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**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NUMBER: 2016/8525**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO

In the matter between:-

**V: C**

Plaintiff

and

**THE ROAD ACCIDENT FUND**

Defendant

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**JUDGMENT**

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**FMM SNYMAN (AJ)****Introduction**

- [1] The matter came before me to determine the percentage of contingency fee deduction that would be reasonable and fair as compensation of the plaintiff's loss of future income or potential future earnings.
- [2] The merits of the matter have been settled between the parties to the effect that the plaintiff would be entitled to 90% of her proven loss.
- [3] On 8 March 2015 and the age of 23, whilst driving a sedan motor vehicle, the plaintiff was in a head-on collision with a truck. The South African Police Service Accident Report reflected that the truck crossed over to the lane in which the plaintiff was travelling and collided with her vehicle. The plaintiff's vehicle tumbled from the bridge where the vehicles were traveling and came to a stop below the bridge. The plaintiff sustained serious injuries resultant from the collision.

**Injuries and treatment**

- [4] The plaintiff suffered "serious long-term impairment or loss of a body function(s)" as reflected in the Narrative Test stipulated in paragraph 5.1 of the defendant's RAF 4 Report. Both parties' medical experts

confirmed that the plaintiff's injuries will cause serious long term impairment to the plaintiff.

[5] As a result of the collision, the plaintiff sustained a mild concussion, soft tissue injuries of her neck, blunt abdominal trauma, a fracture of her left clavicle, soft tissue injuries of her left hip, both knees as well as her lower back. She further sustained a chest contusion with lacerations and burn marks to her face and to the right upper side of her chest as well as a contusion on her right lower lung. The plaintiff did not have any pre-existing medical conditions and was "perfectly healthy" when the collision occurred.

[6] The plaintiff currently presents with cervical spondylosis, which is a general term for age-related wear and tear affecting the spinal disks in the neck. As the disks dehydrate and shrink, signs of osteoarthritis develop, including bony projections along the edges of bones. She also suffers from chronic mechanical pains and headaches. The spondylosis is exacerbated as a result of the collision. The plaintiff also suffers from severe restriction in the movement of her spine, hips and knees.

[7] It is common cause that the plaintiff will have to undergo future medical treatment entailing a neck surgery, arthroscopy of both knees (which is a minimally invasive surgical procedure on a joint in which an examination and sometimes treatment of damage is performed using

an arthroscope) and debridement (which entails the removal of damaged tissue or foreign objects from a wound) for damages to the patella-femoral joints of both knees of the plaintiff, more specifically where the patella (kneecap) and femur (thigh bone) meet at the front of the knee.

[8] Both parties' medical experts also agree that these surgeries have to be performed at least twice in the plaintiff's lifetime due to her young age at the time of the collision.

[9] The neuropsychological assessments indicated that the plaintiff has reduced cognitive functioning including persistent difficulties in her attention span, which detracts from her ability to sustain performance, encode information to memory, work quickly and accurately and complete complex tasks. Subsequent to the collision she is also prone to making errors under pressure, she is easily distracted and her performance accuracy decreased with the length of individual tasks.

[10] On a psychological level, the plaintiff presents with a severe anxiety disorder, major depression, an adjustment disorder and post-traumatic stress disorder which includes hyperarousal of sounds and voices, avoidance of places and people and intrusive thoughts, all of which have a negative impact on her work performance. These impairments are likely to have a continued reductive impact on the occupational functioning of the plaintiff. The presence of chronic pain, loss of full

functionality in her lower back, legs and knees, would also make it challenging for her to function optimally in sedentary positions.

[11] Both parties' occupational therapists, however, concluded that the plaintiff would be able to work within sedentary to light categories of work and would be able to cope within her chosen occupation as a senior articles clerk (actuarial). This comes with a proviso that the plaintiff be accommodated by her employer to receive physiotherapy and rehabilitation to prevent exacerbation of her symptoms. The occupational therapists agree that the plaintiff is considered a vulnerable employee in the open labour market having her career prospects negatively affected as a result of the collision.

## **Education**

[12] The plaintiff completed Grade 12 level of schooling and thereafter she completed a Higher Certificate in Business Management Principles in 2010. She also obtained a Bachelor of Commerce in Financial Management in 2014. After the collision in 2015 the plaintiff was registered as a trainee accountant with the South African Institute from 9 December 2016 to 9 December 2019 at the South African Institute of Professional Accountants (SAIPA).

[13] The plaintiff was a passionate ballerina from the age of 3. She completed the Royal Academy Dance examination in 2011. She had

some professional dancing experience and performed for Mzansi Productions and she performed in the Nutcracker during 2009. Following her dancing career, she decided to pursue a professional career in accountancy and commenced work as an accountant article clerk for JC Scheepers Accounting on 16 February 2015. She was working in this position for a period of approximately two weeks when the collision occurred.

[14] The plaintiff resigned on 31 March 2015 and secured a position as an accountant at MJS Mining Supplies, which she resigned from on 30 April 2016. The plaintiff thereafter secured a position as a trainee accountant at 123 Consulting (PTY) on 3 May 2016, which position she held in 2017 when the industrial psychologist reports were drafted.

[15] The joint minutes of the industrial psychologists reflect that the plaintiff secured employment in line with the Paterson B5 median level (annual package) following the collision, even with her limitations. This reflects her potential to progress despite the injuries sustained in the collision. These joint minutes also reflect that it is not unreasonable to assume that the plaintiff could progress to, at least, the level of an individual with a degree level of education which would be earning a total annual package in line with the Paterson D1 median level. This would then have inflationary increases until retirement at the age of 60 to 65.

[16] The industrial psychologists further agree that the plaintiff will experience a 3 to 5 year delay in her career progression. They also postulate that the plaintiff might be able to function at her pre-morbid levels with the correct treatment and an accommodative employer.

[17] Despite the above postulation, both industrial psychologists recommend the application of a differentially higher contingency to be applied to account for (a) the plaintiff's time off work to receive the recommended surgeries and treatment, (b) the requirement of an accommodative employer to facilitate and allow time from work for treatment (c) her limitation in vocational options due to the injuries, (d) the plaintiff's possible slower and decreased salary progression in not reaching the same earnings peak as postulated in her uninjured state, and (e) she can no longer pursue a career in dancing, had she intended to do so.

[18] I hold the view that the plaintiff's quality of work may be negatively impacted in that she would not be able to ventilate stress through dancing as a result of the collision. Subsequent to the collision she is left with a greater chance of being subjected to the vicissitudes of life. (**Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A)** at 119D – H).

## **Assessment**

[19] It is so that the plaintiff's life has irreparably been altered by the collision. For pain and suffering, and loss of life's amenities the plaintiff is compensated in the amount of general damages, an amount that the parties have settled *inter partes*. I have to assess what percentage of contingency would be fair and reasonable to apply to the plaintiffs' future loss of income, alternatively potential loss of earnings.

[20] The Supreme Court of Appeal has recently held in **Road Accident Fund v Kerridge** 2019 (2) SA 233 (SCA) in paragraph 40:

*“[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.”*

### **Calculations of contingencies**

[21] In **Botha v Road Accident Fund** 2015 (2) SA 108 (GP) it was held by Victor J that:

*“[33] The once-and-for-all rule is of importance here. It cannot assist a plaintiff who may in the future, depending on the nature of the injury, be subjected to a loss of earning capacity which he/she cannot quantify with exactitude at the time of trial.*

*Therefore, based on this principle, the court must at this stage determine the question of future loss of income.”*

- [22] In determining what percentage of contingency differential would be fair and reasonable, I take guidance from Nicholas JA, set out in **Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A)** at 113G – 114A, where he stated as follows:

*“It has open to it two possible approaches. One is for a Judge to make a round estimate of 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 to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on 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 greater or lesser extent. But the court cannot for this reason adopt a non possumus attitude and make no award.”*

- [23] In **Sil and Others v Road Accident Fund 2013 (3) SA 402 (GSJ)** it was held by Sutherland J as follows:

*“[13] An 'annual loss' cannot be the equivalent of the 'annual income' because the projected annual income is merely a part of the exercise in calculating the actual loss. In projecting a future actual loss, the exercise contemplates the chances of not achieving the projected rate of earnings by factoring in predictable risks. Those risks are expressed as the given contingencies. There is no other place in the calculation process where, sensibly, the contingencies could be usefully intruded*

*into a calculation of loss, that is to say the net loss or, more appropriately, the 'actual loss'. The important point to guard against is employing phraseology that is likely to obscure the critical point that the word 'loss' ought to be reserved for what is indeed suffered, and used to allude to what is to be paid by way of compensation."*

[24] Mr Tshimna argued on behalf of the defendant that the plaintiff has not suffered any mental status impairment or disability which could prevent her from performing any actions, which include the complete and full execution of her occupational duties. This is indeed stated as such by the plaintiff's neurologist. I accept that on a clinical level the mental status of the plaintiff has not been impaired. However, in the joint minutes the clinical psychologists agree that the plaintiff has suffered severe psychological damages as set out in paragraph 10 above. These psychological impairments will most definitely have a negative impact on the plaintiff's performance at work.

[25] The defendant's argument is based on the further premises that the industrial psychologists postulate a delay of 3 to 5 years in career progression, and as such the future loss of income for the plaintiff should be limited to a period of 3 to 5 years. Put differently, the defendant advances that the plaintiff should be compensated only for the 3 to 5 years that she would be disadvantaged as a result of the collision.

[26] The defendant further argues that, due to the plaintiff's potential capability to reach her pre-morbid future income, a contingency differential of 5% would be just and fair.

[27] Application of the defendant's argued contingencies would result in a monetary amount of R 838,572. This is calculated as follows:

	20%	25%	5%
	Had accident not happened	Now that accident did happen	Difference = Loss
Future earnings	R 9,772,690	R9,306,106	
Less contingency deduction	R 1,954,538	R 2,326,526	
Total loss of future earnings	R7,818,152	R 6 979 579	R 838,573

[28] The plaintiff's argument is that a higher contingency should be allowed, on the basis as set out in paragraphs 15 and 17 above and agreed upon by the industrial psychologists. The plaintiff argues that a contingency of 20% should be allowed on the scenario "but for the incident" as 20% is the "norm" for future loss of income, and a contingency of 50% should be applied on the scenario "having regard to the incident" which would be a high contingency and justifiable in these circumstances. This would leave the plaintiff with a contingency differential of 30%.

[29] On the other hand, the application of the plaintiff's argued contingencies would result in a monetary loss of R3,297,150, calculated as follows:

	20%	50%	30%
	Had accident not happened	Now that accident did happen	Difference = Loss
Future earnings	R 10,212,862	R9,746,278	
Less contingency deduction	R 2,042,572	R4,873,139	
Total loss of future earnings	R 8,170,289	R4,873,139	R 3,297,150

[30] I deem it necessary to repeat that both parties' experts agree that the plaintiff, with the correct medical care, surgeries and rehabilitation, may recover to such an extent that she might have the potential to reach her pre-morbid condition since she was only 23 when the collision occurred. The counter to that argument, however, is that the plaintiff is at much more risk having regard thereto that every surgery carries with it, its own risks of complications, with anaesthetics and unforeseen surgical implications and as such might leave the plaintiff with much less potential to reach her pre-morbid condition. These conditions are also taken into account when determining a fair and reasonable percentage of contingencies.

[31] Having considered the various medico-legal reports, the different legal approaches and the submissions by counsel for both the plaintiff and

defendant, I am persuaded that application of contingencies as set out in paragraph 33 hereunder would be reasonable and fair in these circumstances.

[32] In determining the monetary amount with application of the contingencies, I use the values of the defendant's industrial psychologist. These values take into account future earnings on scenarios had the accident not occurred and now that accident had indeed occurred. Application of 20% on the pre-morbid scenario, and application of 35% on the post-morbid scenario, leads to a contingency differential of 15% which would result in the monetary amount R1,769,183. This monetary amount of R1,769,183 is calculated as follows:

	20%	35%	15%
	Had accident not happened	Now that accident did happen	Difference = Loss
Future earnings	R 9,772,690	R9,306,106	
Less contingency deduction	R 1,954,538	R3,257,137	
Total loss of future earnings	R7,818,152	R6,048,986	R1,769,183

[33] I was not made aware of any contingency fee agreement.

I make the following order:

1. The defendant is liable to compensate the plaintiff for 90% (ninety percent) of the plaintiff's delictual damages suffered as a result of the motor vehicle collision on 8 March 2015.
  
2. The issue of the plaintiff's past hospital and medical expenses is separated from all the other heads of damages in terms of Rule 33(4) of the Uniform Rules of Court, and is postponed *sine die*.
  
3. The defendant shall pay the capital amount of **R2,219,183.00 (Two Million Two Hundred and Nineteen Thousand, One Hundred and Eighty Three Rand)** for the following delictual damages, calculated as follows:
 

3.1	Loss of Earnings:	R 1,769,183.00
3.2	General Damages:	<u>R 450,000.00</u>
3.3	Total:	<b>R 2,219,183.00</b>
  
4. The capital amount is payable by means of direct fund transfer on or into the trust bank account of the plaintiff's attorneys; Du Plessis Attorneys, 2<sup>nd</sup> Floor 88 Fox Street, Cnr Harrison Street, Johannesburg Tel (011) 331 1223; Fax (011) 331 8828 Ref Mr M du Plessis / V.
  
5. No interest will be payable except in the event of default of payment before or on 31 March 2020 in which case interest will be payable at

the rate of 10% calculated on the capital amount from the date of this judgment.

6. The defendant shall furnish plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, of the costs of the future accommodation of the plaintiff in a hospital and nursing home and treatment of and rendering of a service to the plaintiff and supplying of goods to the plaintiff arising out of the injuries sustained by the plaintiff in the motor vehicle collision on 8 March 2015 after such costs have been incurred and upon proof thereof;
7. The defendant shall pay the plaintiff's taxed or agreed party and party costs up to 20 February 2020 on the High Court scale, which party and party costs shall include, but not be limited to:
  - 7.1 The reasonable costs in respect of the preparation of the medico legal reports, consultations with the medical experts, completing the RAF 4 serious injury assessment with evaluation as well as the actuarial calculations, and other expert accounts;
  - 7.2 Consultations when detailed instructions were given due to the complexities of the matter;
  - 7.3 Costs of counsel;

- 7.4 The travelling costs of the plaintiff to and from all medico-legal appointments and consultations;
  - 7.5 The cost of the preparation and making 5 copies of all bundles for purpose of trial;
  - 7.6 Qualifying and / or reservation and / or preparation fees, if any for the trial on 20 February 2020 to be proven to the taxing master of the plaintiff's expert witnesses.
  - 7.7 As well as the reasonable preparation fees of the overlapping experts in respect of the joint meeting discussions, preparation and drawing of the joint expert minutes;
  - 7.8 Any costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 3 *supra*, as well as any costs attended upon the obtaining of payment of the taxed costs.
8. Subject to the following conditions:
- 8.1 The plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the defendant's attorney of record; and
  - 8.2 The plaintiff shall allow the defendant 14 (fourteen) court days to make payment of the taxed costs. No interest will be payable,

except in the event of default of payment of such costs, in which case interest will be payable at the rate of 10% from date of taxation.

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**FMM SNYMAN, AJ**  
**ACTING JUDGE OF THE HIGH COURT**

DATE OF HEARING: 20 FEBRUARY 2020

DATE OF JUDGMENT: 05 MARCH 2020

Appearance for the appellant: Adv J Nell  
Instructed by Du Plessis Attorneys  
Tel: 011 331 1223

Appearance for the respondent: Adv Tshimna  
Instructed by Twala Attorneys  
Tel: 011 832 2073