

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, PRETORIA

CASE NO: 56048/15

- | | |
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| (1) | <u>REPORTABLE: NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES: NO</u> |
| (3) | <u>REVISED.</u> |

18 April 2023

DATE

.....
SIGNATURE

In the matter between:

VAN DER MERWE, ADV J as Curator ad Litem for and on behalf of:

Zizipho Ntame

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

PIENAAR AJ

INTRODUCTION:

[1] The Plaintiff is the duly appointed Curator ad Litem for Zizipho Ntame

("the patient"). She claims delictual damages and or behalf of the patient

from the defendant in terms of the provisions of the Road Accident Fund Act

number 56 of 1996, as amended ("the Act"). The damages arise as a result

of personal injuries sustained by the patient in a motor vehicle collision which

occurred on the 1 March 2012 on the R58 near Necobo, Elliot an accident

occurred.

[2] On 10 August 2022 Mrs Tammy-Jean van Jaarsveld was appointed as

Curatrix Bonis for and on behalf of Zizipho Ntame.

[3] The patient, whose date of birth is the [...] September [...] was 19 years

old at the time of the accident, she sustained a severe traumatic brain

injury with diffuse and focal damage and very marked percent neuropsychological and cognitive impairments and fallouts and personality

changes; a distal radius and ulna fracture left, facial injuries, neck injury,

depression and anxiety, multiple permanent scars; bruising and contusion.

She is currently 30 years old.

[4] On 19 March 2018 an order was made in favour of the Plaintiff in respect of

100% liability for merits.

[5] On 23 November 2021 an order was made in favour of the Plaintiff in respect

of 100% liability for merits, R1 500 000,00 in respect of General Damages

and future medical expenses with an unlimited undertaking in terms of the

provisions of Section 17(4)(a) of the Road Accident Fund Act, Act 56 of

1996. This means the only issue which remains unresolved which I am

required to adjudicate are that of the quantum of the Plaintiff's past and

future loss of earnings/loss of income earning capacity/loss of employability.

[6] The defendant entered an appearance to defend and filed a plea, but at

some stage the attorneys of record for the defendant withdrew and no

attorneys were appointed. On 10 February 2022 the defendant's defence

was struck out. It is on that basis that the plaintiff proceed with an application for default judgment.

[7] The Plaintiff did not present any viva voce evidence, but relied on numerous

affidavits, accompanied by reports, compiled by expert witnesses.

[8] The Plaintiff amended the Particulars of Claim for past and future loss of

earnings and/or earning capacity as follows:

8.1 Past loss of earnings/earning capacity	R1 000 000,00
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8.2 Future loss of earnings/earning capacity	R8 000 000,00
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[9] For sake of completeness the following documents is uploaded onto

Caselines as exhibits for the trial, namely:

- 9.1 Plaintiff's quantum bundles as Exhibit A pg 1 -115 Caselines 012(a)
- 9.2 Plaintiff's hospital record bundles Exhibit B pg 1-149 Caselines 012 (b)
- 9.3 Plaintiff's expert reports bundles Exhibit C pg 1 -655 Caselines 014
- 9.4 Plaintiff's experts' affidavits Exhibit D pg 1 - Caselines 015 (a)
- 9.5 Plaintiff's Affidavit for trial Exhibit E pg 1 - Caselines 015 (b)
- 9.6 Plaintiff's amended actuary report for trial Exhibit F

[10] At the commence of the trial, the Plaintiff Counsel made submissions that
past medical expenses must be postponed sine die.

THE FACTS:

[11] After the accident on the 01 May 2012 she was taken to All Saints Hospital

from where she was transferred the following day to Queenstown hospital

after a back slab was put on the left arm. On arrival her GCS was 10/15

(03/05/12) this was two days later. She was in ICU for another 2 weeks.

Ntame had difficulty to walk. She was very confused and she laughed at

everything. She was transferred to Life Rehab Centre in East London on 16 May 2012 with the final diagnose of diffuse axonal head injury and left forearm fracture.

[12] She is emotionally unstable due to her injury/her mood is often changing and shifting and she appears to have episodes of confusion and disorientation.

[13] She complains of daily headaches, some of the headaches are vascular headaches (migraine). The pain is in her eyes. She does not want to open her eyes at all. She has severe chronic pain including headache, neck, arm and back pain. The neck and back pain suggestive of a whiplash injury. Dr M Mazabow (neuropsychologist) concludes in his report that Ms Ntame sustained a severe traumatic brain injury, comprising diffuse and right frontal focal components.

[14] Dr JA Smuts (neurologist) is of the opinion that she sustained a severe diffuse concussive head injury that influences both her memory and personality.

[15] Ms Ntame was a Grade 12 learner at the time of the accident.
Reportedly she always obtained good academic results.

[16] According to the Natasha van der Heyde (Occupational Therapist),
post-
accident the plaintiff is unemployable in the open labour market,
because of
her functional difficulties, as well as her physical and psychological
presentation. Also her cognitive, emotional and behavioural profile
would
preclude her from securing/maintaining gainful employment.

LOSS OF INCOME:

[17] Ms Möller (Educational Psychologist) opines that taking the
background
and her intellectual ability into account, Ms Ntame was a girl with
promising
learning potential. She had the intellectual potential to complete
at least
Grade 12 (NQF4) followed by a three year diploma (if finances
were made
available) enter the open labour market in her professional field of
study.

[18] Dr Pretorius (Industrial Psychologist) accepts that, and the accident not occurred, Ntame would have searched for financial support to further her studies for one year. And postulates she would have entered the open labour market in January 2017 with earnings in line with Paterson Level B3 (R179 049,00 p/a) reaching her earnings pinnacle around the age of 45 with earnings comparable to Paterson Level C4 (R619 749,00 pa/) followed by inflation related growth until retirement at age 45.

[19] After the accident she did not return to school but managed to complete Grade 12 the following year in 2013. She attempted to improve her marks and obtain further education and remained unemployed since leaving school until 2020 when she obtained contract work as a teacher's assistant and in January 2021 started self-employment as seller of handbags and flasks, but was unsuccessful and stopped in September 2022. At present she is 29 years old and unemployed and the experts concur that she is rendered unemployable in the open labour market.

[20] She sustained a severe traumatic brain injury and is unable to perform

accordingly to her potential. The experts are in agreement that she

sustained and note in their reports a severe traumatic brain injury resulting

in profound cognitive and psychological impairments keeping her from

functional autonomy in the prime of her life.

[21] According to Dr Nel (psychiatrist) she met the criteria for severe traumatic

brain injury with chronic severe depressive illness and behavioral disorder

secondary to the accident with significant mood disorder, behaviour

disorder and cognitive deterioration.

[22] Due to the injuries sustained in the collision, the Plaintiff cannot even

manage and take care of her personal affairs as a situation resulting to the

appointment of a Curator ad Litem.

[23] The Plaintiff relied on the report, as confirmed via affidavit, of an Industrial

psychologist, Dr Pretorius and an actuarial report compiled by

Willem Boshoff from Munro Forensic Actuaries in support of the claim for past and future loss of earnings.

[24] Therefore, on the basis of the calculations as per the report by Munro

	Capped Loss	
Past	R	1 018 994
Future	R	6 783 300
Total	R	7 802 294

Actuaries dated 23rd March 2023 including the RAF cap and after applying contingencies are as follows:

[22] This was submitted notwithstanding that the amended particulars of claim

refer to an amount of R1 000 000,00 for past loss of earnings/earning

capacity and no further amendments has been delivered or applied for to

amend the amount to an amount being proposed by Plaintiff's Counsel.

CONTINGENCIES

[23] According to Munro actuary report, the Claimant is HIV positive.
Koch

defines life expectancy as “the sum of the separate chances of survival

into each and every possible year and notes that it is assumed that

a person has a normal expectation of life unless there is evidence to the contrary.

[24] Koch refers to the following as some of the guidelines a regards contingencies:

* “Normal contingencies” as deductions of 5% for past and 15% for future loss.

* Sliding scale: 1/2 % per year retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age and relies on **Goodall v President Insurance 1978 (1) SA 389.**

[25] In his book **The Quantum Yearbook**, Koch states that when assessing

damages for loss of earnings or support it is usual for a deduction to be

made for general contingencies for which no explicit allowance has been

made in the actuarial calculation. The deduction is in the prerogative of the

Court. General contingencies cover a wide range of considerations which

may vary from case to case and may include: taxation, early death, loss

of employment, promotion prospect, divorce etc.

[26] See **Van der Plaats v South African Mutual Fire and General**

Insurance Co Ltd 1980 (3)SA 105 (A) at 114-5. The rate of the

discount cannot of course be assessed on any logical basis: the assessment

must be largely arbitrary and must depend upon the trial Judge's impression of the case.

[27] It is trite that the determination of a suitable contingency deduction falls

within the discretion of the Court. In **Southern Insurance Association**

Ltd v Bailey NO 1984 (1) SA 98 (AD) the advantage of applying

actuarial calculations to assist in this task was emphasized. It was stated

that:

“Any enquiry into damages for loss of earning capacity is of its nature

speculative, because it involves a prediction as to the future without the

benefit of crystal balls, soothsayers, augers or oracles. All that the court

can do is to make an estimate, which is often a very rough estimate, of the

present value of a loss. It has open to it, two possible approaches. One is

for the Judge to make a round estimate on an amount which seems to him

to be fair and reasonable. That is entirely a matter of guesswork, a blind

plunge into the unknown. The other is to try and make an assessment, by

way of mathematical calculations on the basis of assumptions resting on the

evidence. The validity of this approach depends of course upon the soundness of the assumptions and these may vary from the strongly probable

to the speculative. It is manifest that either approach involves guesswork to

a greater or lesser extent. But the court cannot for this reason adopt a

non-possoms attitude and make no award”.

[28] Ms Ntame is currently 29 years of age. Having regard to all the uncertainties in the future, I am of the view that a 25% pre-morbid contingency deduction will be fair and reasonable.

As a result the following order is made:

[29] The Defendant shall make payment in the sum of **R7 783 300,00** (seven million seven hundred eighty three thousand three hundred rand and zero cents) as full and final settlement of loss of earnings/ earning capacity within 180 days from the date of this Court Order which is computed as follows:

29.1 Past loss of income R1 000 000,00

29.2 Future loss of income R6 783 300,00

At the hearing of the matter, I was presented with a draft order, which the Plaintiff's attorney is directed to account to the curatrix bones Mrs Tammy van Jaarsveld who has already been appointed and it is ordered that the net award payable from the proceeds of this order to her is to be administered mutatis mutans in compliance with the orders previously made.

I therefore make the Draft Order attached herewith an Order of Court, which I have marked "X" signed and dated.

M PIENAAR

Acting Judge of the High

Gauteng Division, Pretoria

Court

Date of hearing : 23 March 2023
Date of judgment : 18 April 2023
Counsel for the Applicants : Adv Ludvich Visser
court@slerouxprok.co.za
: Adv J van der Merwe
jana@gkchambers.co.za
Instructed by : Salomè Le Roux Attorneys
sleroux@law.co.za

Appearance for the Respondents: No appearance

[1] Court Order dated 16 May 2019 - Curatrix ad Litem appointed
[2] Court Order dated 10 August 2022
[3] Court Order dated 19 May 2018 - Merits
[4] Court Order dated 23 November 2021 - Merits ; Section 17(4)(a)
and

General Damages

[5] Court Order dated 10 February 2022 - Defendant's defence be struck out

[6] Caselines : 00 (c) Trial of 23 March 2023 : Trial documents
Notice of Set down - 14 February 2023

[7] Goodall v President Insurance 1978 (1) SA 389

[8] Van der Plaats v South African Mutual Fire and General
Insurance Co Ltd 1980 (3)SA 105 (A) at 114-5

[9] Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98
(AD)