REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2018/179

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

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9 SEPTEMBER 2022

In the matter between:

WILLEMINA DANIELA JOHANITA VAN VUUREN Plaintiff

and

ROAD ACCIDENT FUND Defendant

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JUDGMENT

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Olivier AJ:

Introduction & background

[1] This is an action for damages in terms of the Road Accident Fund Act 56 of 1996 ('Act 56 of 1996'). It proceeded on a default judgment basis, following dismissal of the defendant's defence on 8 October 2021.

[2] Willemina Daniela Johanita Van Vuuren (the “plaintiff”), an adult female born 5 September 1989, sustained bodily injuries as a result of a collision between two vehicles on 27 May 2016 at approximately 11h36, at or near the intersection of Versveld and Bowker Streets, Vanderbijlpark. The plaintiff was a passenger in one of the vehicles at the time of the collision.

[3] Following the collision the plaintiff lost consciousness and was taken by ambulance to the Emfuleni MediClinic, where she was admitted. She was hospitalised for two weeks – one week in the Intensive Care Unit, and one week in the general ward. She remained bedridden for seven weeks following her discharge from hospital. The plaintiff was 26 years old at the time of the accident.

[4] The Plaintiff suffered a laceration to the head, multiple rib fractures, liver laceration, severe pelvic fracture, kidney laceration, head injury, teeth fracture, back injury, and sternum fracture.

[5] The merits have become settled, and the defendant has conceded liability for 100 per cent of the plaintiff’s proved damages. The defendant has agreed to provide the plaintiff with an undertaking in terms of s 17(4)(a) of Act 56 of 1996.

[6] The plaintiff accepted the defendant’s offer of R 500 000 in respect of the general damages claim, on the day of the trial. The only remaining issue is the quantum of loss of earnings.

Expert reports

[7] The Plaintiff relies on the reports of the following experts: Dr C. E. Barlin (Orthopaedic Surgeon); Dr J. H. Kruger (Neurosurgeon); Mr T. Reynolds (Clinical Psychologist); Dr M. Close (Specialist Psychiatrist); Ms F. Burger (Occupational Therapist); Mr L. Linde & Dr J. Bosman (Industrial Psychologists); and Mr G. A. Whittaker (Consulting Actuary).

[8] The Defendant procured reports from the following experts: Dr A.J. Dybala (Orthopaedic Surgeon), Ms L. Khasu (Clinical Psychologist), Dr B. Mosadi

(Neurosurgeon), Ms M. Magoele (Occupational Therapist), and Mr T. Kalanko (Industrial Psychologist)

[9] The experts deposed to affidavits. I am satisfied that the evidence to be adduced, be given on affidavit in terms of Uniform Rule 38(2).

[10] Joint minutes were prepared by the orthopaedic surgeons, the neurosurgeons, the industrial psychologists (Dr Bosman and Mr Linde subsequently prepared an addendum following a change in the plaintiff's employment circumstances), and the occupational therapists.

[11] The *sequelae* are gleaned from the joint minutes of the various experts. The plaintiff has, or suffers from, severe to very severe major depressive mood disorder, some relative neurocognitive weaknesses, neck pain and headaches, and severe left groin pain aggravated by activity and lying on her left side, which affects her ability to sleep. She has become socially isolated and withdrawn, and is unable to participate in the physical activities from which she derived joy and affirmation. She has become tearful, irritable, short tempered and has feelings of worthlessness. She experiences insomnia, fatigue and forgetfulness.

[12] The physical injuries sustained by the plaintiff are more or less common cause. The orthopaedic surgeons agree that she sustained fractures of the left superior rami and multiple rib fractures. They agree that with adequate treatment she should be able to continue working in her current capacity until retirement age but defer to the opinions of the occupational therapists and the industrial psychologists in this regard.

[13] The neurosurgeons agree that the plaintiff suffered a mild traumatic brain injury in the accident, chest trauma and fractured ribs. Dr Kruger suggests that due to the severity of the plaintiff's lumbar back injury, she has a 10% chance of future lumbar spine injury.

[14] The clinical psychologists highlight the potential significance of the plaintiff's present clinical and neuropsychological status on her earning capacity. She has

suffered a profound diminution of quality of life. The accident has resulted in the plaintiff suffering severe long-term mental or behavioural disturbance or disorder. They disagree on whether the plaintiff suffers from post-traumatic stress disorder.

[15] The occupational therapists agree that the plaintiff has a reduced work capacity and that she is a vulnerable employee due to a combination of her physical and neurocognitive difficulties; that the plaintiff is likely to have difficulties succeeding in occupations requiring higher cognitive abilities due to the nature of her neurocognitive impairments, as these deficits may result in error proneness; and that the plaintiff would be suited for sedentary to light work, such as her current occupation as a personal assistant.

[16] Both agree that she will have less efficiency as far as standing, walking, climbing, lifting and carrying is concerned. Ms Magoele opines that the plaintiff would be suited for low to medium type work, subject to adequate rest breaks when in pain. Ms Burger is of the view that the plaintiff is suited to light work but with certain specific limitations, including that she will only be able to do standing work and forward-bending standing work for 2 hours during an 8 hour day.

[17] They agree on loss of amenities, reduced leisure activities with children, and that the plaintiff's ability to perform household tasks has been affected. They agree that the plaintiff has become an emotionally vulnerable employee in the open labour market as a result of the psycho-social *sequelae* of the accident.

Career path development, employment prospects, and earning capacity

[18] The plaintiff is married with two minor children. She holds a grade 12 level of education. She worked as a waitron between December 2007 and May 2010, then as Senior Manager at the Amigo Spur, Vanderbijlpark, before joining Occupational Care South Africa (OCSA) at the end of September 2014, as a personal assistant, where she still worked at the time of the accident.

[19] The industrial psychologists agree that but for the accident, the plaintiff would probably have continued working as a personal assistant, earning within the Paterson Level B2 scale. She would have been capable of increasing her earnings after gaining workplace experience, knowledge, skills, and qualifications, and as such would have become eligible to apply for similar positions at a more senior level in larger organisations.

[20] According to the plaintiff's experts, she would have been able to progress from Paterson B2 level to C1 level by the age of 40—45 years, reaching her ceiling at the C1 level. She would thereafter receive inflationary increases until retirement at age 65. The defendant's expert suggests a career ceiling at 40—45 years at Paterson B5/C1, and that the average between the two career ceilings should be used for calculations.

[21] In respect of her post-accident work situation, the industrial psychologists agree that the plaintiff is a vulnerable employee. Should she lose her current employment (at OCSA at the time of the joint minute), given her medical history, cognitive and psychological difficulties and resulting impact thereof on her performance and efficiency, she would find it difficult to secure and sustain similar employment elsewhere.

[22] They agree that at best she will continue to earn within the Paterson B2 level taking into account her poor prognosis. She is no longer seen as a candidate for career progression to Paterson C1 level. The plaintiff's experts recommend that a higher contingency deduction be considered in relation to the likelihood of the plaintiff losing her present employment and her significantly reduced employability outside a sympathetic work environment.

[23] The defendant's expert notes that the accident has reduced her optimal competitiveness and thus she will experience some challenges performing on par with her healthier and uninjured counterparts in the open labour market. She will likely no longer be able to perform in her pre-accident capacity. He notes the challenges she currently experiences due to the accident and recommends that a

relevant post-accident contingency percentage be applied, which he leaves in the hands of the court.

[24] At the time of the joint minute, the plaintiff's experts recommended for the purposes of quantification that the plaintiff's earning potential is 5/8ths of the Paterson B2 level (meaning that she is better suited to reduced working hours offered by a 5/8th position) and, in addition, a higher than usual contingency deduction in respect of future injured earnings.

[25] The plaintiff was retrenched from her employment at OCSA in September 2020, and so lost her "sympathetic" employment, as forecasted by the industrial psychologists. She gained employment at SPUR Vaal Mall, but left after less than a year as she could not cope with the physical demands of the position (she was required to be on her feet permanently). She found alternative employment as a Trainee Clinical Technician at LLM (Labour Medical Monitoring) Occupational Health Service where she currently earns R 14,000 per month, with no benefits. It is predicted she will receive only inflationary increases until retirement at age 65. Due to the nature of work she is still required to move around and she suffers from hip pain and discomfort.

[26] The plaintiff's industrial psychologists prepared a supplementary report following the change in her employment circumstances. When asked about her prospects, the plaintiff answered that she believes that she will work in her current capacity until retirement. Her salary is unlikely to increase. Sister Marx, Director at LMM, says that in terms of career path the plaintiff will continue working as a technician until retirement, with annual inflationary salary adjustments.

[27] During her time at Spur, the plaintiff's earnings fell within the Paterson A3 level. Her current earnings at LMM amount to R 168 000 per year which falls within the median of the Paterson A2 level. They submit that her earnings will remain at 5/8 of Paterson B2 in a half-day position, or within Paterson A2 level in a full-time position, such as her current position. They suggest that the plaintiff's actual earnings be used as the basis for future earnings calculations. Her current earnings of R 14 000 is more or less 5/8ths of the Paterson B2 level.

[28] The approach to determining loss of earnings and applicable contingencies, was recently explained by the Supreme Court of Appeal in *Road Accident Fund v Kerridge*:[1]

> [40] Any claim for future loss of earning capacity requires a comparison of what a claimant would have earned had the accident not occurred, with what a claimant is likely to earn thereafter. The loss is the difference between the monetary value of the earning capacity immediately prior to the injury and immediately thereafter. This can never be a matter of exact mathematical calculation and is, of its nature, a highly speculative inquiry. All the court can do is make an estimate, which is often a very rough estimate, of the present value of the loss.
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> [41] Courts have used actuarial calculations in an attempt to estimate the monetary value of the loss. These calculations are obviously dependent on the accuracy of the factual information provided by the various witnesses. In order to address life's unknown future hazards, an actuary will usually suggest that a court should determine the appropriate contingency deduction. Often a claimant, as a result of the injury, has to engage in less lucrative employment. The nature of the risks associated with the two career paths may differ widely. It is therefore appropriate to make different contingency deductions in respect of the pre-morbid and the post-morbid scenarios. The future loss will therefore be the shortfall between the two, once the appropriate contingencies have been applied.
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> [42] Contingencies are arbitrary and also highly subjective. It can be described no better than the oft-quoted passage in Goodall v President Insurance Co Ltd where the court said: 'In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by authors of a certain type of almanack, is not numbered among the qualifications for judicial office.'
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> [43] It is for this reason that a trial court has a wide discretion when it comes

[1] 2019 (2) SA 233 (SCA) at paras [40]—[44].

to determining contingencies. An appeal court will therefore be slow to interfere with a contingency award of a trial court and impose its own subjective estimates. …

[44] Some general rules have been established in regard to contingency deductions, one being the age of a claimant. The younger a claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings they include, inter alia, a downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill health, death, and the myriad of events that may occur in one's everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in a pre-morbid scenario, generally awarded higher contingencies, the younger the age of the claimant. This court, in Guedes, relying on Koch's Quantum Yearbook 2004, found the appropriate pre-morbid contingency for a young man of 26 years was 20% which would decrease on a sliding scale as the claimant got older. This, of course, depends on the specific circumstances of each case but is a convenient starting point.

[29] In quantifying the monetary value of the loss of earning capacity, the court must remember that the case depends on its own facts and circumstances, as well as the evidence placed before the court by the plaintiff.[2]

Past loss of earnings

[30] The plaintiff's gross past uninjured earnings was calculated by Mr Whittaker to be R 370,814. He applied a contingency deduction of 5%, resulting in the net past uninjured earnings of R 352,273.

[31] The plaintiff's injured earnings were calculated at R209 556, minus a contingency deduction of 5%, resulting in a net value of income injured of R 199,078. This makes a total net past loss of R 153 195. A contingency

[2] *Terblanche v Minister of Safety and Security* 2016 (2) SA 109 (SCA) at par [14].

deduction of 5 % in respect of both injured and uninjured income is acceptable under the circumstances.

Future loss of earnings

[32] Plaintiff's counsel presented three scenarios (which incorporates past loss of earnings), set out in the updated actuarial report of 2 May 2022:

a. Scenario 1: Using the plaintiff's current salary with inflation in the injured state and applying a 16% contingency in respect of the Plaintiff's future uninjured income, and a 36% contingency in respect of the Plaintiff's future injured income, results in a net loss of R 4 397 222.00. The plaintiff's uninjured ceiling is taken as the median-guaranteed package of the Paterson C1 level.
b. Scenario 2: Again, the plaintiff's uninjured ceiling is taken as the median-guaranteed package of the Paterson C1 level. But instead of using the current salary, future injured earnings are determined at 5/8ths of Paterson B2 level i.e. R 163,750 per annum (March 2022 money terms) increasing in line with inflation until retirement. This results in a net loss of R 4,445,580.
c. Scenario 3: The uninjured ceiling is the average of the (Paterson B5 & C1 levels) and (Paterson C1 level) at age 42½. Future injured earnings of R 18,565.95 per month (September 2019 money terms) increasing in line with inflation until retirement, resulting in a net loss of R 3,144,561.

[33] The assessment of contingencies is largely arbitrary and depends on the court's impression of the case. The contingencies allow for general hazards of life such as periods of unemployment, possible loss of earnings due to illness and risk of future retrenchments. There are guidelines to assist the court. Generally, the younger a claimant, and the longer the remaining working life of a claimant, there is more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. As a result courts have, in a pre-morbid scenario, generally awarded higher

contingencies, the younger the age of the claimant. In past cases, the Supreme Court of Appeal has found the appropriate pre-morbid contingency for a young man of 26 years was 20% which would decrease on a sliding scale as the claimant got older. Although dependant on the specific circumstances of each case, it serves as a convenient starting point.

[34] I am satisfied with the suggested 16% contingency deduction in respect of future uninjured income, which is line with the widely accepted sliding-scale of Dr Robert Koch, of applying 0,5% per annum for the remainder of the plaintiff's working life. In *casu* the industrial psychologists recommended a future income injured contingency deduction that is higher than usual, for the reasons already given above. I am sympathetic to the concerns raised by the experts, but under the circumstances I consider 36% to be too high. The plaintiff now seems to be in more stable employment in an environment that, for the most part, accommodates her other difficulties. However, I still think a high contingency rate is called for. A contingency deduction of 30% is fair and reasonable under the circumstances.

[35] I am inclined to reject scenario 3; its approach to the determination of past and future loss does not accord with the facts. I consider scenario 1 to be the most practical and fairest means of determining the plaintiff's loss, under the circumstances. Using the plaintiff's actual income is sensible. The detailed calculations, with the reduction of the contingency on future income injured from 36% to 30%, are set out in the table below.

Uninjured ceiling at the median-guaranteed package of the Paterson C1 level. Future injured earnings of R 14,000.00 per month (March 2022 money terms) increasing in line with inflation until retirement.

Past loss		**Future loss**	
Value of income uninjured:	R 370,814	Value of income uninjured:	R 7,596,749
Less contingency deduction: 5.00%	R 18,541	Less contingency deduction:	R 1,215,480

		16.00%	
	R 352,273		R 6,381,269
Value of income injured:	R 209,556	Value of income injured:	R 3,339,441
Less contingency deduction: 5.00%	R 10,478	Less contingency deduction: 30.00%	R 1,001,832
	R 199,078		R 2,337,609
Net past loss:	R 153,195	Net future loss:	R 4,043,660
		Total net loss:	R 4,196,855

[36] In summary, the defendant is liable to pay the Plaintiff the total sum of R 4,696,855: R 4,196,855 for loss of earnings, and R 500,000 for general damages.

[37] The psychologists have recommended the creation of a trust to protect the financial interests of the plaintiff, and to assist her in the management and administration of the award. This recommendation is based on the psychological state of the plaintiff.

[38] The plaintiff accepts this recommendation and has consented to the creation of a trust. She indicates her understanding of the implications thereof, in particular that the award will not be paid directly to her, in a signed statement.

[39] Plaintiff's attorneys recommend the appointment of Mr. Hendrik Jacobus van Heerden, who practises at Enonix (Pty) Ltd Trust Administration, as trustee. A purported letter of acceptance is attached to the papers, but it is in respect of a different person, not the plaintiff. I am prepared to sanction the appointment of Mr. van Heerden, subject to his formally accepting the appointment as trustee. The proposed name of the trust is the WDJ VAN VUUREN TRUST.

[40] This litigation was conducted on a contingency basis. The appropriate affidavits were filed and I am satisfied that there has been compliance with the Contingency Fees Act 66 of 1997.

[41] I shall grant an order along the lines proposed in the draft order, also in respect of costs.

IN THE RESULT THE FOLLOWING ORDER IS MADE:

1. The Defendant shall pay the sum of R 4,696,855 (FOUR MILLION, SIX HUNDRED NINETY-SIX THOUSAND, EIGHT HUNDRED AND FIFTY-FIVE RAND) to the Plaintiff's attorneys, Erasmus de Klerk Inc., in settlement of the Plaintiff's claim, which amount is calculated as follows:

1.1 Loss of Income: R 4,196,855.

1.2 General Damages: R 500,000.

The settlement amount shall be paid by direct transfer into the trust account of Plaintiff's Attorneys, details of which are as follows: ERASMUS DE KLERK INC ABSA Bank Account number: 406 383 9468 Branch number: 632 005 Rosebank Ref.: J Erasmus/VAN VUUREN WDJ

2. The capital amount referred to in paragraph 1:

2.1 will be payable within 180 days from date hereof;

2.2 will bear interest at the rate of 7.25% per annum calculated from and including the 15 (FIFTEENTH) calendar day after the date of this Order to and including the date of payment thereof.

3. The Defendant shall provide the Plaintiff with an Undertaking as envisaged in Section 17 (4) (a) of Act 56 of 1996, for 100% of the costs of the future accommodation in a hospital or nursing home and such treatment, services or goods as the plaintiff may require as a result of the injuries that she sustained as a result of the accident which occurred on 27 May 2016, as set out in the medico legal reports obtained on behalf of the Plaintiff, after

such costs have been incurred and upon proof thereof, which costs shall include:

3.1 The cost to be incurred in the establishment of a trust to inter alia protect, administer and/or manage the capital amount and the proceeds thereof referred to in paragraph 1;

3.2 The remuneration of the trustee in administering the capital amount, which amounts to 1% per annum on the amount held in the trust.

3.3 The costs of the furnishing of annual security in terms of section 77 of the Administration of Estates Act, Act 687 of 1965 (as amended).

4. That the attorneys for the Plaintiff, Erasmus de Klerk Incorporated, are ordered:

4.1 To cause a trust ("the trust") to be established in accordance with the Trust Property Control Act No. 57 of 1988, within six months of date of granting of this order and shall approach the above Honourable Court for condonation and further direction should the trust not be established within the said period of six months;

4.2 To deposit all proceeds in terms hereof in an interest-bearing account, for the benefit of the Plaintiff, as contemplated in the Legal Practice Act, pending the establishment of the trust;

4.3 To pay all monies held in trust by them for the benefit of the plaintiff, immediately to the trust, upon creation of the trust.

5. The trust instrument contemplated above shall make provision for the following:

5.1 that the plaintiff is the sole beneficiary of the trust during her lifetime and after her death, her lawful descendants;

5.2 that the first trustees shall be HJ van Heerden as representative of Enonix (Pty) Ltd;

5.3 that the trustee(s) are to provide security to the satisfaction of the Master during the lifetime of the plaintiff;

5.4 that the ownership of the trust property vest in the trustees of the trust in their capacity as trustees;

5.5 procedures to resolve any potential disputes;

5.6 that the trustees be authorised to recover the remuneration of, and costs incurred by the trustees, in administering the undertaking in terms of Section 17(4)(a) of Act 56 of 1996 in accordance with the certificate of undertaking to be provided by the Defendant;

5.7 that the amendment or termination of the trust instrument be subject to the leave of this Honourable Court during the lifetime of the plaintiff;

5.8 that the trust property and the administration thereof be subject to an annual audit during the lifetime of the plaintiff.

6. Subject to the discretion of the Taxing Master, the Defendant must make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale, which costs include (but not limited to):

6.1 The costs of senior-junior counsel (which is to include, inter alia, preparation, perusal, and counsel's fees for 2 June 2022, 3 June 2022 and 10 June 2022);

6.2 The costs of attorneys;

6.3 All the cost in obtaining all medico legal/expert and actuarial reports, as well as the Plaintiff's travelling in attending the Plaintiff's experts, of the following Doctors or Experts:

6.3.1 Dr C. Barlin (Orthopaedic Surgeon);

6.3.2 Dr D Koton (Dentist);

6.3.3 Dr JH Kruger (Neurosurgeon);

6.3.4 Trevor Reynolds (Clinical Psychologist);

6.3.5 Dr M Close (Psychiatrist)

6.3.6 Alison Crosbie Inc – Franja Burger (Occupational Therapist);

6.3.7 Louis Linde (Industrial Psychologist);

6.3.8 Algorithm Actuaries & Consultants - G.A. Whittaker (Actuary).

6.4 The above costs will also be paid into the aforementioned trust account.

7. The Plaintiff's attorneys shall be entitled to make payment of expenses incurred in respect of accounts rendered by: -

7.1 the expert witnesses set out in paragraph 6.3 supra; and

7.2 counsel employed on behalf of the Plaintiff, from the aforesaid funds held by them for the benefit of the Plaintiff.

8. The Plaintiff's attorneys shall not recover their fee until such time as the party and party bill of costs has been taxed.

9. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-

9.1 The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;

9.2 The Plaintiff shall allow the Defendant 14 (FOURTEEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;

9.3 Should payment not be affected timeously, Plaintiff will be entitled to recover interest at the prescribed rate of 7.25% on the taxed or agreed costs from date of allocator to date of final payment.

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M Olivier
Acting Judge of the High Court
Gauteng Division, Johannesburg

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 16h00 on 9 September 2022.

Date of hearing:	10 June 2022
Date of judgment:	9 September 2022

Appearances:

On behalf of the Plaintiff:	D. Combrink
Instructed by:	Erasmus De Klerk Inc

No appearance on behalf of the Defendant