

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



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

Case Number: 19411/2017

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

DATE

SIGNATURE

In the matter between:

KHENA PHINDILE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

Coertse, AJ

[1] This is an action for damages brought by Ms Phindile Khena (“plaintiff”), against the Road Accident Fund [“defendant”], for injuries sustained by her on 15

January 2017, as a result of a collision which occurred along Wessie Street, Jabavu, Soweto, Gauteng.

- [2] The following became settled between the parties that:
- a. Defendant is liable for 100% of plaintiff's proven or agreed damages.
 - b. Defendant shall furnish to plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the plaintiff's future medical expenses.
 - c. Past loss of earnings is in the amount of R243 503.25; and
 - d. The aspect of general damages is referred to the Road Accident Fund tribunal at the HPCSA.
- [3] It was further agreed between the parties that the expert reports filed on behalf of plaintiff is admitted into evidence and the facts and opinions contained therein are admitted and have become common cause. The parties agreed that the plaintiff's pre-morbid earning capacity, had the accident not occurred, would have been R2 822 994, 00. It was further agreed that a 25% contingency has to be deducted therefrom.
- [4] For purposes of argument, the parties agreed to use the sum of R 2 822 994,00 for plaintiff's post morbid income, now that the accident occurred, and to apply contingencies thereto. The honourable court is therefore only required to decide, now that the collision had occurred, having regard to the collision, what is the likelihood of plaintiff, on probabilities, to earn at best R 2 822 994,00? The defendant contends that plaintiff has a 65% chance on still earning that amount. It is contended on behalf of plaintiff that she has a 35% chance of earning the aforesaid amount having regard to the seriousness of the sequelae.
- [5] The plaintiff sustained the following injuries as a result of the collision: A **significant traumatic brain injury with severe neurocognitive and neuropsychological sequelae**. [court's emphasis]. A contusion on the right side of her forehead. An injury to her cervical spine.

[6] The plaintiff engaged the services of the following expert witnesses, for the purposes of furnishing medico-legal reports relating to her physical and psychological status resulting from the injuries she sustained in the accident in question, namely:

- a. Dr. C. Kahanovitz (General Practitioner);
- b. Dr. A. Peche (Clinical Psychologist, Neurotherapist, EEG Technician);
- c. Ms. A. Reynolds (Occupational Therapist);
- d. Dr. T. Bingle (Neurosurgeon);
- e. Ms. R. Hovsha (Clinical Psychologist, Neuropsychologist);
- f. Dr. O. Guy (Speech/ Language Therapist & Audiologist);
- g. Dr. L. Fine (Psychiatrist);
- h. Dr. J. Goosen (Trauma Surgeon);
- i. Dr. G.O. Read (Orthopaedic Surgeon); and
- j. Ms. N. Kotzé (Industrial Psychologist).

[7] Plaintiff has also instructed an actuary (Mr. G.A. Whittaker).

[8] What follows is the summary of the key findings on the medico-legal reports. This summary was supplied by the plaintiff and there was no objection raised by the defendant. In fact, the Defendant did not file any expert notices and argued from Plaintiff's papers.

[9] Ms. Hovsha (Neuropsychologist) opines that the neuropsychological assessment revealed several severely impaired deficits, in almost all areas of functioning assessed, including orientation, attention and concentration, numerical reasoning, visuopraxis, speed of information processing, executive functioning and memory. Further, the deficits found on assessment are indicative of the pattern of deficits typically associated with traumatic brain injury.

- a. There is a temporal relationship between the onset of these deficits and the time of the accident. There is recorded evidence of cranial impact and loss of consciousness, as well as reported period of dense post traumatic

amnesia and an extended period of non-contiguous post traumatic amnesia/confusion, together with neurocognitive and neuropsychological sequelae following the accident. It thus appears that plaintiff sustained a significant traumatic brain injury.

[10] Dr Fine (Psychiatrist) indicated that psychiatrically, as assessed 2 years 7 months following upon the causative accident, and where deference is given to other opinions concerning the physical effects of his physical Injuries, plaintiff presents with having sustained a head-injury with organic brain-damage, with a period of amnesia/unconsciousness/confusion, and ongoing difficulties with memory, mood and behaviour, and where neuropsychological assessment is required in order to confirm, qualify and quantify the extent of alteration in mental status, cognition and highest integrative function.

[11] Ms Reynolds (Occupational Therapist) indicated that taking into account the above findings, she is of the opinion that Ms Khenia is presently not suited to working in the open labour market due to the cognitive and psychological sequelae of the accident. The slowing in psychomotor speed and poor perseverance will result in Ms Khenia not always finishing tasks or requiring additional time to complete tasks, particularly on more complex tasks. She will be making mistakes in tasks, she will have difficulty in sustaining concentration to complete tasks, as well as missing specific instructions, due to the attention and concentration difficulties. Diminished memory will make it difficult for her to remember important information and may result in her forgetting to carry out specific instructions or forgetting the required workflow processes to complete specified tasks.

- a. She will have difficulty sustaining conversations with customers, as well as projecting product information in a positive and meaningful manner. She may misunderstand communications, and customers may misunderstand her communications. This will result in increased arguments and interpersonal conflict in the workplace. Difficulties with executive functioning will further detract from her ability to plan, organise and prioritise work tasks.

- b. Her ability to problem solve and display initiative when completing tasks will be low. This is all compounded by her low volition, poor perseverance, anhedonia and disinterest in activities. Due to the depression and low volition, it is unlikely that she will have the drive to seek such employment in the first place. She suspects that any attempts at formal employment would be fraught with periods of absenteeism, which would be associated with increase in the depression and anxiety symptoms, thereby reducing her volition further.

[12] Dr Bingle (neurosurgeon) is of the opinion that having regard to the totality of expert evidence, (including the Addendum Opinion by Rolene Hovsha, Clinical Psychologist dated 27 June 2023) with particular reference to the “outcome based” approach to the determination of the severity of the plaintiff’s traumatic brain injury, plaintiff probably sustained a significant traumatic brain injury.

[13] Ms Kotze (Industrial Psychologist) opines that the plaintiff is 27 years of age. As indicated, she holds a Grade 11 qualification, having failed Grades 10, 11 and 12. Dr Peche (Neurotherapist) and Ms Hovsha (Clinical Psychologist) (par 10.3) advised that Ms. Khena was probably of a low-average intelligence premorbid. It is therefore accepted that uninjured she would likely have been reliant on manual physical work to earn a living all her life.

- a. She advised that she was engaging in the latter while seeking better paid permanent employment. As per the available proof she earned about R700 for the month of December 2016, and it is accepted that she would have been able to continue earning on par with the afore until such time that she secured better paid employment.
- b. The plaintiff was only 22 years of age at time of the accident and therefore still in the exploration phase of her career. The exploration phase is from the early teens to mid-twenties, where people begin to crystallize, specify and implement an occupational choice. Different roles are tried, and various occupational options are explored through school, leisure, part-time work and volunteering. “Trial jobs” may be tested before more firmly finding a more stable and appropriate fit. The next phase is the

Establishment phase, generally from the mid-twenties through mid-forties, when typically, a suitable field is selected, and efforts are made to secure a long-term place in the chosen career. Young adulthood tends to be a time for stabilizing, consolidating, building momentum and moving up.

- c. Uninjured it is hence accepted that she would reasonably have been able to secure work during the second half of 2017. Given her educational level it is furthermore accepted that she would have been able to enter on par with the median of the salaries indicated for unskilled workers, progressing in a straight line over a period of 10 – 12 years to the midpoint between the median and upper notch of the indicated salaries for semi-skilled workers. Thereafter she would have received only annual inflationary increases.
- d. Having regard to the accident, from a physical perspective it is then evident that plaintiff is limited to work of a light nature and still suited (in her impaired presentation) to her pre-morbid job as promoter. It however also transpires that her physical ability and current presentation is being influenced by neuropsychological difficulties.
- e. In considering a brain injury Dr Bingle (Neurosurgeon) is of the opinion that Ms Khena sustained a significant traumatic brain. Dr Peche (Neurotherapist) indicated that Ms Khena's presenting symptoms and level of cognitive functioning meet the criteria for a significant brain injury as the neurocognitive dysfunction was followed by incomplete recovery and will probably result in permanent neurocognitive impairment. She advised that the deficits found are indicative of the pattern seen in individuals with traumatic brain injury and stated that she presents with moderate to severe cognitive deficits that are typically associated with traumatic brain injury.
- f. Dr Fine (Psychiatrist) is of the opinion that plaintiff presents with having sustained a head injury with organic brain damage with ongoing difficulties with memory, mood and behaviour. With regards to the afore Dr Peche found during testing that Ms Khena presented with severely compromised

visual scanning ability, attentional processing, working, and auditory sequential memory, severely impaired working memory, Ms. Khena appears to have difficulty with abstract reasoning where she obtained a score in the moderately impaired range in terms of abstract thinking, she also had difficulty to distinguish between irrelevant and relevant aspects or essentials and nonessentials, whilst she also presents with compromised psychomotor speed and processing speed.

- g. Dr Guy (Speech, language Pathologist and Audiologist) indicated adequate receptive language skills. Ms Reynolds noted that there are a number of difficulties present which would be consistent with a traumatic brain injury and a psychiatric condition, including poor attention, reduced concentration span, poor memory and poor social skills. Based on the results of her assessment she also indicated poor visual motor integration, markedly below that expected considering her education level, slowed rate of performance on fine motor tasks, difficulty following instructions, poor judgement and diminished memory.
- h. Ms Hovsha (Clinical Psychologist) found during her neuropsychological assessment that plaintiff presented with several severely impaired deficits, in almost all areas of functioning assessed, including orientation, attention and concentration, numerical reasoning, visuopraxis, speed of information processing, executive functioning and memory and indicated that the findings of this current cognitive assessment reveal a pattern of cognitive deficits that are indicative of the pattern of deficits typically associated with traumatic brain injury.
- i. In considering a brain injury, it transpires that Ms Khena sustained a significant brain injury as per Dr Bingle / significant brain injury as per Dr Peche with deficits including but not limited to attention and concentration difficulties, memory and learning, language difficulties, motor speed, and perception difficulties as well as difficulties in terms of motivation, error detection, judgment, planning, impulse control, problem solving and abstract reasoning. Of concern is the poor prognosis with functional effects being regarded as permanent and irreversible. Dr Fine

recommends psychiatric treatment but warned that considering the permanency of organicity, prognosis for meaningful improvement would be poor.

- j. While from a physical perspective Ms Khena is limited to work of a light nature, of bigger concern is the neurocognitive and psychological sequelae to the brain injury sustained. If regard is had to the expert opinions at hand, one has no choice but to accept that Ms Khena has been rendered a very vulnerable and compromised individual. Apart from her being limited to light work, she also presents with neurocognitive and neuropsychological difficulties with Dr Fine opining that prognosis for meaningful improvement would be poor. Even with treatment, a marked improvement in her overall presentation is therefore not expected. This certainly does not bode well for Ms Khena who would have to seek employment in a brimful labour market with an unemployment rate in excess of 34%.
- k. As per the expert opinions at hand, it transpires that even after treatment, her depression with low levels of energy and drive may result in her not actively seeking a job again. Furthermore, she would have to compete with loads of uninjured, driven counterparts for a job in today's brimful labour market. Should psychometric testing form part of a selection process, the indicated neurocognitive deficits and behavioural difficulties will likely be noted and probably result in Ms Khena not being regarded as the most suitable candidate in a brimful labour market where employers can pick and choose between suitable candidates.
- l. Considering Ms Reynolds' opinion that plaintiff would likely be a slow worker, struggling to complete tasks on time, may be error prone and have difficulty in sustaining concentration to complete tasks, struggling to learn new methods, forget to carry out specific instructions, may be a substandard communicator and may misunderstand communications, may be prone to interpersonal conflict, struggle to solve problems, present with little to no initiative, presents with very little drive, etc. there is no doubt that she would struggle to outperform her uninjured counterparts

which would adversely affect her career progression. Same, in a worst-case scenario, may even result in her struggling to sustain employment past the probation period.

- m. The aforementioned difficulties could also result in Ms Khena resigning in the face of adversity. This could result in Ms Khena getting entrapped in a negative downward spiral of engaging in short contract jobs with increasingly longer periods of unemployment in between. If regard is had to the expert opinions at hand and the deficits that she presents with, it is evident that she has been rendered a very vulnerable and compromised individual who would likely not be able to progress to the same income levels as anticipated in the pre-accident scenario. The writer is therefore of the opinion that it would be apt to address the risks discussed towards her future employability and earning capacity by means of a significantly higher post-morbid contingency deduction. Writer notes that contingency deductions remain the prerogative of the Court or remain a matter of negotiation.

[14] The actuarial calculation was prepared on behalf of the Plaintiff. Defendant did not file any expert reports at all. Neither did it file an actuarial calculation. Defendant's counsel argued solely on the Plaintiff's version and Plaintiff's papers. It was suggested by Defendant's counsel that the court should apply a 35% contingency in respect of future loss of earning. Plaintiff's counsel on the other hand suggested that the Court should apply a 65% contingency. Counsel for the plaintiff and for defendant hasten to point out the this is purely in the domain of the court. He has a large discretion to award what he considers right.

[15] By agreement the parties presented the court with their different calculations as to the past loss of income and the future loss of income and the contingencies they urged the court to apply their respective versions.

[16] Plaintiff's calculations are as follows:

- a. Past loss Value of income uninjured: R 324 671.00 Less contingency deduction: 25.00% R 81 167.75 R 243 503.25 Value of income

injured: R - Less contingency deduction: 0.00% R 0 R 0 Net past loss: R 243 503.25

b. Future loss Value of income uninjured: R2 822 994.00 Less contingency deduction: 25.00% R705 748.50 R 2 117 245.50 Value of income injured: R2 822 994.00 Less contingency deduction: 65.00% R1 834 946.10 R988 047.90 Net future loss: R1 129 197.60
Total net loss: R1 372 700.85

[17] Defendant's calculations are the following:

a. Past loss Value of income uninjured: R324 671.00 Less contingency deduction: 25.00% R81167.75 R243 503.25 Value of income injured: R 0 Less contingency deduction: 0.00% R 0 R 0 Net past loss: R 243 503.25

b. Future loss of earnings: Value of income uninjured: R 2,822,994.00 Less contingency deduction: 25.00% R 705 748.50 R 2 117 245.50 Value of income injured: R 2 822 994.00 Less contingency deduction: 35.00% R 988 047.90 R1 834 946.10 Net future loss: R 282 299.40 Total net loss: R525 802.65

[18] In considering the implication of a suitable contingency factor to be applied to the plaintiff's future earnings post-morbidly, this court was referred to the case of *Southern Insurance Association v Bailey*¹ where Nicholson JA held:

"Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations. He has a large discretion to award what he considers right" (*per* HOLMES JA in *Legal Assurance Co Ltd v Botes* 1963 (1) SA 608 (A) at 614F). One of the elements in exercising that discretion is the making of a discount for "contingencies" or "vicissitudes of life." These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The

¹ 1984 (1) SA 98 (A) at 1156G.

amount of any discount may vary, depending upon the circumstances of the case."

[19] Damages for loss of income will be granted where the plaintiff has suffered or will suffer a patrimonial loss in that her employment situation has manifestly changed. The plaintiff's performance can also influence his patrimony if there is a possibility that the plaintiff could lose her current job and be limited in the number and/or quality of available choices, should she decide to find other employment.

[20] In *Goodall v President Insurance Co Ltd*² it was stated that:

"In 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 practices by ancient prophets and soothsayers, and by authors of a certain type of almanac, is not numbered among the qualifications for judicial office."

[21] In *Road Accident Fund v De Bruyn*³ a 60% post-morbid contingency deduction was applied to a Plaintiff, who at the time of the trial, was still functioning in his pre-accident occupation and still employed. He would however not be able to sustain the postulated levels of earnings going forward.

[22] In *Fischer obo Mvelase* Case No: 40353/09 Botha AJ applied a 60% postmorbid contingency to a 16-year-old male who sustained severe orthopaedic injuries and who might suffer a delay in reaching his career ceiling. In *Afrika v Road Accident Fund*⁴ a 45% contingency was deducted where no evidence suggested that the Plaintiff would not stay in his current employment.

[23] In *Kannenbergh v Road Accident Fund*⁵ Dippenaar J applied a differential of 40% in respect of a compromised Plaintiff who at the time of trial has suffered no loss, was still employed, and was even promoted after the accident. The evidence was that her functions would be compromised over time resulting in a diminished earning capacity. In *Maluleke v Road Accident Fund*⁶ the Court

² 1978 (1) SA 389 (W) at 192.

³ [2014] ZAGPPHC 108.

⁴ [2022] ZAFSHC 210 (24 August 2022).

⁵ [2018] ZAGPPHC 630 (20 August 2018).

⁶ [2018] ZAGPPHC 567 (7 March 2018).

awarded a 50% post morbid contingency deduction, which the learned Judge described as being moderately higher.

[24] Plaintiff's counsel concentrated, during his very able argument, plaintiff's condition after the collision occurred. The court is sympathetic towards plaintiff in that she suffered a traumatic and significant permanent brain injury, but it should not be over emphasised. Defendant's counsel, who was just as competent as her learned colleague, on the other hand, concentrated heavily on the plaintiff's pre-collision state almost to the exclusion of her post-collision state.

[25] Having regard to all of the above the court finds that plaintiff over emphasised the severity and significance of plaintiff's post-collision trauma. Defendant on the other hand, over emphasised plaintiff's pre-collision state. Having said that, it follows that the court should decide what is fair and reasonable in the circumstances.

[26] The court must navigate between these two extreme versions. The court is not going to traverse all the experts' opinions because it is summarised herein. The court now have to navigate between these two extremes well knowing that the court was not born with a crystal ball, neither is the court a soothsayer nor a prophet. Yet, the court is duty bound to look into the future and must make a ruling as to what the fair and reasonable contingencies in this matter should be.

[27] It is submitted that the common cause facts militate against the Plaintiff ever being gainfully employed and as such I find that a 55% post morbid contingency deduction is under these circumstances fair and reasonable. Plaintiff's total loss of earnings is in the total amount of R1'090'401.45 calculated below.

[28] The court's calculations are the following:

c. Past loss Value of income uninjured: R324 671.00 Less contingency deduction: 25.00% R81167.75 R243 503.25 Value of income injured:

R 0 Less contingency deduction: 0.00% R 0 R 0 Net past loss: R 243 503.25 [these were common cause].

- d. Future loss of earnings: Value of income uninjured: R 2 822 994.00
Less contingency deduction: 25.00% R 705 748.50 R 2 117 245.50
[these were common cause].
- e. Value of income injured: R 2 822 994.00 Less contingency
deduction: 55.00% R 1 552 646.70 R1 270 347.30 Net future loss: R
846 898.20 Total net loss: R1 090 401.45

Order

[29] By agreement between the parties, it is ordered that:

- b. The Defendant is liable for 100% of the Plaintiff's proven or agreed damages.
- c. The Defendant shall pay the Plaintiff the net amount of R243 503.25 in settlement of the plaintiff's claim in respect of Past Loss of earnings. Payment of the shall be made to the Plaintiff's Attorneys of Record, by payment into their trust account with the following details:
- d. RENE FOUCHE INC STANDARD BANK – TRUST ACCOUNT ACC. NR: [...] BRANCH CODE: 004305 REF: GPS/JDK/GT/K180
- e. The Defendant shall pay to the Plaintiff the capital amount referred to in c above together with interest a tempore mora calculated in accordance with the prescribed Rate of Interest Act 55 of 1975, on any amount outstanding after the expiry of 180 days, failing payment within 180 days, read with Section 17 (3)(a) of the Road Accident Fund Act 56 of 1996.
- f. The Defendant shall within 14 days of receipt of the order register the matter on the so called RNYP list.
- g. The Defendant shall furnish to the Plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for 100% (Hundred percent) the costs of the future accommodation of the Plaintiff in a hospital or nursing some or treatment of or rendering of a service to the Plaintiff or supplying of goods to the Plaintiff arising

out of the injuries sustained by the Plaintiff in the motor vehicle collision which occurred on 15 January 2017, after such costs have been incurred and upon proof thereof.

- h. The statutory undertaking referred to in paragraph 3 supra, shall be delivered by the Defendant to the Plaintiff's Attorney of Record within 60 (Sixty) days of the date of this Order.
- i. The aspect of General Damages is postponed sine die.
- j. The Defendant shall pay the Plaintiff the net amount of R 846 898.20 in settlement of the plaintiff's claim in respect of future loss of earnings.
- k. The amounts in paragraphs c & j shall collectively be referred to as the "judgment amount" being in the total of R1 090 401.45.
- l. Payment of the judgment amount shall be made to the Plaintiff's Attorneys of Record, by payment into their trust account with the following details: RENE FOUCHE INC STANDARD BANK – TRUST ACCOUNT ACC. NR:[...] BRANCH CODE: 004305 REF: GPS/JDK/GT/K180
- m. The Defendant shall pay to the Plaintiff the settlement and judgment amounts together with interest a tempore mora calculated in accordance with the Prescribed Rate of Interest Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund Act 56 of 1996.
- n. The Defendant shall within 14 days of receipt of this Court Order register the matter on the RNYP list.
- o. The Defendant shall pay the Plaintiff's Taxed or agreed Party and Party costs of suit on the High Court Scale to date of this order, such costs including but not limited to:
 - i. The costs of the reports (including RAF 4 Forms and addendum reports, if any) of Dir. C. Kahanovitz,
 1. Dr. A. Peche,
 2. Dr. L. Fine,
 3. Dr. O Guy,
 4. Dr. J. Goosen,
 5. Ms R. Hovsha,
 6. Dr G.O. Read,

7. Dr Pillay Radiology,
 8. Ms. A. Reynolds,
 9. Dr. T. Bingle,
 10. Mr. L.J. Van Tonder, and
 11. Ms. N. Kotze.
- ii. The qualifying, and preparation costs, including affidavits of experts (if any);
 - iii. Costs of senior-junior Counsel, Advocate Anton Louw, for trial preparation and on trial for 17 July 2023 and 18 July 2023, inclusive of the costs in preparing for and appearing at, the pre-trial conference and judicial case management;
 - iv. The costs of Counsel for the preparation of substantial heads of argument;
 - v. The costs of the actuarial reports, inclusive of the amended reports, of Mr. G Whittaker (Algorithm Consulting Actuaries); The costs of attending to an inspection in Loco; and
 - vi. The costs of the preparation of copies of two sets of bundles and uploaded the matter onto CaseLines; and Plaintiff's reasonable travelling expenses to and from medico-legal appointments in respect of the experts of the plaintiff and the defendant and consultations at trial.
- p. In the event the costs are not agreed, the Plaintiff's attorney shall serve a Notice of taxation on the Defendant and/or the Defendant's attorneys of record. The Defendant shall be granted a period of 60 days post taxation to pay the taxed costs.

COERTSE AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant: Adv Anton Louw

instructed by Mr Joubert De Koker
from the firm René Fouché Inc

For the Respondent: Ms Moyo State
Attorney