

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 76673/2018

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES / NO

DATE: 4th SEPTEMBER 2023

SIGNATURE OF JUDGE:

In the matter between:

SM obo PN

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

FLATELA J

[1] This matter concerns a loss of earnings claim pursued by Ms. Mhlongo (hereinafter the Plaintiff) in her representative capacity as the mother and natural guardian of PN (hereinafter, "the minor") against the Road Accident Fund for injuries sustained by the minor whilst being a passenger in a motor vehicle accident that

occurred on 22 September 2017 near Carolina, Mpumalanga. The minor was six years and eight months old at the time of the accident.

[2] According to the Plaintiff, the Defendant is liable to compensate PN in the amount of R2, 804, 655 (two million, eight hundred and four-thousand, six-hundred and sixty-five hundred) for loss of future earnings.

Factual Background

[3] In her particulars of claim, the Plaintiff alleges that on 22nd September 2017, the minor was passenger in a backseat of a double cab bakkie which collided with a bus on its rear.

[4] The Plaintiff alleges further that the accident was caused solely by the negligence of the insured driver.

[5] According to Ms. Mhlongo, after impact, PN stared into blank space and was not communicating for approximately an hour before she started crying. Paramedics came and found her lying supine on the ground. They transported her to Carolina Hospital where a close reduction under Ketamine sedation and an application of plaster pares was performed. Hospital records reflect that the patient was fully awake and well orientated when received at the hospital.

[6] PN was discharged on the same day and given analgesics (pain medication).

[7] Two days later, PN complained of acute pain in her right arm. She was taken to Life Wilgeheuwel Hospital for a follow-up assessment. She was admitted for four days and treated conservatively with analgesics. The X-Ray report from the radiologist, Dr. Van Rensburg, states that "*the right elbow demonstrates a transverse supracondylar fracture of the humerus.*" The findings were that the patient showed internal fixation of the right elbow and good position and alignment of the bony elements.

[8] Except for this copy of the radiologist report, the hospital records of Life Wilgeheuwel Hospital were not discovered, and they are not part of the pleadings.

[9] Dr. N. Mogoru, an independent medical assessor, opines that PN would have experienced pain for no more than 10 (ten) days. Furthermore, the doctor concludes that the PN's Whole Person Impairment is 1%. He listed the injuries and treatment received in RAF 4 form as follows:

- Closed reduction
- Percutaneous pinning
- Serial Neurovascular check
- Immobilisation and elevation

[10] The Fund conceded merits 100% in favour of PN's proven damages on 16 November 2021. The Fund also tendered the following as partial settlement to the Plaintiff's claim:

- a. Future medical expenses: a Certificate of Undertaking in terms of Section 17(4)(a).
- b. R450 000 (four hundred and fifty thousand rands) as final settlement for general damages.
- c. R500 000 (five hundred thousand rands) as an interim amount for loss of earnings.

[11] The settlement was made an order of Court by Mbongwe J on 25 November 2022 which read as follows:

'By agreement between the parties, the following order is made:

1. The Defendant is liable for hundred percent of (100%) of the Plaintiff's agreed or proven damages from the motor vehicle collision that occurred on the 22 September 2017.

2. The Defendant has compensated and/or furnished the following:
 - 2.1. General damages – R450 000 (four hundred and fifty thousand rands).
 - 2.2. Loss of earnings – R500 000 (five hundred thousand rands).
3. The total above has been paid by the Defendant into the Trust account [of the Plaintiff's attorneys] below...
4. The remaining issue in respect of loss of earnings is postponed *sine die*.
5. The Plaintiff has appointed Standard bank Trust to establish a trust account on behalf of the minor child.
6. The Defendant is directed to provide the Plaintiff with a Certificate in terms of Section 17(4) of the Road Accident Fund Act of 56 of 1996, as amended, in respect of future accommodation in a hospital or nursing home for treatment of or rendering a service or supplying of goods to her to compensate the Plaintiff in respect of said costs after costs have been incurred on tendering of proof of the above motor vehicle collusion...'

[12] It appears from the Order above that when the settlement was made an order of Court, the Defendant had already deposited the above sums into the Plaintiff's attorneys trust account. All the experts had also filed their reports on pecuniary and non-pecuniary damages.

[13] I am therefore called to determine the only remaining issue which is in respect of loss of earnings.

PN's present complaints

[14] PN relayed to several experts that examined her that she chronically experiences pain in her right elbow, and this is further aggravated by inclement weather conditions. She also cannot write for long periods at school as she experiences pain when writing. She is also unable to lift heavy objects. She experiences post-concussion headaches approximately 3 (three) times a week. These are localized in the frontal region. She has concentration difficulties. Other neuro-psychological, neuro-cognitive, and psycho-social behavioural impairments were noted by the Plaintiff's several experts as well. These I discuss in their relevant reports.

Plaintiff's expert reports

[15] An application was made for the admission of the affidavits of experts and their report as evidence without leading oral evidence in terms Rule 38(2) of the Uniform Rules. I granted the application.

[16] The Plaintiff was examined by the following experts:

- a. Ms. G Bokaba, a clinical psychologist, on 05 March 2021.
- b. Dr N. Mogoru, an independent medical examiner, on 8 March 2021.
- c. Ms. Kagiso Motseto, an occupational therapist, on 9 March 2021.
- d. Mrs L.P Acedede-Selahle, an educational psychologist, on 24 March 2021.
- e. Dr L.F Segwapa, a neurosurgeon, on 29th April 2021.
- f. Mr. Ramosebi Morabe, an industrial psychologist, 12th May 2021.

Dr Segwapa's (Neurosurgeon) Report

[17] PN complained to Dr Segwapa that she experiences headaches located at the frontal region approximately three times a week. She also has concentration difficulties.

[18] Ms. Mhlongo reported to Dr Segwapa that the PN was unresponsive for about an hour after impact and just stared into blank space. Despite finding no evidence of direct trauma to the head, Dr Segwapa concluded that the reported unresponsiveness of the minor after the impact implied that the minor child sustained a mild concussive brain injury due to the acceleration and deceleration effects of the impact.

[19] In the post-MVA analysis, Dr Segwapa found that the PN has no neuro-physical impairments and deferred to a clinical psychologist for a neuropsychological evaluation opinion for the reported concentration problems.

Ms. G Bokaba, (clinical psychologist) Report

[20] Ms. Bokaba performed a neuropsychological assessment on PN to establish the impact of the injuries on her cognitive, emotional, and behavioural functioning; and to also indicate thereto, implications of the findings of the neuropsychological assessment in relation to current and future functional capacity, including associated recommendations and costs, if any. It was reported to Ms. Bokaba by Ms. Mhlongo that PN was a jolly child with no significant behavioural challenges. She had also achieved her gross developmental milestones at expected ages.

[21] There was also no history of psychiatric consultations, medication, or psychotherapy prior to being involved in the accident. It was noted however that her eldest sister was on depression medication after failing her third year at university.

[22] Ms. Mhlongo reported to Ms. Bokaba that PN suffers from travel related anxiety and is hypervigilant when travelling and tends to have flashbacks about the accident. Her school marks have slightly deteriorated, but she has never failed a

grade. She has become socially reserved and prefers to be indoors and does not spend time with her friends.

[23] As to accident events pertaining post-impact, Ms. Mhlongo reported that PN suffered a brief loss of consciousness for an uncertain period. She was sitting down, not crying, or talking but regained consciousness and started crying on her way to the hospital.

[24] On the Post-concussion symptoms rating chart – information taken from PN – with 0 being no symptom; 1-mild; 2-moderate; 3-severe; 4-very severe; PN reported no headaches, dizziness nor drowsiness. Memory and poor concentration problems were rated at point level 1.i.e., mild and fatigue at point level 2, i.e., moderate. PN reported that she tires easily and unable to do some tasks. Behaviourally, she is moderately irritable (i.e., point level 2). Her anxiety and post-traumatic stress disorder (PTSD) were scored as severe (i.e., point level 3).

[25] Several tests were performed by Ms. Bokaba. The summary of her tests results reveal that:

25.1. Summary of neuropsychological assessment (deficits)

- There are signs of mental and behavioural challenges. Her attention and concentration fluctuated.
- She illustrated compromised psychomotor speed. She was however able to follow basic instructions.
- Perceptual reasoning varied on domains assessed with more scores on the low average.
- Verbal comprehension and language fluency was varying.
- Memory and learning varied on domains assessed.
- Double tracking difficulties, poor cognitive flexibility and processing of information was indicated on complex tasks.

25.2. Neuropsychological outcome – the assessment revealed a performance between average and low average suggesting

areas of retained cognitive potential as well as cognitive impairment across the various domains on formal testing.

25.3. Based on PN's developmental milestones, as well as her academic history, Ms. Bokaba opined that pre-MVA, PN was of at least average cognitive functioning. The identified cognitive difficulties, she says, could be related to complex interplay between experience of pain, physical discomfort, and the psychological and behavioural dysfunction because of the injuries sustained.

25.4. Impact of the head injury – Contrary to the opinion of Dr Segwapa, Ms. Bokaba is of the opinion that PN did not suffer a head injury and the duration of the post-traumatic amnesia as well as her behaviour at the accident could be attributed to effects of shock. Furthermore, her injuries seem to be more orthopaedic in nature.

25.5. Furthermore, presenting neurocognitive and psychological sequelae in this case are highly likely to be a result of the unexpected right elbow fracture resulting in chronic pain and stress which leads to cognitive (thinking) challenges, personality changes and problem behaviour. Headaches, dizziness, isolation in interactions are common symptoms of stress, depression, and anxiety. The prolonged mental illnesses trigger physical symptoms and conversely.

25.6. Psychological functioning – PN presents with PTSD and according to Ms. Mhlongo, she seriously suffers from travel related anxiety and is hypervigilant. She also reported that PN has flashback relating to the accident; is socially reserved and prefers to be indoors and does not spend time with her friends anymore.

25.7. The anxiety and PTSD symptoms have already affected her emotional stability and general level of functioning and might also result in psycho-somatic complaints. Furthermore, the pain is thought to be acting as regular reminders of her traumatic experience in the accident and further contributing to the persistence of her post traumatic stress response and associated symptoms. Deference was made to a psychiatrist to attend to her PTSD and anxiety symptoms.

25.8. Quality of life – the presenting emotional and psychological problems, arising from the MVA are considered to have a negative impact on her cognitive, interpersonal as well as her quality and enjoyment of life. Therefore, she would benefit from therapeutic support from a clinical psychologist.

25.9. Educational functioning – PN was in grade 1 at the time of the accident, and in grade 5 at the time of the assessment. In view of assessments conducted, PN demonstrated retained cognitive abilities and deficits. Cognitively, she will need more stimulation and multidisciplinary effort from her environment to enable her to perform according to her potential when she progresses with her schooling. Ms. Bokaba deferred to an educational psychologist to further assess her learning ability and sustainability in the mainstream school.

25.10. Occupational functioning – PN's occupational prospects will be negatively affected by her compromised speed and behavioural challenges in the instance where the cognitive or behavioural challenges are not rehabilitated. The prospects of being employed will further be determined by her level of education, skills, and experiences achieved. Ms. Bokaba deferred to an occupational therapist to assess body functioning and prospects of future employment.

Mrs L.P Acedede-Selahle (educational psychologist) Report

[26] Mrs. Acedede-Selahle assessed PN's scholastic functioning. The objectives of the assessment were to determine whether there were any psycho-educational problems resulting from the injuries that PN sustained; to describe her cognitive and scholastic potential pre- and post-MVA; and to assess how the accident under discussion may have influenced these functions. Furthermore, the Report was to make recommendations on schooling placement best suited for PN as well as an informed prediction and determination of the level of schooling she would have attained, but for the accident, and after the accident.

[27] Schooling reports availed to Mrs. Acedede-Selahle show that PN was in Grade 1 at the time of the accident and proceeded to pass all learning areas in all terms consistently throughout her grades, up to grade 5, which was at the time of assessment.

[28] Collateral information obtained from Ms. Mhlongo was that PN was conscious upon impact but however confused and disorientated – this could be attributable to the acceleration and deceleration effects of the accident. On aftereffects of the accident, Ms. Mhlongo says that PN complains of constant frontal headaches giving in teary eyes. She has concentration and memory difficulties; and she is noted to misplace her items, and this is also reported from her school by her teachers. Her mathematics teacher constantly complains about her slowness in class.

[29] Furthermore, Ms. Mhlongo reported that PN experienced personality changes since the accident. The changes manifest in cognitive functioning resulting in concentration and memory problems, therefore impeding her ability to learn well at school.

[30] The summary findings of Mrs. Acedede-Selahle's Report are:

30.1. intellectual and educational functioning – from the tests administered, they show that PN's global intellectual functioning fell within the superior range, with an Intelligence Quotient score of 121. However, the writer commented that although her current intellectual full-scale score is in the superior range, her capacity to learn well appears to be affected and will be affected as she progresses to higher grades as the areas of memory and concentration seem to have been specifically affected by the accident. **Furthermore, there was clear evidence of impairment in short-term auditory memory and poor concentration. Poor memory, poor concentration and attention functioning will affect her capacity to learn well as she progresses to senior grades.** (Mrs. Acedede-Selahle's own emphasis).

30.2. Psycho-motor speed –in a classroom environment where there is a stipulated time allocated for each learning area, her ability to sustain focused attention and concentration, as well as execute all written tasks within the stipulated time limits will become even worse as she must always dedicate focused concentration to all learning areas.

30.3. Pre-accident functioning – reasoning from PN's developmental milestones which were uneventful, her parents' educational attainments, and the available scholastic information which demonstrates good scholastic achievement, Mrs Acedede-Selahle's opinion is that pre-MVA PN probably had the potential to pass Grade 12 and be eligible to study for a diploma (NQF 6) or degree (NQF 7).

30.4. Post-accident functioning - post-MVA, PN is reported to suffer from constant frontal headaches resulting in teary eyes. She has memory and concentration problems coupled with forgetfulness

and misplacing of items. She experiences chronic pain in her right arm and elbow. She struggles to lift or carry heavy objects with her dominant right hand. She is a slow writer, and reports that her right fingers experience numbness associated with spasms when she is writing for long.

30.5. Scholastic prospects – depending on opportunities available to her, she might be able to further her education at college level (NFQ6). Remedial intervention by a specialist for effective study skills and time management was recommended. Mrs. Acedede-Selahle also deferred to a clinical psychologist for further cognitive assessment and recommendations on future scholastic progress. - (Mrs. Acedede-Selahle's own emphasis).

[31] Mrs Acedede-Selahle's conclusion was that PN's injuries are likely to affect her educability and future employability. Therefore, consideration needs to be paid to this in a compensation award. She went on to state that the psycho-educational difficulties identified would interfere with PN's ability to apply residual cognitive skills, psychomotor abilities, and intellect, therefore placing her at risk for learning difficulties. The information available about her background and environment, and particularly her present level of scholastic functioning suggests that the accident has contributed to her difficulties.

[32] The poor psychomotor functioning, fluctuating concentration and attention, mental fatigue and impulsivity will affect her scholastic performance negatively if left unattended. Psychological rehabilitations with both an educational and clinical psychologist were recommended. As for psychomotor rehabilitations, these were recommended to be best dealt with by an occupational therapist.

Kagiso Motseto (Occupational Therapist) Report

[33] Ms. K Motseto, consulted the Plaintiff on 9 March 2021, to determine the effect of the PN's injuries on her everyday life activities, such as personal care, schooling, home chores and play. Furthermore, the assessment was to further determine the effects of her injuries on her scholastic ability and to predict her future ability to work in an income generating capacity and to make recommendations on any special assistance and accommodations, if any, that PN may need or any other therapeutic measures.

[34] Collateral information obtained from Ms. Mhlongo about the accident and PN's present complaints remains much the same as said above. Therefore, I do not repeat them here except to add or highlight discrepancies. Ms. Mhlongo reports that PN has a poor and strained relationship with her sister because of her temperament and irritable mood. She plays netball but does experience pain in high leisure impact activities and she has daily headaches.

[35] Ms. Motseto's examination found that the comprehensive functional capacity evaluation revealed that the PN presents with pain in the right arm and elbow as well as fatigue with continuous use of the right dominant hand. She has difficulty working above shoulder level as well as performing tasks that require heavy lifting. From a physical perspective she displayed limitations that would have a negative impact on her choice of occupation when she reaches full maturity. Due to the noted skeletal pain and fatigue in the upper limb, she would be precluded from occupations that are medium, heavy, and very heavy in physical nature.

[36] From a cognitive point of view, the minor complained that post accident she would experience occasional headaches. Note was made that PN presented with neuro-cognitive and neuro-psychologic impairments during the assessment that would impact on her future learning ability. Ms Motseto reiterated the psycho-educational report which demonstrated that there was evidence of cognitive deficits in the areas of short-term auditory memory, sustained concentration, focused attention, and fatigue. Furthermore, Ms. Motseto took note of the educational psychologist findings that post-MVA there has been a moderate reduction of cognitive functioning and psychomotor functioning. These deficits were opined that

they would become worse as PN progressed to further senior grades. Ms. Motseto then also took note of the clinical psychologist report that PN presented with symptoms of anxiety and PTSD and has developed emotional and psychological problems arising from the MVA.

[37] Based on these findings, Ms Motseto is of the opinion that it would be reasonable to conclude that PN would not be able to reach her pre-accident scholastic and work potential. And in the event, she does not receive the necessary treatment and therapy, her career choices may be limited with the behavioural challenges in the workplace influencing her ability to form and maintain relationships. The writer agreed with Mrs. Acedede-Selahle that PN's occupational progression will be linked to the highest education level that she is able to achieve – this was postulated by Ms Acedede-Selahle to be NQF level 6, i.e., a diploma qualification post-MVA.

Mr. Ramosebi Morabe (Industrial Psychologist) Report

[38] Mr. Morabe projected the probable impact of the accident on PN's career prospects by having regard to likely earnings pre-accident and post-accident. Above other employability and earning potential to be taken when evaluating the earning capacity of an individual, which Mr. Morabe listed to be 14 (fourteen), his entire report hinged on the difference between the pre- and post-accident scenario postulated by Mrs. Acedede-Selahle. According to the latter, PN had the potential to either obtain an NQF 6 (diploma) or NQF 7 (degree) qualification pre-accident, but post-accident, she might likely obtain an NQF 6 qualification.

[39] After factoring the available information from the various experts; and consideration of the educational psychologist's Report with the fact that PN's parents have both passed grade 12 and have obtained tertiary education degrees, Mr Morabe discussed research of which therein it was accepted that there is a strong positive correlation between parental characteristics, the schooling of mothers (of whom Ms. Mhlongo is the primary caregiver to PN) and the educational attainment of their children. From this he then concluded that PN would have most likely finished

her high school career around age of 17 or 18, and then may have enrolled for a university degree and would have most likely finished within four years' time.

[40] Following this scenario prediction he estimated earnings using Robert Koch's corporate earnings schedule of 2020.

[41] In terms of the post-accident narrative, her loss of earnings was determined by the difference between the anticipated pre- and post-accident educational outcomes as discussed by the educational psychologist. Emphasis was given to the following statement from Mrs. Acedede-Selahle's Report:

*'it is evident that there has been a moderate reduction of cognitive functioning and psychomotor functioning since the accident. The above-mentioned depletion of functioning will become worse as she progresses to senior grades where work load and work tempo increases. Depending on opportunities available to her, she might be able to finish her education at education level (NQF 6). **Recommendation intervention by a specialist for effective study skills and time management is recommended; and deference be made to the clinical psychologist for further cognitive assessment and recommendations for future scholastic progress'** (emphasis in the original paragraph).*

[42] With an NQF level 6 it was postulated that PN could have probably entered the formal labour market at a Paterson B4 level (lower quartile – basic pay) and reaching her career ceiling when approximately being 45 years of age at Paterson C3/C4 (median quartile -total package), whereas had she had a degree as it was her potential in the pre-MVA scenario, she could have probably entered the formal labour market at a Paterson C1/C2 (lower quartile – basic pay) level and reaching her career ceiling at Paterson D1 (median quartile – total package) level at approximately 45 years of age. Therefore, the logical conclusion from the above was

that PN lost earnings as her pre- and post-accident working ability has been compromised.

Discussion

[43] The principles of earning capacity have long been established by our courts. Earning capacity is defined as one's potential and prospects to generate income in the future regard being had to their skills, talents, abilities, and experiences including his/her present position and plans and of course external factors over which a person has no control. Where this potential has been diminished by reason of injury, and the quantum value income which one could have generated to their estate is depreciated had it been not for injury, then there has been loss of earning capacity.

[44] In *Rudman v Road Accident Fund*¹ it was held that earning capacity must be considered wholly. Earning capacity is a complex of abilities which together make up an asset in a claimant's estate and which becomes part of the *universitas* of her or his rights and duties which has allegedly been compromised and for which compensation is sought. One must not isolate individual elements of the ability to earn a living, which have been compromised and place a monetary value on them, without considering whether they bring about a diminution in her or his earning capacity.

[45] In a loss of earnings claim the Plaintiff must prove the extent of her loss, as well as the amount of damages that should be awarded. The measure of proof is a preponderance of probabilities, which entails proving that the occurrence of the loss is more likely than not, that there is more than a fifty per cent chance that it will occur.

Evaluation of the Plaintiff's expert evidence

Mrs. Acedede- Selahle – educational psychologist.

¹ *Rudman v Road Accident Fund* (370/01) [2002] ZASCA 129

[46] Mrs. Acedede-Selahle's findings are that in the current cognitive assessments conducted, PN displayed intellectual functioning within the superior range of average intelligence with a full global score of 121. However, there was demonstrable evidence of cognitive deficits in short-term auditory memory, sustained concentration, focused attention, fatigue as well as slow working pace. But despite these deficits, of which Mrs. Acedede-Selahle postulated that they will become worse if left unabated, PN has throughout her grades continued to pass all her learning areas since MVA to date of assessment.

[47] Judging from the available scholastic achievement of PN, as well as her parents' educational attainments, Mrs. Acedede-Selahle opined that PN probably had the potential and aptitude to obtain an NQF level 6 or 7 qualification. But because of the injury sustained in the MVA and the sequelae therefrom, Mrs. Acedede-Selahle opined that PN may depending on the opportunities available to her, be able to further her education at college level, that is in an NQF 6. The glaring question is this, with the necessary interventions provided, and even if they were not, what will preclude PN from obtaining an NQF level 7 if she can complete an NQF 6? How would an extra year's difference (which is typical in the duration of these qualifications) impede PN from obtaining an NFQ7 if she can obtain an NFQ 6?

[48] I haste to mention that in either scenario, if PN were to have chosen to enrol for diploma studies, she would have undertaken at least three years to complete her qualification. The same rings true for Bachelor NQF 7-degree studies. In sum, the negation of PN's scholastic potential to enrol for degree studies post-MVA is not founded on any logical reasoning.

[49] I do take cognisance of the fact that the Plaintiff's the experts are *ad idem* that PN's present learning difficulties are remedial if specialist support and necessary interventions were to be provided by the appropriate clinical professionals. However, sight should not be lost that despite the noted cognitive deficits, and even without the recommended remedial support, PN has continued to perform well above average and is of demonstrable superior intelligence already determinable at her young tender age.

Ms. K Motsetso – Occupational Therapist.

[50] From a physical point of view, Ms. Motsetso's Report reiterated PN's presenting complaints as has been discussed throughout this judgment. But on residual work capacity and potential of loss of earnings, the germane point of Ms. Motsetso's assessment provided nothing more than a summary reading of Mrs. Acedede-Selahle's Report and that of Ms. Bokaba (the clinical psychologist). From these reports, she came to the conclusion that *"the writer is of the opinion that due to the noted physical, neuro-cognitive and psychosocial impairments, it is reasonable to conclude that [PN] would not be able to reach her pre-accident scholastic and work potential"*. Whether this opinion is truly of her own independent finding or deduction from the Reports which came way much later than her assessment, is not without doubt. This I shall address with appropriate contingencies.

Mr Ramosebi Morabe – industrial Psychologist

[51] Mr Morabe's Report on PN's future career prospects, educability, trainability, earning potential and loss of earnings, above other factors and industry and labour market considerations, hinged tightly on Mrs. Acedede-Selahle's statement that post-MVA, PN may, depending on opportunities available to her continue her education at college level NQF level 6. From thereon he postulates two scenarios. One pre-MVA where PN is likely to have studied towards degree studies; and the second where PN is only likely to be able to study towards a diploma qualification.

[52] Thereafter, the likely career progressions and prospects of PN were outlaid on these bases. But here's the fatality: Mrs. Acedede-Selahle's prediction of PN's educational outcomes post-MVA is irrational. In Mrs. Acedede-Selahle's view, PN has retained cognitive abilities, but with notable deficits post-MVA. The deficits were not present pre-MVA and arose as a result of the MVA. But for the MVA, PN would have reached her full scholastic potential, possibly at degree level or by her own choice, diploma level. But because of the MVA, the former is still probable subject to necessary interventions whereas the latter has been excluded. I have already

discussed above that there is no logical foundation provided to justify this perceived limitation other than the fact that PN now presents with learning difficulties. If learning difficulties notwithstanding she can proceed to diploma studies, then it has not been shown why she cannot proceed to degree studies.

[53] I accept that PN has because of the accident lost potential earnings. Her behavioural challenges, reported temperament and cognitive and psycho-motor deficits which impair her scholastic functioning, and of which are projected to be capable of impairing her further as she goes to senior grades if necessary remedial support is not in place, cannot speak of any less of potential loss of earnings. Now I address the matter of contingencies.

Contingencies

[54] Steynberg In "*FAIR" MATHEMATICS IN ASSESSING DELICTUAL DAMAGES* in PER / PELJ 2011(14)2 writes that "Contingencies could be defined as uncertain circumstances of a positive or negative nature which, independent of the defendant's conduct and if they should realise, would probably influence a person's health, income, earning capacity, quality of life, life expectancy or dependency on support in future or could have done so in the past. These "uncertain" circumstances must consequently be taken into account in a fair and realistic manner by increasing or decreasing the plaintiff's damages during the quantification process. If the relevance of a positive contingency is proved it will increase the amount of damages to be awarded, and if the relevance of a negative contingency is proved, it will decrease the amount of damages to be awarded."(page 9).

[55] In *Burger v Union National South British Insurance Co* 1975 4 SA 72 (W) 75DG. 21 Colman J explains, as quoted with consent by Corbett JA in *Blyth v Van den*

Heever 1980 1 SA 191 (A) 225, that:

"how the court should take account of an uncertain future event in the assessment of future loss: A related aspect of the technique of

assessing damages is this one: it is recognised as proper in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said to have been proved, on preponderance of probability, that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind. If, for example, there is acceptable evidence that there is a 30 per cent chance that an injury to a leg will lead to an amputation, that possibility is not ignored because 30 per cent is less than 50 per cent and there is therefore no proved preponderance of probability that there will be an amputation. The contingency is allowed for by including in the damages a figure representing a percentage of that which would have. That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure.”

Calculations

[56] The Plaintiff claims an amount of **2 804 655.00** (two million, eight hundred and four thousand, six hundred and fifty-five rands) based on the following actuarial assumptions.

Pre-MVA

- a. Income if accident did not occur: **R10 669 140** (ten million, six hundred and sixty-nine, one hundred and forty rands)
- b. Less: contingency deduction (15%) being **R1 600 371** (one million, six hundred thousand, three hundred and seventy-one rands)
- c. Totalling a net income of **R9 068 769** (nine million, sixty-eight thousand, seven hundred and sixty-nine rands).

Post- MVA

- a. income given accident did occur: **R7 830 142** (seven million, eight hundred and thirty thousand, one hundred and forty-two rands)
- b. Less: contingency deduction (20%) being **R1 566 028** (one million, five hundred and sixty-six thousand, twenty-eight rands).

c. Totalling **R 6 264 114** (six million, two hundred and sixty-four thousand, one hundred and fourteen rands);

d. Total **loss of earnings at 2 804 655.**

[57] I agree with the pre-MVA postulation but regard being had to the fact that PN is and has been progressing satisfactory, albeit with learning and behavioural challenges; and the experts' *ad idem* opinion that her challenges are remediable through appropriate clinical intervention, in the circumstances I would apply a 30% contingency deduction (being **R3 200 742** i.e., three million, seven hundred and forty-two rands) in the post-MVA postulation. This then equating to a post-MVA income of **R7 498 348** (seven million, four hundred and ninety-eight thousand, three hundred and forty-eight rands). And the net result being that PN's net loss of income is **R1 600 371** (one million, six hundred thousand and three hundred and seventy-one rands) less R500 000 already paid. The sum total thereof loss of earnings is **R1 100 371** (one million, one hundred thousand and three hundred and seventy-one rands).

ORDER

[58] In the circumstances, I make the following order:

1. The Defendant is to pay the Plaintiff an amount of **R1 100 371.00** (One million, One Hundred Thousand and Three hundred and Seventy-one Rand) to the Plaintiff's attorneys mentioned trust account.
2. The Defendant will be liable for interest at seven (**7%**) percent in event it fails and/or refuse to pay the capital amount and costs mentioned below within hundred and eighty (**180**) days into the following account: -

Account Holder: Nkuna Rose Attorneys Trust Account.
Bank Name Standard Bank
Account Number 010424164
Reference RAF14/202

3. The Defendant will pay the Plaintiff's reasonable taxed costs with the taxing master's discretion or agreed party and party costs on a High Court scale which include: -
 - 3.1. Fees of counsel for preparation, consultation, and appearance attendance at trial Court on the 27 February 2023.
 - 3.2. Cost of attorney for consultations and attendance of the trial Court.
 - 3.3. Cost of preparing, obtaining and filing the updated actuarial report.
 - 3.4. Cost of preparing and filing Court supplemented bundles.
4. The above compensation to be protected in a trust in accordance with the Court Order dated **24 November 2022** and the Defendant is liable for the expenses and/or the administration costs.
5. In the event, the above parties do not agree regarding costs, the following will apply: -
 - 5.1. The Plaintiff shall serve the notice of taxation on the Defendant's legal representative.
 - 5.2. The Plaintiff shall allow the Defendant to make payment of the taxed bill of costs as mentioned above.
6. Contingency fees agreement is applicable in this matter.

FLATELA L

JUDGE OF THE HIGH COURT

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 the hand down is deemed to be 10h00 on 04 September 2023

Appearances

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Link number:	4245984
Date of Hearing:	27 February 2023
Date of Judgement:	04 September 2023