

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: **32449/2007**

THE HONOURABLE ACTING JUSTICE ROELOF DU PLESSIS

In the matter between:

H MELCK

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

<p>JUDGMENT</p>

1. This is an application for leave to appeal against a judgment which I delivered on 28 February 2012, which was based on a draft order that was drafted by both parties after all issues in dispute had been settled, save one outstanding issue.
2. The only issue that had to be decided by me was the issue of the percentage of contingency to be applied to the loss of earning capacity suffered by the minor child, whose father instituted the action on her behalf.
3. The minor child suffered severe brain injuries as a result of an accident. It was common cause between the parties that the only possible employment

that she would be able to obtain in future would be sheltered employment. She was a normal child before the accident and was a passenger in a motor vehicle when the accident occurred.

4. I do not intend to elaborate further on the facts as I have dealt with the relevant facts in my judgment.
5. In my judgment I referred to the case law and guidelines in case law up to the date of my judgment that indicated that contingencies for children should generally be 25%. It was argued by plaintiff that a contingency percentage of 20% should be awarded, and the defendant argued that a higher percentage should be awarded.
6. In the light of the fact that a normal child was disabled for the rest of her life, and the effect thereof, I came to the conclusion that a contingency of 7% would be fair and reasonable under the circumstances.
7. It is this finding that forms the basis of the application for leave to appeal.
8. In the application for leave to appeal, both parties provided me with comprehensive heads of argument pertaining to the case law applicable to contingencies.
9. Certain judgments were referred to in argument, where contingency percentages as low as 15% were applied, in matters where the injured persons became entirely unemployable, or had suffered mental retardation,

and permanent impairment. (See **Nkomo v President Insurance Co Ltd 1992 (4) C&B A4-82 (W)**, **Uijs v General Accident Versekerings Maatskappy Beperk 1991 (4) C&B A4-88 (C)**, **Hurter v Road Accident Fund and Another 2010 6 QOD A4-12 (ECP)**, **Hendricks v Minister of Safety & Security (Eastern Cape High Court, Grahamstown case number 331/05)**, **Cordeira v Road Accident Fund 2010 6 QOD A4-45 (GNP).**)

10. The applicant relied on various cases where a contingency allowance was made between 15% and 25%. (See **Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A)**, **MM Makangu v Road Accident Fund case number 30137/2003**, **Megalane v Road Accident Fund**, **Penane MA v Road Accident Fund case number 7702/2006**, **Goodall v President Insurance Co 1978 (1) SA 389 (WLD).**)
11. I have to consider whether there is a reasonable possibility that another court will overturn my finding, what the approach of an appeal court to these types of cases would be, and whether or not I have exercised my discretion correctly under the circumstances.
12. Whether an appeal court will, with reference to the case law referred to above interfere, on the basis that there was a misdirection, or that I had not considered all the relevant facts, is the question that I must consider.
13. Although I am of the view that it is possible that a higher court will not interfere with the judgment, I cannot discount the possibility that such a

finding may be made, especially in the light of the fact that no authorities were quoted to me where a contingency percentage was allowed as low as the 7% I had allowed in this matter.

14. I am therefore of the view that another court may reasonably come to a different finding, and that a court of appeal may even interfere with the exercise of my discretion under the circumstances.

15. I therefore make the following order:

15.1. The applicant (defendant in the court *a quo*) is granted leave to appeal to the Supreme Court of Appeal of the Republic of South Africa on the question whether the contingency deduction of 7% should have been applied, and if not, to determine the contingency percentage which should be applied.

15.2. The costs of the application for leave to appeal shall be costs in the appeal.

DATED AND SIGNED AT PRETORIA THIS 13TH DAY OF FEBRUARY 2013.



ACTING JUDGE ROELOF DU PLESSIS