, there was a possibility that the defendant's post-accident *sequalae* could be improved; and

[83.2] second, that I should be mindful that an award of damages is paid from the public purse, and circumspection should be exercised in making an award.

[84] I am unable to agree with Mr Naidoo's argument.

[85] First, and in relation to the evidence that was led:

[85.1] The evidence given by Dr Townsend, Dr Rossi and Ms Talmud was unequivocal. Whilst a better treatment regime of the plaintiff's epilepsy may lead to fewer epileptic episodes, the damage to the plaintiff's brain and hence her cognitive ability is irreversible. With each epileptic episode, the neural pathways in the plaintiff's brain are further irreversibly damaged.

[85.2] There was no evidence that any existing or future medical treatment that could possibly come about in the future could or may reverse the existing and future extent of the plaintiff's epilepsy, and the effect thereof on her brain and cognitive function.

[85.3] In these circumstances, and even on the most benevolent application of judicial notice surrounding advances in medicine, this speculative argument does not find traction on the facts. The defendant's case was entirely hypothetical and speculative. It had no basis upon which to advance the defence it attempted to advance.

[86] Second, in relation to the law, the quantum of a plaintiff's damages are determined by applying applicable precedent to the proven facts, subject to the limitation imposed by the Act.

[87] Third, and in relation to the purpose of the Road Accident Fund and that damages awards are paid from the public purse, the case advanced by the defendant in this case bears a striking resemblance to that in **Mlatsheni**³³ where the Court said:

"[10] I turn my attention now to a most worrying aspect of this case. With the degree of consensus between the parties that I have spoken of – they were only R20 000 apart on the quantum for general damages – and bearing in mind the simplicity of the matter, one would have expected that the matter would have been settled a long time ago. I was informed by Mr Mvulana, however, that he had been instructed to oppose the relief claimed on the basis, as I understood him, that the Compensation Commissioner (in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993) might perhaps still pay the plaintiff more in compensation than the amount already paid. Quite what this 'defence' entailed was not clear to me because it was advanced in the vaguest of terms.

[11] This defence, if it may be so called, was never pleaded and there was not one jot of evidence, or the slightest hint in the documents, to suggest that it may have any merit.

³³

Mlatsheni v Road Accident Fund 2009 (2) SA 401 (ECD)

Nor did Mr Mvulana seek to lead any evidence to establish a factual basis for it. (If he had, the plaintiff would no doubt have objected to the evidence being led.) I take the view that this defence was frivolous and calculated only to delay and frustrate the legitimate claim of the plaintiff. The instruction to raise it was, to put it as kindly as I can, misconceived. On the basis of what was before me in the trial, it seems to me that the employee of the defendant who gave the instruction could surely not have believed in good faith that the instruction was a proper one in the circumstances.

[12] I have raised the problem of this spurious defence, the absence of any mention of it in the pleadings and the absence of evidence upon which it could be based because this type of approach to matters of this kind by the defendant has become common practice in this jurisdiction: typically, when a trial commences, the plaintiff and his or her witnesses are ritualistically required to jump through a few hoops by the defendant, who leads no evidence to advance its case and has not so much as an expert's report to counter the expert witnesses of the plaintiff, but still persists in its opposition in circumstances in which the matter should have been settled at an early stage.

[13] The defendant is established by s 2 of the Road Accident Fund Act 56 of 1996. Its object is to pay compensation 'in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles'. It uses public funds to achieve the purposes assigned to it by the Act. Its resources and facilities are to be 'used exclusively to achieve, exercise and perform the object, powers and functions of the Fund, respectively'.

[14] From these provisions, and a reading of the Act as a whole, it is not open to doubt that the defendant is an organ of State. That being so, it is bound by the Bill of Rights and is under an express constitutional duty to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. This means not only that it must refrain from interfering with the fundamental rights of people but also that it is under a positive duty to act in such a way that their fundamental rights are realised. Furthermore, s 237 of the Constitution requires that all of its constitutional obligations 'must be performed diligently and without delay'.

[15] By frustrating the legitimate claim of the plaintiff in the way that I have described, the employee of the fund who gave Mr Mvulana his instructions has acted in violation of the Constitution: he or she has, by unjustifiably frustrating the claim of the plaintiff, failed to 'protect, promote and fulfil' his fundamental rights to human dignity, to freedom and security of the person and to bodily integrity. This employee has also fallen short of what is expected of public administrators by s 195 of the Constitution, in

that it cannot be said that the irresponsible raising of a frivolous defence promotes and maintains a high standard of professional ethics or that it promotes the '(e)fficient, economic and effective use of resources'. It cannot similarly be said that he or she has performed the constitutional obligations owed to the plaintiff diligently.

[16] Organs of State are not free to litigate as they please. The Constitution has subordinated them to what Cameron J, in *Van Niekerk v Pretoria City Council*, called 'a new regimen of openness and fair dealing with the public'. The very purpose of their existence is to further the public interest, and their decisions must be aimed at doing just that. The power they exercise has been entrusted to them and they are accountable for how they fulfil their trust.

[17] It is expected of organs of State that they behave honourably – that they treat the members of the public with whom they deal with dignity, honestly, openly and fairly. This is particularly so in the case of the defendant: it is mandated to compensate with public funds those who have suffered violations of their fundamental rights to dignity, freedom and security of the person, and bodily integrity, as a result of road accidents. The very mission of the defendant is to rectify those violations, to the extent that monetary compensation and compensation in kind are able to. That places the defendant in a position of great responsibility: its control of the purse strings places it in a position of immense power in relation to the victims of road accidents, many of whom, it is well known, are poor and 'lacking in protective and assertive armour'. In this case, the employee who gave Mr Mvulana his instructions has abused his or her position of power.”

[88] Such objurgation is appropriate in this case. Had the defendant properly prepared its case, a multi-day trial, and the costs consequent thereon could have been wholly avoided. The use of public funds could have been better utilised by the defendant acquainting itself with the facts and legal principles and making a proper, sensible offer to the plaintiff, rather than unnecessarily persisting in a trial in order to test the plaintiff's experts' evidence, by advancing an unsustainable case and wholly speculative line of questioning.

Conclusion

[89] In the circumstances, I find that:

[89.1] the plaintiff has proved a past loss of earnings in the amount of R40 230.00, and the value of her income, but for the accident, to be R10 869 410.00, and the value of the income having regard to the accident to be R1 930 610.00;

[89.2] it is appropriate that a 5% contingency be applied to the plaintiff's claim for past loss of earnings, a 20% contingency to be applied to the value of the plaintiff's income, but for the accident, and a 25% contingency to the value of the plaintiff's income, regard being had to the accident.

[90] In the result, it is ordered that:

[90.1] The defendant shall pay to the plaintiff the sum of R8 035 789.00 within 180 days hereof, in respect of the plaintiff's claim against the defendant for the following heads of damages:

[90.1.1] past and future loss of earnings/earning capacity
R7 285 789.00;

[90.1.2] general damages of R750 000.00.

[90.2] In the event of the aforesaid amount not being paid timeously, the defendant shall be liable for interest on the amount at the maximum rate prescribed by law, calculated from the 181st calendar day after the date of this order to date of payment.

[91] The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996, for payment of 100% of the costs of future accommodation for the plaintiff in hospital or a nursing home, or treatment of or rendering of a service, or supplying of goods to the plaintiff resulting from the motor vehicle accident that occurred on 14 February 2018, to compensate the plaintiff in respect of these costs after the costs had been incurred and upon proof thereof.

[92] The defendant shall pay the plaintiff's taxed or agreed party and party costs, on the High Court scale, in respect of both the merits and the quantum, up to and including 29 July 2022, and notwithstanding, over and above the costs referred to in paragraph 92.2 below, subject thereto that:

[92.1] In the event that the costs are not agreed:

[92.1.1] the plaintiff shall serve a notice of taxation on the defendant's attorneys of record;

[92.1.2] the plaintiff shall allow the defendant on 180 days from the date of *allocatur* to make payment of the taxed costs; and

[92.1.3] should payment not be effected timeously, the plaintiff shall be entitled to recover interest at the maximum rate prescribed by law, on the taxed or agreed costs, from the 180th day from the date of *allocatur* to the date of final payment.

[92.2] The costs referred to above shall include, as allowing by the Taxing Master:

[92.2.1] the costs incurred in obtaining payment of the amounts mentioned in paragraphs 90.1, 91 and 92 above;

[92.2.2] the costs of and consequent to the appointment of counsel, Adv Amelia Murray van der Merwe, including but not limited to the following:

[92.2.2.1] for trial, including, but not limited to counsel's full fee for 26 July, 27 July and 29 July 2022, and the preparation and reasonable attendance fee of the applicable counsel for attending:

92.2.2.1.1. the interlocutory application to compel the defendant to serve

outstanding Medico-Legal Reports (orthopaedic surgeon, educational psychologist and clinical psychologist) held on 28 October 2021 (Adv Mudau briefed on attendance at the interlocutory application);

92.2.2.1.2. the interlocutory application to compel the defendant to serve outstanding Medico-Legal Reports (orthopaedic surgeon, educational psychologist and clinical psychologist) held on 28 October 2021 (Adv Mudau briefed on attendance at the interlocutory application);

92.2.2.1.3. the interlocutory application to compel the defendant to attend the inter-party pre-trial meeting with the plaintiff held on 28 October 2021 (Adv Mudau briefed on attendance at the interlocutory application);

92.2.2.1.4. the pre-trial conference held on
2 November 2021 and 18 July
2022;

92.2.2.1.5. the case management meeting
held on 2 February 2022
(Adv Mudau briefed on
attendance at the case
management meeting);

[92.2.3] the costs of all Medico-Legal, radiological, MR, sonar, pathologist, actuarial and addendum reports and/or forms obtained, as well as such reports and/or forms furnished to the defendant and/or its attorneys, as well as all reports and/or forms in their possession and all reports and/or forms contained in the plaintiff's bundles, including but not limited to the following:

[92.2.3.1] Dr M De Graad, orthopaedic surgeon;

[92.2.3.2] Dr De Villiers & Partners, radiologists;

[92.2.3.3] Dr Kruger, neurosurgeon;

[92.2.3.4] Dr Digby Ormond-Brown, neurophysiologist;

[92.2.3.5] Dr T Townsend, neurologist;

[92.2.3.6] Dr M Naidoo, psychiatrist;

[92.2.3.7] Ms J Rossi, educational psychologist;

[92.2.3.8] Ms K Cummings, occupational therapist;

[92.2.3.9] Ms T Talmud, industrial psychologist;

[92.2.3.10] Gerard Jacobson Consulting Actuaries.

[92.2.4] the reasonable and taxable preparation, qualifying and reservation fees of Dr Townsend, Ms Rossi and Ms Talmud, in such amount as is allowed by the Taxing Master in respect of these experts;

[92.2.5] the reasonable costs incurred by and on behalf of the plaintiff in attending the Medico-Legal examinations of both parties' experts;

[92.2.6] the costs of and consequent to the plaintiff's trial bundles and witness bundles;

[92.2.7] the plaintiff is declared a necessary witness, her reasonable travelling expenses to attend the trial, as allowed by the Taxing Master; and

[92.2.8] the costs consequent upon the holding of all pre-trial conferences.

[93] The amounts referred to in paragraphs 90.1 and 92 will be paid to the plaintiff's attorneys, A Wolmarans Inc, by direct transfer into their trust account, the details of which are the following:

Name of account holder:	A Wolmarans Inc
Name of bank and branch:	Absa Bank Northcliff
Account Number:	4066803929
Branch Code:	632005
Type of account:	Cheque (Trust)
Reference:	Ms Kordas / MAT7158

[94] The statutory undertaking referred to in paragraph 91 above shall be delivered by the defendant to A Wolmarans Inc, within 14 days of this order.

[95] The plaintiff signed a Non-Contingency Fee Agreement with her attorneys of record.

A W PULLINGER, AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 07 September 2022.

Date of hearing: 26, 27 and 29 July 2022
Date of judgment: 07 September 2022

Appearances:

Counsel for the plaintiff: A M van der Merwe
Attorney for the plaintiff: A Wolmarans Inc / Ms Kordas / MAT7158
Counsel for the defendant: Mr T Naidoo
Attorney for the defendant: State Attorney