REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2769/2020

NOT REPORTABLE

NOT OF INTEREST

In the matter between:

N, T D Plaintiff

and

CITY OF JOHANNESBURG METROPOLITAN

MUNICIPALITY Defendant

JUDGMENT

VAN DER MERWE AJ:

Introduction

[1] The plaintiff, T N, instituted an action against the defendant for delictual damages suffered as a result of a severe head injury sustained by her when she fell

into a manhole on 24 August 2019. She now suffers from bilateral blindness, constant headaches, seizures and injury related sequelae. The plaintiff was sixteen years old, in grade 10 and well advanced in her pregnancy at the time of the incident.

[2] At the onset of the trial, the defendant applied for a separation of merits and quantum which was opposed by the plaintiff. The only basis for the separation was that, according to the defendant, one of the plaintiff's expert reports being the neurosurgeon's report was "stale" and more than two years old. On the other hand, it was argued on behalf of the plaintiff that she was ready to proceed with the trial and that all the merits and quantum witnesses were available. Moreover, it was submitted that in particular the neurosurgeon would testify with regards to both the issues of merits and quantum and that usually when a report is "stale" (and if there is a need to update such a report), an addendum is filed. No addendum report was filed. Not being convinced that it would be convenient to separate the issues under these circumstances and after considering the appropriate rule and case law[1] the application for separation was refused.

[3] The questions for determination are whether the plaintiff was injured on the day as alleged, whether the sequelae are as a result of the injuries sustained during the incident, the extent of her injuries and the amount of damages to be awarded to the plaintiff in respect of general damages, loss of income and income capacity as well as future medical and related expenses.

The pleadings

[4] In the amended plea which was served on the defendant on 9 November 2021, the plaintiff pleads that:

"5. On the 24 August 2019, at approximately 18:30 at or near Plaintiff's residence and while walking on the sidewalk at night along Kremetart Street, next to

[1] Rule 33(4), Molotlegi and another v Mokwalase[2010] 4 All SA 258 (SCA); Denel (Edms) Bpk v Voster 2004 (4) SA 481 (SCA) para 3; Consolidated News Agencies (Pty) Ltd (In Liquidation) v Mobile Telephone Networks (Pty) Ltd and another 2010 (3) 382 (SCA) paras 89 and 90

Cederberg Street, Eldorado Park, Extention 3, Johannesburg and on her way to her aunt's residence, she suddenly fell into an open manhole ….

6. The Plaintiff who was pregnant at the time was taken to the Rahima Moosa Hospital for Mothers and Children where she was stabilized and assisted with medication. She was discharged the following day. The Plaintiff experienced debilitating headaches and was re-admitted to the hospital some 3 weeks later and only then diagnosed through scans and x-rays."

[5] The plaintiff also increased the total amount claimed from the defendant to **R9 216 000**.

[6] No objection or amended plea was filed by the defendant at the time and the allegations are still denied as per the amended plea.

The evidence

[7] The plaintiff testified herself and called as witnesses, her attorney of record, Mr. Moodley, her brother Mr. N and her mother, Mrs. Beverley N. Her expert witnesses who all conducted reports were called in the following order:

i) Dr. Van Onselen (ophthalmologist)
ii) Morongwa Sekele (occupational therapist)
iii) Mrs.Babitsanang Selepe (Industrial psychologist)
iv) N. Kambaran (actuary)
v) Dr. Mazwe (neurosurgeon)
vi) E.D. Monyela (educational psychologist)

[8] On the evening of 24 August 2019 between approximately 19:00 and 20:00 and at the corner of Kremetart and Cederberg Streets, not far from her home, the plaintiff fell into an open manhole. She landed on her side at the bottom of the manhole and she shifted herself up. It was dark at the time and the streetlights were not working. The plaintiff was walking with her brother to her right and her mother to the far left and in front of her, on their way to her aunt's home to celebrate her

birthday. Although she grew up in the area she was not too familiar with the streets and was in particular not aware of the open manhole. When she realised she had fallen into the manhole she shouted and her brother came to her assistance by using his cellular phone's torch light and climbing down the manhole to lift her up and out of the manhole. He was assisted by a passer-by to pull the plaintiff out of the manhole.

[9] The plaintiff testified that she sustained an injury to her head and pointed towards the bottom of the back of her head which she described as an open and bleeding wound as well as that she sustained wounds to her arm and leg. She could not remember which leg or exactly what injury she sustained on her arm as she was in a state. During cross-examination she said that she must have hit her head against a sharp point in the drain.

[10] Before her brother and mother took her to the Rahima Moosa Hospital for Mothers and Children after the fall, they first went home to change. When she arrived at Rahima Moosa on 24 August 2019, the nursing staff monitored the baby and she was kept there overnight and released the next morning. The baby was the main concern. During her overnight stay she had to sit on the chairs most of the time and was only given a bed in the early hours of the morning. It is common cause that there is no hospital records available for the day when she was admitted.

[11] Since her fall into the manhole she experienced severe headaches, body pain and blurry eyes. After she was released from Rahima Moosa on 25 August 2019 her brother and mother collected her and she continued to suffer from body pains, constant headaches and blurry eyes and went to see a private doctor during that week who prescribed panado tablets only as she was pregnant. She did not want to go back to Rahima Moosa Hospital because of the way they treated her. Even after seeing the private doctor she continued to suffer from blurry eyes and headaches. The blurriness of her eyes came and went, but it continued.

[12] Her next visit to Rahima Moosa Hospital was when she gave birth to her (healthy) baby girl on 8 September 2019. The uncontested evidence of Mrs. Beverly

N is that she took the plaintiff to the hospital at about 10:45-11:15pm on 8 September 2019 to give birth. Mrs. N later received a WhatsApp message from the plaintiff stating that the baby was born. When she went to hospital on 9 September 2019 she noticed that plaintiff's eyes were glassy, that the plaintiff could not recall what happened, she looked lost and it looked like her mind was somewhere else. According to Mrs. N she was told by the doctor that they were aware of the incident which took place (i.e. the fall into the manhole), that the plaintiff was now blind and that she had bleeding on her brain and swelling. After about 4 days she fetched her granddaughter from hospital. The plaintiff was moved to another floor in the hospital and thereafter transferred to Helen Joseph Hospital for about a month.

[13] Both the plaintiff's brother and mother confirmed that the plaintiff fell into the manhole on 24 August 2019, that her head was bleeding, that she was kept overnight at Rahima Moosa Hospital until 25 August 2019, that she was given panado tablets only because of her pregnancy, that she saw a private doctor during the week and that she gave birth on 8 September 2019.

[14] Although there are no hospital records available for these dates, it is clear from the other available hospital records and the undisputed evidence that plaintiff fell into the manhole as described, gave birth on 8 September 2019 and that she was thereafter found to have sustained a brain haemorrhage when CT-scans were performed. The defendant's counsel's submissions (as per the heads of argument) that the plaintiff and her family members concocted their evidence that the plaintiff fell into an open manhole is without merit. The defendant called no witnesses to contradict the plaintiff's version.

[15] The defendant called one merits witness, Mr. Ndlovu, a civil engineer, who has been employed by Johannesburg Roads Agency (JRA) for just more than 6 years. He inspected the manhole in question with the plaintiff's attorney on 8 September 2020. At that stage (approximately one year after the incident) the manhole was covered with a cement slab. When he removed the cover he ascertained that it belonged to the JRA and the defendant. He indicated that a person could fit in the manhole which had iron bars inside that one could use as stairs. He described the depth of the manhole as approximately 2.5 to 3 meters

deep and the width as approximately 0.5 meter. In essence, this witness's description of the manhole in question is similar to the description given by the plaintiff's brother and he could not dispute the evidence that the manhole was not covered on the day of the incident until at least when the plaintiff's attorney of record first took pictures of it on 25 September 2019.

[16] In my view the plaintiff's injury was caused due to the negligence of defendant who failed to take reasonable steps to cover a dangerous manhole on the sidewalk or warn the public of the danger it posed. No contributory negligence was proved by the defendant.

[17] Dr Van Onselen the **ophthalmologist** wrote a report after he considered the available hospital records, the report of the neurosurgeon, performed basic ophthalmic testing and observation and he considered the information provided to him by the plaintiff. According to him, there were two sequences to the history provided. There was visual loss after the fall into the manhole and an exacerbation thereof after she had given birth. The same history was given to the neurosurgeon. The plaintiff complained of blindness since giving birth and frontal headaches as well as pain in both eyes and blurry vision since the fall into the manhole. He diagnosed the plaintiff with bilateral cortical blindness as a result of damage to the occipital lobe when she fell into the manhole and injured the back of her head. From an eye perspective her whole person impairment is 75%. The plaintiff has permanent visual incapacity with a poor prognosis. He testified during the hearing that there is no chance of recovery.

[18] The uncontested evidence of the ophthalmologist is that firstly, the clinical picture is in keeping with cortical blindness and an injury to the back of the brain. Her loss of vision was caused by the damage to her brain. Secondly, the CT-scans taken on 10 and 11 September 2019 revealed intra cranial haemorrhage following trauma and he confirmed that the CT-scan is unequivocal in that the brain haemorrhage is as a result of the trauma versus high blood pressure (for example). The trauma is accordingly attributed to a fall into a manhole about three weeks (3/52) before.

[19] Dr. Mazwe, a **neurosurgeon** confirmed that at the time when he examined the plaintiff on 20 October 2020 she had already reached maximum medical improvement and that since then there was no improvement.

[20] He clarified the cryptic recording in the discharge summary for the adult high care of the Rahima Moosa Mother and Child Hospital dated 12 September 2019. He confirmed the meaning thereof that the plaintiff sustained an intracranial haemorrhage following trauma when she fell into a manhole three weeks before and that she was observed in high care overnight with a GCS of 13/15.[2]

[21] After the plaintiff was discharged from Rahima Moosa, she was transferred to Helen Joseph Hospital where she remained for approximately one month. The plaintiff's injury was diagnosed as an occipital lobe haemorrhage.[3] Dr. Mazwe explained that the occipital lobe is situated at the back of the head and that it is the part of the brain responsible for vision. In his opinion the plaintiff sustained a severe brain injury and he arrived at this conclusion by taking into consideration factors such as the various recorded Glasco Coma Scales (GCS), the brain scan results and neuro-physical deficits which the plaintiff presented with such as left sided weakness, vision dysfunction and expressive speech aphasia. The GCS alone is not indicative of the severity of a brain injury and once a brain scan shows haemorrhages, it is serious. In concluding that the plaintiff brain injury is severe he also considered plaintiff's prolonged loss of consciousness and amnesia. Plaintiff's memory disturbances and poor concentration are due to the head injury. The plaintiff also complained of chronic headaches and he provided for treatment for epilepsy in future. He classified her whole person impairment as 30%.

[22] I accept the neurosurgeon's evidence that all other factors which could have caused a brain haemorrhage were ruled out when the CT scan of the brain and an angiogram were done. These are vascular malformation, aneurysms, ischaemia, high blood pressure and loss of blood supply. High blood pressure can cause a stroke, but plaintiff's blood pressure was normal. No aneurysms, vascular

[2] Caselines 002-29
[3] Caselines 002-32

malformation or a brain tumour were found and none of the other factors were recorded.

[23] This expert further explained that a brain haemorrhage can resolve with time, may remain unchanged for days or weeks or it can keep on expanding /getting worse (as in the plaintiff's case) resulting in neurological deficits or even death. He testified that the plaintiff's haemorrhage worsened, because since her fall into the manhole (where no loss of consciousness was reported) up to the day on which the CT-scan was done on 10 September 2019 (3 weeks / approximately 18 days thereafter), there was a drop in the plaintiff's GCS as per the hospital records.[4] The plaintiff's GCS dropped further to 10/15 as recorded on 12 September 2019.[5] No causes, other than the trauma to the plaintiff's head during the fall into the manhole on 24 August 2019 could explain the haemorrhage. There is accordingly a nexus between the incident and the plaintiff's injuries.

[24] Dr. Mazwe estimated that future treatment due to plaintiff's condition over the plaintiff's lifespan would include medication (R30 000), physiotherapy (R40 000), psychotherapy (R40 000), consultations with her general practitioner (R30 000) treatment for epilepsy (R40 000) and MRI scans (R12 000). The expert evidence in respect of the plaintiff's injuries and future treatment were not meaningfully contested and no experts were appointed on behalf of the defendant to gainsay this evidence.

[25] The **occupational therapist** Morongwa Sekele considered the reports of the neurosurgeon, ophthalmologist and educational psychologist, clinically observed the plaintiff, performed clinical testing, a cognitive impairment test and evaluated her psychologically. The plaintiff presented with a despondent mood and was emotional during the interview. Post-accident the plaintiff cannot perform self-care and domestic tasks independently and requires assistance. Plaintiff's mother assists her with her daily living as she cannot cook, clean, care for her clothes, shop or do home maintenance and has to be accompanied when using public

[4] Caselines 002-93
[5] Caselines 002-38

transport. She struggles with all activities due to her bilateral blindness. The plaintiff struggled with all aspects of the testing done during the evaluation and she is considered unemployable in the open labour market.

[26] The undisputed evidence of the occupational therapist is that provision should be made for a fulltime caregiver and domestic assistance at the prevailing rates in her area. Provision is also made for handyman assistance at a rate of R4000 per annum and gardening assistance once per month in winter and twice per month in summer at a prevailing rate in the area. The plaintiff will also require assistive devices over her life span to enable more effective functioning in her daily activities such as a kettle tipper costing R400 every three years, a liquid indicator at R250 every two years, a talking combination oven at R6 500 every five years, a talking watch at R1 425 every five years, a navigational aid for the visually impaired at R7 290 every five years, a talking timer at R1 300 every three years and a collapsible mobility cane at R560 every five years.

[27] The **industrial psychologist** Babitsanang Selepe testified that it is not likely that the plaintiff would find employment in her injured state because she only has a grade 9 level of education, is blind and has a severe neurocognitive problems.

[28] In the pre-morbid scenario (and based on attaining a certificate and a diploma) she postulated that the plaintiff would have entered the labour market at the B4/5 lower band and would have reached her career ceiling at the median C3/4 level at the age of 45 and thereafter she would have received inflationary increases until retirement age of 65.

[29] The **actuary** Mr. Kambaran, in turn used this basis to calculate the plaintiff's postulated future uninjured income. Before entering the labour market at the B4/5 level, the plaintiff would have completed grade 12 in 2021, would have attained a 1-2 years certificate and a 2-3 year's diploma, would have done internship in the year 2026 and would have commenced employment by July 2028 (after being unemployed for 2 years). Before the application of contingencies the postulated uninjured income amounted to R8 216 071.

[30] However, the **educational psychologist** E.D. Monyela in her report indicated that pre-morbidly plaintiff's intellectual functioning was within the average range (based on her school reports) and plaintiff would have passed Grade 12 with admission to a higher certificate and would have followed up her studies at a TVET college and achieve NQF level 6. She explained that plaintiff would have obtained NQF level 5 and with in-house training she would have achieved NQF level 6. She also postulated a scenario where plaintiff would have only attained a lower level certificate (i.e. a NQF level 5 certificate) post grade 12. The plaintiff passed all her grades in the Boekenhout Primary School, and all her other grades in Willow Crescent Secondary School, save for Grade 10. Her first term's report in 2019 (repeating grade 10 and already pregnant) revealed that her highest score was 73% in Life Sciences, followed by 60% in Tourism, between 40-47%in English home language, Economics and Afrikaans First additional language. She obtained 38% for mathematics and 19% in Business studies. She passed this term with a 47% average. The expert was adamant even during cross-examination, that plaintiff had the ability to obtain certificate because she was of average intelligence pre-morbidly. If regard is had to her family's educational background, her mother obtained grade 10, her father standard 4 and conducting his own business, her brothers obtained grade 9, grade 11 and grade 12 (which brother is working at ABSA as a customer service manager and who testified during the hearing). Despite this, the expert opined that there is tendency that children do better than their parents and that it does not mean that if both parents are domestic workers for example that a child will follow the same career path of their parents. Despite the fact that the plaintiff was young and pregnant, she did not drop out and continued with her schooling until the incident occurred.

[31] In the plaintiff's injured state the educational psychologist reported that it was challenging to do the SSAIS-R intelligence test due to her bilateral blindness. Verbal subtests were administered and the plaintiff scored from poorly (excessively low in the number problem test) to below average in the other tests. She was withdrawn from school due to the sequelae of the injuries sustained in the incident and the educational psychologist confirmed that she would not cope with mainstream schooling. This expert testified that normally children who sustained severe brain injuries are enrolled in special schools, but in plaintiff's instance it

would be more difficult as she is visually impaired. Plaintiff would rather benefit from learning organizational skills where she can learn how to cope better and learn how to walk with a walking stick.

[32] Based on the evidence and to assist the court, I directed that a recalculation be done by the actuary to include different scenarios postulated for the plaintiff's pre-morbid future income (based on the different levels of education) and to calculate the future medical expenses as testified to by the experts. There was no objection to the recalculation.

Discussion

[33] There is no doubt that based on the evidence the plaintiff was injured when she fell into an open manhole on 24 August 2019 and that she sustained a traumatic brain injury on that day which caused permanent blindness and other sequelae some weeks later after she gave birth on 8 September 2019.

[34] At the time of the incident the plaintiff was 16 years old and repeating grade 10. Although she was not attending school physically at the time because she was well advanced in her pregnancy, she continued to do her school homework and handed in her assignments. She enjoyed school and dreamed of studying and becoming an accountant. She participated in running for her school and was very healthy.

[35] Since the incident she initially suffered from blurry eyes and headaches which turned into blindness around the time when her baby girl was born. Her headaches are constant and she suffers from seizures every now and again which drains her. The plaintiff testified that the incident and injuries are affecting her terribly because cannot finish school and that there is no special school for the blind in the area where she lives. She cannot look after her own child and she relies on the assistance of her mother and father. She does not even know what her three and a half year old child looks like. When she became blind she was not sure what was happening to her, she was very down and could not believe what had happened to her. The plaintiff impressed the court as a brave young woman under

the circumstances who is dependent on her mother for most of her daily activities and who testified as to how the loss of sight and other sequelae affected all aspects of her life.

Quantification

General damages

[36] In the unreported matter of *Ntsukanyane v Road Accident Fund*[6] Tolmay J awarded R1 350 000 to a self-employed man in 2016 who was rendered blind by an accident and could thereafter not take care of his four children who had to subsequently move to live with his deceased wife's sister. Today's value of the claim is approximately R1.8 million.

[37] A similar amount was awarded to a girl who was born blind due to medical negligence in the matter of *Van der Merwe v Premier of Mpumalanga*[7] which was also referred to in the *Ntsukanyane*-matter. In awarding a similar amount to an older person, the court said that "It may be argued that to turn blind might even be worse for someone who previously had the privilege of sight than for a person who does not know what he/she is missing out on. Consequently it may, depending on the circumstances of the case, even be appropriate to award a larger sum."

[38] It was submitted on behalf of the plaintiff that an amount of R1 000 000 would be a fair compensation in respect of general damages. The defendant argued that no amount could take the plaintiff back to what she was before the injury.

[39] General damages falls within the discretion of the court.[8] Plaintiff's counsel argued for an award of **R1 000 000** only, which I am inclined to grant in the circumstances.

Calculation of the quantum of future amounts to be awarded:

[6] (30173/2014) [2016] ZAGPPHC 1217 (6 December 2016)
[7] QOP vol 13-14 [2005] ZAGPHC 103
[8] Road Accident Fund v Marunga 2003(5) SA 164 (AD) 169E

Loss of income and income capacity

[40] It was reiterated in Road Accident Fund v Guedes[9] that:

"It is trite that a person is entitled to be compensated to the extent that the person's patrimony has been diminished in consequence of another's negligence. Such damages include loss of future earning capacity (see for example *President Insurance Co Ltd v Mathews)*. The calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss which is often a very rough estimate (see for example *Southern Insurance Association Ltd v Bailey NO*. The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial court has a wide discretion to award what it believes is just (see for example the *Bailey* case and *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd.*) (Footnotes omitted)

[41] In Southern Insurance Company (Ltd) v Bailey[10] it was said 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, augurs 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 the loss.

It has open to it two possible approaches.

One is for the 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 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 possumus* attitude and make no award. See Hersman v A Shapiro & Co 1926 TPD 367 at 379 per STRATFORD J:

"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages."

[9] 2006(5) 583 (SCA) at para 8
[10] 1984(1) SA 98 at p113 G – 114 E

And in Anthony and Another v Cape Town Municipality 1967 (4) SA 445 (A) HOLMES JA is reported as saying at 451B - C:

"I therefore turn to the assessment of damages. When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss; see Pitt v Economic Insurance Co Ltd 1957 (3) SA 284 (N) at 287 and Turkstra Ltd v Richards 1926 TPD at 282 in fin - 283."

In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's "gut feeling" (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess. (Cf Goldie v City Council of Johannesburg 1948 (2) SA 913 (W) at 920.)"

[42] The recalculation done in respect of plaintiff's future uninjured income postulates three scenarios. Before the application of contingencies in the first scenario (assumed to have completed grade 12 only) she would have reached her career ceiling by the age of 45 earning R236 000 per annum and her income over the years until retirement of 65 would have been R4 004 036. In the second scenario (assumed to have completed NCF level 5) she would have reached her career ceiling by the age of 45 earning R292 000 per annum and her income over the years until retirement of 65 would have been R4 958 009**.** In the third scenario (assumed to have obtained a diploma) her total income would have been R9 608 945.

[43] Taking into consideration the opinion of the educational psychologist coupled with the plaintiff's positive attributes and especially that the plaintiff continued with her schooling despite being pregnant at a young age, I am of the view that plaintiff had the ability to obtain grade 12 at a lower level certificate (NQF level 5). Contingencies must accordingly be applied to the figure in scenario two.

[44] Regarding contingencies it was confirmed in Road Accident Fund v Reynolds[11]:

[11] A 5023/04 [2005] ZAGPHC 18 February 2005

'Contingencies may consist of a wide variety of factors. They include matters such as the possibility of error in the estimation of a person's life expectancy, the likelihood of illness, accident or employment which in any event would have occurred and therefore affects a person's earning capacity (Minister of Defence and Another v Jackson supra at 34 FH; Boberg "Deductions from Gross Damages in Actions for Wrongful Death" (1964) 81 SALJ 194 at 198). Contingencies may be positive or negative. Not all contingencies are negative involving a reduction of the award. In Bresatz v Przibilia [1962] HCA 54; (1962) 36 ALJR 212 (HCA) at 213 (cited with approval in Minister of Defence and Another v Jackson supra at 34 H-J and Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A) at 117 B-D) the following was said:

"It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on considering what the future might have held for the particular concerned. He might have fallen sick from time to time, been away from work and unpaid. He might have become unemployed and unable to get work. He might have been injured in circumstances in which he would receive no compensation from any source. He might have met an untimely death. Allowance must be made for these 'contingencies' or 'vicissitudes of life' as they are glibly called. But this ought not to be done by ignoring the individual case and making some arbitrary subtraction ... Moreover, the generalisation, that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse, all 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets, and ignore the rewards of fortune. Each case depends on its own facts."

[45] The plaintiff contended for a 25% deduction to the second scenario (Grade 12 with a NQF level 5 certificate) and the defendant for a 10-15% deduction to the first scenario (Grade 12 only).

[46] In considering what contingency deduction to apply to the plaintiff's postulated pre-morbid future earnings, I particularly took into account the plaintiff's young age, good health and family support structure (in addition to the normal vicissitudes of life such as illness had the incident not occurred, unemployment and the like) and in my view there would have been no reason to deviate from the normal contingency deduction of 0.5% for the remainder of the plaintiff's working life in the pre-morbid scenario. With a certificate she could have started employment in July 2023 and with her being 20 years old at present she would have had 45 years left to work. If a contingency percentage of 22.5% is deducted from the amount of R4 958 009, it is reduced to R3 842 456.98, however because plaintiff's counsel argued for a 25% contingency deduction I am inclined to apply such a nominal higher percentage which reduces the amount further to **R3 718 506.75**.

Future medical expenses and care

[47] In respect of future medical expenses, the cost of medication, medical intervention, care, other assistance and assistive devices before the application of contingencies, as per the recalculation, amounts to R4 147 497.

[48] I was not convinced by the defendant that there were duplications of the items in the list of expenses, neither was I convinced that some of the items or services would only be needed once the plaintiff lives alone. Any uncertainties in this regard may be compensated for by the application of a higher contingency percentage. It was conceded by the defendant that fulltime care for plaintiff is necessary. The figures used in the calculation in respect of future care and domestic services are based on the minimum wage only, which are in my view conservative.

[49] If a contingency percentage of 25% is deducted as argued for by the plaintiff's counsel, the amount for future medical expenses and care is reduced to **R3 110 622.75**.

Conclusion

[50] The total amount of damages payable to the plaintiff is accordingly **R7 828 829.50** calculated as R1 000 000 for general damages, R3 718 506.75 for future loss of income and income capacity and R3 110 622.75 for future medical expenses and care.

[51] The total amount does not exceed the amount claimed in the pleadings.

Costs

[52] As for costs, no reason exists to deviate from the principle that costs follow the cause.

ORDER

In the result, the following order is granted:

1. The defendant is liable to the plaintiff for damages she suffered as a result of injuries she sustained when she fell into an open manhole on 24 August 2019.

2. The defendant shall pay to the plaintiff an amount of R7 828 829.50 (seven million eight hundred and twenty eight thousand, eight hundred and twenty nine and fifty cents).

3. The defendant shall pay interest on the sum of R7 828 829.50 at the prescribed legal rate, calculated from the date of judgment until date of payment thereof.

4. The defendant shall pay the costs of suit.

_____

A.M van der Merwe

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the plaintiff: Adv. S. Dlali

Instructed by: Smith Rand Attorneys

For the defendant:	Adv. F. Mahome
Instructed by:	K. Matji & Partners
Date of the hearing:	7-10 March 2023 and heads of argument received 14 March 2023
Date of judgment:	26 June 2023