



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

DATE: 06/09/2023

SIGNATURE

Case no. 5403/2019

In the matter between:

ADV. CLAIRE CAWOOD NO. obo FERENZA BEY

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

The judgment and order are published and distributed electronically.

P A VAN NIEKERK, AJ

INTRODUCTION:

- [1] Plaintiff was a pedestrian involved in a collision with a motor vehicle on 25 September 2017 resulting in injuries to Plaintiff. As a result of the nature and consequences of the injuries sustained, a *curatrix ad litem* was appointed on behalf of the Plaintiff to institute an action in this Court for damages against Defendant resulting from the collision.
- [2] Defendant agreed to pay 60% of the proven or agreed damages arising from the collision.
- [3] Expert medical reports were filed on behalf of both parties and in terms of the signed joint minutes of a meeting between Dr Z Domingo and Dr A Maharaj, both Neurosurgeons, appointed respectively on behalf of Plaintiff and Defendant, the following relevant portion of the joint minutes is quoted:

- “1. Ms. Bey was involved in motor vehicle accident as a pedestrian on 5 September 2017.
2. There was a significant blow to the head resulting in skull, skull base and facial fractures.
3. CT scan confirmed the presence of a frontal extradural hematoma requiring surgical drainage.
4. Current physical neurological examination is normal with no focal neurological deficits.
5. She reports problems with memory, concentration and behaviour.
6. The extent of the deficits have been confirmed on formal neuropsychological assessment by Mr George Tumane and Ms Renee de Witt.
7. Whilst the traumatic brain injury has not physically impaired on her ability to work, we defer to the neuropsychological opinion that:
 - (a) Mr Temane: “her many cognitive impairments make it impossible for her to engage in gainful employment”;

(b) *Ms de Witt: "her employment and promotional prospects have been significantly curtailed" and "her employment prospects seem bleak and she will struggle to sustain any form of employment".*

8. *In view of the significant impact that her cognitive and behavioral deficits have had on her employability, her injury can be considered to be serious and she will continue to suffer a permanent and serious long term impairment in respect of his (sic) work and personal life (Road Accident Fund Form 4 – the Narrative Test 5.3)".*

- [4] As is usual in matters such as these, the reports of a substantial number of medical expert witnesses were compiled and presented in terms of the provisions of Rule 36(9), including Occupational Therapists, Industrial Psychologists, as well as an actuarial report.
- [5] At the hearing of this matter it was common cause that Plaintiff is entitled for an award of general damages and all that remained to be dealt with by this Court was the calculation of the Plaintiff's damages in relation to a loss of earnings, as well as the award of general damages.
- [6] The Defendant's legal representative took issue with the calculation of the Plaintiff's loss of income based on the expert reports and the actuarial calculation in the sense that it was submitted that the Plaintiff have applied for Unemployment Insurance Fund benefits (UIF) which should be taken into consideration for purposes of calculating a loss of earnings. Although Plaintiff apparently have applied for such benefits, the application has not yet been finalised and to date hereof Plaintiff has not received any such benefits. After debate of this issue, Defendant's legal representative indicated that the issue will be left a bay in the event that an order be made that the Plaintiff withdraws her UIF benefit application or if it is noted that the order is made on the basis that such application be withdrawn.

- [7] Counsel acting on behalf of Plaintiff filed extensive Heads of Argument where the matter of the calculation of the loss of income is comprehensively dealt with. I am satisfied that the calculation constitutes a reasonable calculation having regard to the actuarial report and the contingencies applied to the calculation.
- [8] Insofar as the award of general damages is concerned, Plaintiff's Counsel referred this Court to a number of reported judgments on, what were submitted, similar matters such as:
- (i) **Van Rooyen N.O. v RAF 2022 (8A4) QOD 156 (GNT)**, where an award of general damages of R2.2 million (current value R2 941 000.00) was awarded to a junior Farm Manager who was 29 years old at the age of the judgment, who sustained a severe head injury resulting in severe brain damage with permanent physical, cognitive, neuropsychological and physical consequences. Post-accident, he was severely and permanently impaired;
 - (ii) **MJ v RAF (12601/2017[2018]) ZAGPJHC438** where general damages of R1.9 million was awarded on 18 June 2018, (current value R2 414 000.00) to a 27 year old Stock Clerk who sustained a severe traumatic brain injury with both diffuse and focal components. He presented with significant physical limitations, cognitive defects, emotional difficulties, limitations in speech and language skills and was regarded as unemployable;
 - (iii) **Zarrabi v RAF 2006 (5B4) QOD231 (T)** where general damages of R800 000.00 was awarded in April 2006 (current value R2 067 000.00) to a 30 year old female Trainee Medical Specialist who sustained a severe diffuse axonal brain injury with severe neuro-physical, neurocognitive and neuropsychiatric consequences, multiple facial lacerations, and a substantial number of related injuries. The person further suffered from intellectual impairment, personality change,

dysarthria, spasticity on the right side, loss of depth perception, loss of vision of the right visual field and lack of drive.

- [9] Based on the aforesaid, it was submitted that general damages of R2.5 million would be fair and reasonable.
- [10] Defendant's legal representative submitted that the specific injuries and *sequelae* suffered by the Plaintiff in this matter was not as severe as the victims in the authorities referred to by Plaintiff's Counsel, and in this regard referred to the following authorities:
- (i) **Hurter v Road Accident Fund 2010 (6A4) QOD12**, where a 20 year old female sustained a diffuse axonal injury to her brain which included a brain contusion and fracture of the base of the skull. She regained consciousness after 10 days and she sustained a severe traumatic brain injury with significant cognitive social emotional and social-behavioural difficulties. She was also using inappropriate language and she was awarded an amount of R500 000.00 the current value of which is R835 000.00;
 - (ii) **De Jongh v Du Pisanie 2005 (5) SA 457 (SCA)** where it was held that the evaluation of the brain damaged person depends more on how they actually handle their daily lives rather than how they perform on psychometric tests. In that judgment it was further held that the Court must take care that its award is fair on both sides, and that it must give just compensation to the plaintiff but it must not bore argen (?) from the horn of plenty at the Defendant's expense.
- [11] Defendant's Counsel referred to a number of other judgments where severe primary head injury occurred, which were followed by neurocognitive and neurobehavioral deficits associated with poor memory, difficulties and inability to live independently, and a substantial reduced ability for employment. In these matters damages were

awarded, which amounted to between R800 000.00 and R1.2 million based on present day calculations.

[12] Having considered the joint minutes filed in respect of meetings between the respective Occupational Therapists, and the Clinical Psychologists appointed on behalf of the parties, in summary it can be stated that:

- (i) Plaintiff suffers from *inter alia* psychological and cognitive fallouts, a disruption in her activities of daily living, headaches, dizziness, and intolerance for light and noise;
- (ii) Plaintiff does not have any physical limitations, and her functional strength fell within the light physical demand level provided she was not required to lift directly from floor or crown level. Plaintiff will require supervision and guidance for the rest of her life.

[13] Considering the nature and extent of the *sequelae* of the injuries as specifically recorded in the minutes of the joint meeting between Mrs R de Witt and Mr G Temane dated 5 August 2023, I am of the view that the Plaintiff does not fall within the category of persons referred to by Plaintiff in Plaintiff's Heads of Argument, and that the quantum of general damages in the amount of R2.5 million will not be just and fair in the circumstances.

[14] In my view, general damages in the amount of R1.4 million should be awarded.

[15] **In the result, I have inserted the amount of R1.4 million in the draft order which the parties have handed up and such amended draft order which I have marked with an "X", dated and initialled is made an order of Court.**

A handwritten signature in black ink, appearing to read 'P.A. van Niekerk', with a long horizontal flourish extending to the right.

P A VAN NIEKERK

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Appearances:

For the Applicant:

Adv A LAUBSCHER

Instructed by:

ADENDORFF ATTORNEYS

For the Respondent:

Adv L LEBAKENG

Instructed by:

STATE ATTORNEY

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

43

CASE NO: 5 403 / 2019



HELD AT PRETORIA ON 4 SEPTEMBER 2023
BEFORE THE HONOURABLE ACTING JUSTICE P A VAN NIEKERK
IN COURT GD

In the matter between:

ADV CLAIRE CAWOOD N.O. on behalf of
FEROZA BEY

and

THE ROAD ACCIDENT FUND

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA		
Private Bag X67, Pretoria 0001	Plaintiff	
	2023 -09- 0 6	
GD-PRET-010		Defendant
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA		

This Order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties or their legal representatives by e-mail. This Order is further uploaded to the electronic file of this matter on Case Lines by the Judge or his/her Secretary/Registrar. The date of this Order is deemed to be 4 September 2023

COURT ORDER

HAVING HEARD BOTH COUNSEL FOR PLAINTIFF AND THE STATE
ATTORNEY FOR THE DEFENDANT, CONSIDERING EVIDENCE AND
HAVING CONSIDERED THE MATTER, AS SET DOWN ON 4 SEPTEMBER
2023, IT IS ORDERED THAT:

6/9/2023

1. The Defendant is ordered to pay to the Plaintiff the amount of R 3 582 475-00 (THREE MILLION FIVE HUNDRED AND EIGHTY TWO THOUSAND ~~RAND~~ FOUR HUNDRED AND SEVENTY FIVE RANDS) ("the capital"), **after** the apportionment of 40% (forty percent) in respect of contributory negligence had already been deducted, by way of a lump sum payment within 180 (one hundred and eighty) calendar days of service of the order, by way of electronic transfer to the trust account, details of which are set out hereunder ("the capital payment").



2. The capital **before** the apportionment of 40% (forty percent) in respect of contributory negligence has been deducted, is made up as follows:

2.1 Loss of earnings / earning capacity – R 4 570 792.50 (Four Million Five Hundred and Seventy Thousand Seven Hundred and Ninety-Two Rand and Fifty Cents only).

2.2 General Damages – R 1 400 000-00 (One million four hundred thousand Rands).

3. Payment of the aforesaid sum must be made directly to the Plaintiff's Attorneys of Record, ADENDORFF INC by direct transfer into their trust account with the following details:

ACCOUNT HOLDER	: ADENDORFF INC
BANK	: FIRST NATIONAL BANK
BRANCH CODE	: 201 409
ACCOUNT NUMBER	: 621 131 979 76
REFERENCE NUMBER	: BEY3/0001

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4. The Defendant is ordered to, furnish the Plaintiff with an unlimited undertaking within 30 days from date hereof, free from caveats and qualifications, in terms of section 17(4)(a) of the Road Accident Fund Act, for 60% (sixty percent) of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service to the Plaintiff or supplying of goods to the Plaintiff arising out of the Plaintiff's injuries sustained in the motor vehicle collision which gave rise to the action, after such costs have been incurred and upon proof thereof.

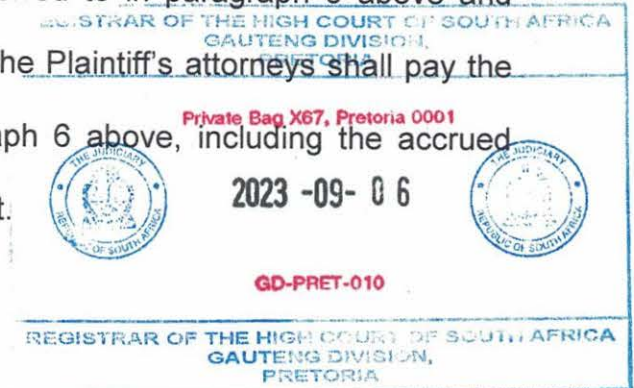


5. The Defendant shall pay the reasonable costs of the Trustee appointed in terms of paragraph 8 hereof, in respect of establishing a Trust and any other reasonable costs that the Trustee may incur in the administration thereof including her fees in this regard, which shall be recoverable in terms of the Section 17(4)(a) Undertaking, and which may also include and be subject to the following:

- a. The fees and administration costs shall be determined in accordance with the Trust Property Control Act, 57 of 1988 (the Trust Act), as amended from time to time, and shall include but not be limited to disbursements incurred.
- b. The costs associated with the yearly audit of the Trust by a chartered accountant.
- c. The reasonable costs of the furnishing of security in obtaining an annual bond, if required by the Master of the High Court.
- d. The costs incurred in administering the Undertaking in terms of Section 17(4)(a).

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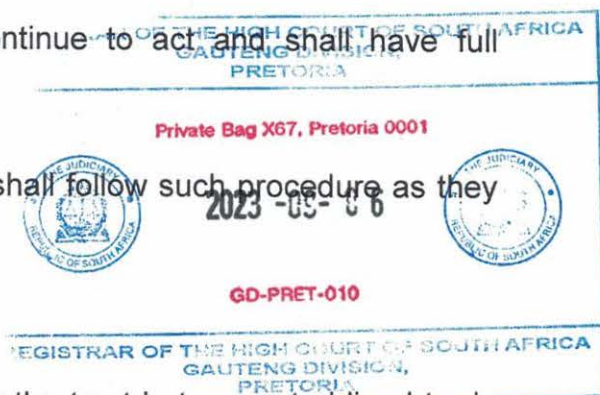
6. That the net proceeds of the amount referred to in paragraph 1 above, after the deduction of Plaintiff's attorney's attorney and client costs ("the capital amount"), shall be payable to a Trust in respect of the **FEROZA BEY TRUST**, to be established within 6 months from date of receipt of the "capital amount".
7. Upon the establishment of the Trust referred to in paragraph 5 above and opening of a bank account of the Trust, the Plaintiff's attorneys shall pay the capital amount as referred to in paragraph 6 above, including the accrued interest, into the Trust's said bank account.



8. The Terms of the Trust are as follows:
- a. The proposed Trustee is Shalene Schreuder (ID Number: 680723 0034 086), whose written consent to act as Trustee in the Trust is loaded on case lines.
 - b. If Shalene Schreuder (ID Number: 680723 0034 086), is unable or unwilling to accept appointment or for any reason becomes unable to continue to act once having been appointed, then the Master of the High Court will in his/her sole discretion be entitled to appoint another trustee.
 - c. The trustee is required to furnish security for the administration of the assets of the trust.
 - d. The Trustee's fees for the administration of the trust are to be calculated at the rate of 1% per annum of the trust assets under administration.
 - e. The trustee shall administer the trust subject to the powers and terms, which follow as from paragraph (f) to (v) herein below.

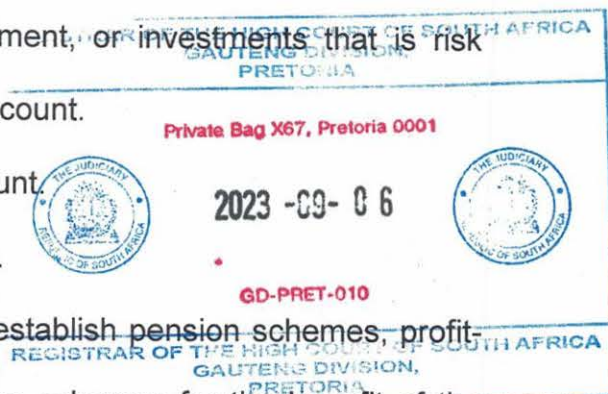
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- f. The trustee must in writing accept her appointment as such and the benefits and duties conveyed by the trust deed and acknowledge receipt of the donation in terms of which the trust will be established.
- g. The trustee may at any time in writing appoint additional trustees limited to one additional trustee.
- h. A trustee shall cease to act as such if he/she resigns, or becomes mentally disturbed or ill, or alcoholic, or incompetent or unable to act as trustee, or being a corporate body, it is liquidated. If any trustee ceases to act, the remaining trustee/s shall continue to act and shall have full powers in terms hereof.
- i. In administering the trust, the trustee shall follow such procedure as they deem fit.
- j. Proper books of account shall be kept.
- k. The trustee may appoint an auditor for the trust but are not obliged to do so. Shalene Schreuder (ID Number: 680723 0034 086), shall have the sole signing powers on all banking accounts and shall have the power to veto any decision. Nevertheless, she shall consult with the other trustees, if any, as to any distributions.
- l. The trustee has the power to perform in the name of the trust or in their own name on behalf of the trust, any acts and enter into any contracts and undertake any obligations, whether commercial or otherwise, which may be done by a natural person of full legal capacity, which powers include but are not limited to the following:
- ii. To purchase necessary movable and immovable property for the beneficiary once he requires same.



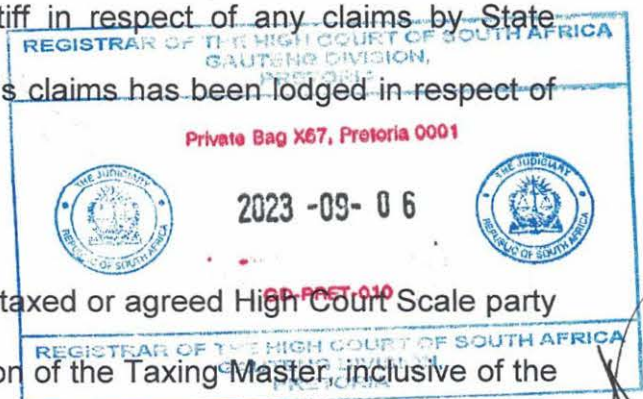
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- iii. To insure, build on and improve all or any part of its property and assets, if so required.
- iv. To borrow money, only for the necessary living expenses of the beneficiary, only until such time as the Road Accident Fund claim is finalised, which is limited to 70% (seventy percent) of the remainder of the claim.
- v. To invest money in in any financial institution accredited by the South African Reserve Bank, in an investment, or investments that is risk averse, such as a money market account.
- vi. To open and operate a banking account.
- vii. To make donations to the beneficiary.
- viii. To pay gratuities and pensions and establish pension schemes, profit-sharing and plans and other incentive schemes for the benefit of the beneficiary where applicable.
- ix. The trustee may determine her own procedure.
- n. The assets of the trust must be held in the name of the trust.
- o. The trustee has an absolute and unlimited discretion, in all matters relating to the trust but may not act contrary to this order and the trust deed to be drafted in accordance herewith.
- p. The trustee and/or her successor or successors shall be required to provide security for the due administration of the trust.
- q. The trustee shall not be personally liable to the beneficiaries for any trust losses, except caused by gross negligence or deliberate wrong.
- r. The trustee shall under no circumstances be personally liable to creditors of the trust.



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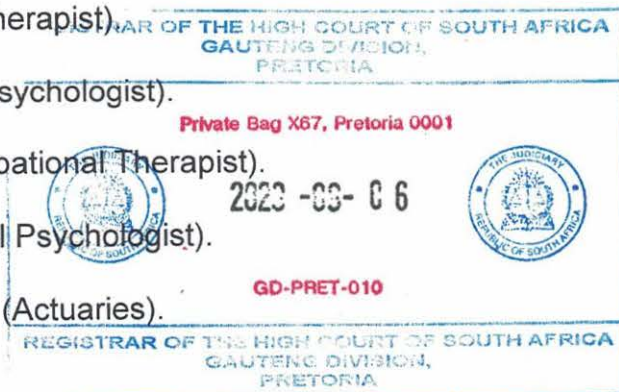
- s. The beneficiary, **FEROZA BEY**, who for income and capital, is **FEROZA BEY** and any of her biological or legally adopted children for whom she would be responsible for in law to maintain and support.
- t. No asset, capital or income of the trust will vest in any beneficiary until such is actually paid over, handed over or delivered by the trustee to the beneficiary. No capital or income benefit to which any beneficiary is or may become entitled by virtue of this trust deed shall, prior to actual payment or transfer thereof by the trustees to the beneficiary, be capable of being ceded, assigned or pledged, or transferred in any way, or be capable of attachment by any creditor or trustee of a beneficiary upon insolvency, unless the trustees consent thereto in writing.
- u. Any asset or money which beneficiary receives pursuant to this trust deed shall not form part of any joint estate, and shall not be subject to any marital power.
- v. The trust deed can only be amended in writing with the consent of the Master of the High Court and, failing such consent, with the leave of this Court provided however that no amendment which is in conflict with the provisions of the Court Order may be effected without the prior leave of the Court having been granted thereto.
9. The Defendant indemnifies the Plaintiff in respect of any claims by State Service Providers in so far as supplier's claims has been lodged in respect of past medical expenses.
10. The Defendant shall pay the Plaintiff's taxed or agreed High Court Scale party and party costs, subject to the discretion of the Taxing Master, inclusive of the



costs related to any motions and applications and including for the sake of clarity, but not limited, to the costs of the Plaintiff's instructing attorneys, Adendorff Incorporated in Cape Town and the correspondent attorneys in Pretoria, Savage Jooste and Adams Inc, as well as the other costs set out hereunder;

a. The costs of the experts employed as per case lines, inclusive of reports, consultations and confirmatory affidavits, being:

- i. Dr Zayne Domingo (Neurologist).
- ii. Prof Tuviah Zabow (Psychiatrist).
- iii. Dr Michael Ostrofsky (Maxillo-Facial & Oral Surgeon).
- iv. Dr Dale Ogilvy (Speech Therapist).
- v. Ms Renee de Wit (Neuropsychologist).
- vi. Ms Michelle Bester (Occupational Therapist).
- vii. Ms Karen Kotze (Industrial Psychologist).
- viii. Messrs Munro Consulting (Actuaries).



b. The costs of Plaintiff's counsel, inclusive of Heads of Argument.

c. The costs of the Curatrix ad Litem, inclusive of day fees.

d. The application costs of appointing the Curatrix ad Litem.

11. Costs are to be paid within 14 days of settlement or taxation, failing which interest shall accrue at the prescribed interest rate.

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12. The above costs shall be paid into the Applicant attorney's trust account as mentioned in paragraph 3 above.
13. The Patient shall withdraw her application for UIF benefits.
14. It is recorded that the Plaintiff entered into a contingency fee agreement and that same complies with the Act.

BY ORDER OF THE COURT

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COURT REGISTRAR

Box 71: Savage Jooste & Adams

Ref no: M Haasbroek / gk / MHA1390 / (JS TERBLANCHE/BEY3/0001)

Plaintiff's Attorney: Mr Jurie Terblanche; cell: 082 416 6545; email: jurie@aalaw.co.za

Plaintiff's Counsel: Adv Anton Laubscher; cell: 082 658 4112; email: antonlau@law.co.za

RAF Claims handler: Mr Muhammad Arbee; email: MuhammadArbeeA@raf.co.za

State Attorney: Mr Lebogang Lebakeng; cell: 064 766 1592; email: LebogangL@raf.co.za

RAF Ref: 503 / 1264 9686 / 307 / 1 & Link: 480 4430

State Attorney Ref: Z07 / PP08719



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