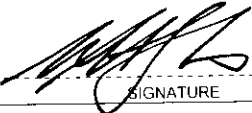


**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 55792/12

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES / NO.
(2)	OF INTEREST TO OTHER JUDGES: YES / NO.
(3)	REVISED.
23/05/2014	
DATE	SIGNATURE

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 JUDGE'S SECRETARY
2014 -05- 23
REGTERS KLERK PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOË HOF, PRETORIA

In the matter between:

23/5/2014

NTOZAKHE ALFRED NDINISA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Coram: **HUGHES J**

JUDGMENT

Delivered on: 23 May 2014

Heard on: 21 May 2014

HUGHES J

1. The plaintiff Ntozakhe Alfred Ndinisa instituted a claim against the defendant, Road Accident Fund, arising from a motor vehicle collision on 29 October 2008. The defendant conceded 100% liability.
2. The plaintiff sustained the following injuries:
 - 2.1 a severe injury to the right tibia and fibula resulting in a traumatic amputation of the right ankle;
 - 2.2 eventual above knee right leg amputation;
 - 2.3 extensive lacerations and scarring;
 - 2.4 psychological stress and trauma;
 - 2.5 ghost pains and neurological complications in amputated stump.
3. Prior to these proceedings the parties agreed on the following:
 - 3.1 an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act, 56 of 1996 would cater for future medical expenses;
 - 3.2 the compensation of general damages would be **R700 000.00**
 - 3.3 the calculation in the actuarial report of Human and Morris dated 14 May 2014 in respect of future loss of earning and /or earning capacity.
4. The crisp issue left to be determined is the applicable contingencies to be applied. Fortunately the parties are in agreement that the applicable contingency to be applied to past loss of earnings is 5%. This leaves me to determine the relevant contingency to be applied to future loss of earnings.
5. The following reports were handed in by consent :

5.1 Dr J F Ziervogel (Orthopaedic Surgeon and Radiologist)

5.2 Genesis Actuarial Solutions (Actuary)

5.3 Brian Redelinghuys (Orthotist Prosthetist)

5.4 Dr Kobus Truter (Clinical Psychologist)

5.5 Dion Rademeyer (Mobility Consult)

5.6 Dr J P M Pienaar (Plastic & Reconstructive Surgeon)

5.7 Dr D A Birrel (Orthopaedic Surgeon and Radiologist)

5.8 Laura Joyce (Occupational Therapist).

5.9 Andre F Kok (Industrial Psychologist)

5.10 Human & Morris (Actuary)

6. The plaintiff's highest level of education is that of grade 10. His work history as recorded in the reports is that he was self-employed from 2003 to 2007 performing the services of gardening in various households earning a monthly income of R800.00. In 2007 he obtained a position at Spar performing duties in the bakery. At Spar he earned a monthly salary of R1 800.00. His services were terminated on 29 October 2008 due to his incapacity to work as a result of this motor vehicle collision.
7. Andre` Kok states in his report that *"according to Dr Birrel, the client has a 60% loss of work capacity due to the accident and has a tiny chance of being able to find light duty work, but in all likelihood will not find any work again in the future."* Kok postulates that in his opinion the plaintiff is unlikely to secure and maintain an appropriate position in the open labour market and as such the

plaintiff is practically unemployable. Thus the plaintiff has suffered a total loss of income from the date of the accident.

8. As a source of income the plaintiff does receive a monthly State Grant. In the scenario of the plaintiff Kok suggested that he be categorised as an unskilled worker entering the labour market at Paterson level A1 and progressing to Paterson A3 which he would reach at age 45 and his career lifespan will be age 65 being retirement. In addition there is the suggestion that he be place in the non-corporate labour sector categories which would entitle him to a basic salary without fringe or employee benefits.
9. Mr Alberts SC for the plaintiff argued that in the circumstances of the plaintiff it would be fair and equitable to apply a contingency deduction of 15% only and nothing higher against the future loss of earnings calculation. He attributes this suggestion to the fact that the plaintiff will have nil earnings for the rest of his life as he is unemployable.
10. Mr Westebaar for the defendant contended that in this instance a contingency of 25% should be applied. He submitted that this was because the earnings of the plaintiff prior to the accident had not been confirmed. Further that the plaintiff had only been in the employ of Spar for a mere 18 months. Lastly that the job market comprising of Spar and the like, that is retail sector, was a volatile sector and it could not be guaranteed that the plaintiff would have been able to hold down his job for a long time. Thus it could not be said that the plaintiff had been in a secure job.
11. The determination of contingency allowances involves a process of subjective impression or estimation rather than objective calculation, in other words, allowance on which judicial opinions vary appreciably. **See Shield Insurance Co Ltd v Booyesen 1979(3) SA 953(A) at 965 G-H**

12. In **Southern Insurance Association v Bailey NO 1984(1) 98 AD** the two approaches that can be used to ascertain future loss of earnings are discussed on **page 113** where the following is said by **Nicholas JA**:

“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 guess work, a blind plunge into the unknown. The other is to try to make an assessment by way of mathematical calculations, on the 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.”

Continues on page 114C-D to state:

“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 “informal guess” it has the advantage of a logical basis”. In addition refer to in **Smit NO v The Road Accident Fund**, The Quantum of Damages, Corbett and Honey, Volume 5, B4-251.

13. **Robert J Kock** in his book “The Quantum Year book” states that there are no fixed rules as regards general contingencies and one of his helpful guidelines is that of the sliding scale contingency theory:

"Sliding scale: ½ % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in middle age".

14. **Kock's** support of this sliding scale theory is attained from **Goodall v President Insurance 1978 (1) SA 389 (W)**. In *Goodall*, Margo J applied a contingency of 10% to the future loss of earnings calculation of a 46 year old male buyer in a commercial company. Margo J attributed this percentage to the fact that the buyer was a steady employee, the period of calculation for his loss of earnings was short and the fact that he had enjoyed a good life but for this accident. In the judgment at **393 A-E** the methodology of the sliding scales madness is illustrated. At **393B-E** the following was stated *"In Van Rensburg's (**Van Rensburg v President Versekeringsmaatskappy WLD 21.11.68, The Quantum of Damages Volume 2 at page 65**) case the plaintiff was 25 years old and in De Jongh's (**De Jongh v Gunther and Another 1975 (4) SA 78 W**) case, which was a claim by dependants for loss of support, Nicholas J adopted the figure of 20 percentage for contingencies in relation to deceased's earning power, the deceased having been approximately 25 years of age at the time of death...In the well-known case of **Sigournay v Gillbanks 1960 (2) SA 552 AD, Schreiner J A at p 569**, made provision for contingencies in an amount equal to approximately 16%. The plaintiff in that case was 33 years of age, a fact which appears from the report of the case in the Appellate Division or in the court of first instance, or Corbett and Buchanan".*
15. In the present case the plaintiff was 25 years old at the time of the motor vehicle collision. The plaintiff's highest level of education was grade 10. The majority of his working life he worked as a gardener earning R800.00 per month. His employment at Spar at a salary of R1800.00 per month was short lived and only lasted for 18 months.
16. Mr Alberts SC submitted that the sliding scale method merely amounts to a thump suck and should not be applied. I tend to disagree as is evident from the case law above the sliding scale has been in existence and utilised as far back as 1960 in the Appellant Division. .

17. In this matter we have a situation where the plaintiff earned a salary of R23 400.00 per annum at the date of the collision. **Kock** sets his future loss to commence at R53 400.00, this is R30 000.00 more than what he earned as at the date of the accident. Further, that the future loss of the plaintiff would need to be calculated over a longer period in order to reach retirement age 65. It is also relevant to take into account the fact that the plaintiff is unemployable for the rest of his life and that he has endeavoured to hold down a job from the time he existed school. I am of the view considering **Sigournay's** case above and **Kock's** Quantum year book, in the circumstances a contingency of 20% would be appropriate to apply as a contingency deduction to the future loss of earnings.
18. In the result as set out in Human & Morris's report if 5% contingency deduction is applied to the past loss as agreed, 20% is applied to the future loss and the disability grant is deducted the net total amounts to **R1 341 571.00**.
19. The net loss together with the amount agreed in respect of general damages totals **R2 041 571. 00**.
20. The order granted is in terms of the order attached marked X, duly incorporated into the judgment, with the insertion of the amount of **R2 041 571.00**.



W. Hughes Judge of the High Court

Delivered on: 23 May 2014

Heard on: 21 May 2014

Attorney for the Plaintiff

SAVAGE JOOSTE & ADAMS INC.

141 Boshoff Street

Nieuw Muckleneuk

PRETORIA

Ref: MR HAYES/MS/RP2789

Attorney for the Defendant

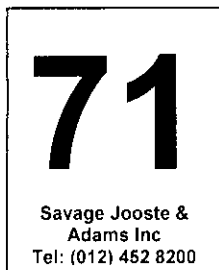
MSMM INC.

980 Park Street

Hatfield

PRETORIA

Ref: RAF11671/1/1 File No. C11919



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

On this the 22nd day of May 2014

Before her Ladyship Justice Hughes (J)

In the matter between:

CASE NO. 55792/2012

NTOZAKHE ALFRED NDINISA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT



AFTER HAVING HEARD COUNSEL for both parties the following order is made:

1. The Defendant is ordered to pay an amount of R 2 041 571.00

(Two million forty one thousand and five hundred and seventy one rand only)

which amount shall be paid to the credit of the trust account of the Plaintiff's Attorneys of record, Savage Jooste & Adams Inc. Pretoria, whose trust account details are as follows:

Nedbank name: NEDCOR – ARCADIA Account type: Trust account

Branch code: 16-33-45-07

Account no: 1633357619

Reference no.: RGH/RP2789

2. The Defendant is ordered to immediately furnish to the Plaintiff an Undertaking to compensate the Plaintiff in terms of Section 17(4)(a) of the Road Accident

Fund Act, 56 of 1996, in respect of the Plaintiff's costs of future accommodation in a hospital or nursing home or treatment or the rendering of a service or supplying of goods to him arising from the injuries sustained by him in consequence of the motor collision on 29 October 2008, after the costs have been incurred and on proof thereof. Without derogating from the generality of the foregoing, the undertaking shall include the reasonable costs of the formation of an *inter vivos* trust for the benefit of the Plaintiff and the costs of administration of the said trust by the trustee, including the costs attendant upon the provision of security by the trustee, provided, however, that such costs shall not exceed the costs which would otherwise be payable in law in respect of a Curator *Bonis*.

3. The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs, which costs shall include:

- 3.1 The costs consequent upon the employment of Senior Counsel, including the cost of attending the pre-trial conferences;

- 3.2 The costs of obtaining the reports, addendum report and RAF4 reports where applicable, of and the reasonable taxable preparation, reservation (if any) and/or qualifying fees of the following expert witnesses:

- 3.2.1 Dr J F Ziervogel, Orthopaedic Surgeon and Radiologist concerned;
- 3.2.2 Genesis Actuarial Solutions, Actuary;
- 3.2.3 Brian Redelinghuys, Orthotist Prosthetist;
- 3.2.4 Dr Kobus Truter, Clinical Psychologist;
- 3.2.5 Dion Rademeyer, Mobility Consultant;
- 3.2.6 Dr JPM Pienaar, Plastic & Reconstructive Surgeon;
- 3.2.7 Dr D A Birrell, Orthopaedic Surgeon and Radiologist concerned;
- 3.2.8 Laura Joyce (Anneke Greeff), Occupational Therapist;

3.2.9 Andre F Kok (Schoombee, Wessels & Associates), Industrial Psychologist;

3.2.10 Human & Morris, Actuary.

3.3 The reasonable travelling and accommodation costs of the Plaintiff's instructing attorneys of record, Podbielski Inc. (Welkom)

4. By agreement between the parties the award to the Plaintiff shall be protected by means of it being entrusted to a trust to be formed for the benefit of the Plaintiff, without derogating from the Plaintiff's ability to otherwise manage his own affairs.

5. Gert Kruger and/or his nominee of ABSA Trust Limited is appointed as trustee for a trust to be formed for the benefit of the Plaintiff, with the following powers:

5.1 Acquire any shares, unit trusts, debentures, stocks, negotiable instruments, mortgage bonds, notarial bonds, securities, certificates and any moveable or immovable property or any incorporeal rights and to invest in such assets and to lend funds to any party or make a deposit or investment with any institution, such investment to be of such nature and on such terms and conditions as the TRUSTEE may deem fit.

5.2 Exchange, replace, re-invest, sell, let, insure, manage, modify, develop, improve, convert to cash or deal in any other manner with any asset which from time to time forms part of the TRUST FUNDS:

5.3 Borrow money.

5.4 Pledge any trust assets, to encumber such assets with mortgage bonds or notarial bonds to utilise same as security in any manner whatsoever.

- 5.5 Institute or defend any legal proceedings or otherwise to take any other steps in any court of law or other tribunal and to subject controversies and disagreements to arbitration.
- 5.6 To call up and/or collect any amounts that may from time to time become due to the TRUST FUND.
- 5.7 Settle or waive any claim in favour of the trust.
- 5.8 Exercise any option and to accept and exercise any rights.
- 5.9 Exercise any rights or to incur any obligation in connection with any shares, stocks, debentures, mortgage bonds or other securities or investments held by this trust.
- 5.10 Open accounts at any bank or other financial institution and to manage such accounts and if necessary to overdraw such account.
- 5.11 Draw any cheque or promissory note, to execute or endorse same.
- 5.12 Take advice from any attorney or advocate or any other expert for the account of the relevant trust account.
- 5.13 Lodge and proof claims against companies in liquidation or under judicial management and against insolvent or deceased estates.

- 5.14 Appoint professional or other persons on a temporary or permanent basis to conduct the whole or any portion of the business of the trust under supervision of the TRUSTEE or to manage the investment of part or the entirety of the funds of the trust and to remunerate such persons for their services out of the funds of the trust.
- 5.15 Form any company and to hold any interest in any company and to form any other trust to hold an interest in any other trust or partnership or undertaking for the purposes of this trust or in the interest of any beneficiary.
- 5.16 Amalgamate with any other trust with the same or similar aims as this trust.
- 5.17 Commence any business or continue such business or to acquire an interest therein and for such purpose to acquire assets or to incur expenses and to partake in the management, supervision and control of any business and to conclude any partnership or joint venture.
- 5.18 Accept any disposal in favour of this trust and to comply with any conditions regarding such disposal.
- 5.19 In general do all things and to sign all documents required to give effect to the aims of this trust.
- 6. The Trustee is ordered to furnish security to the satisfaction of the Master.
- 7. The Plaintiff has entered into a Contingency Fee Agreement.

BY ORDER

REGISTRAR



Absa Trust

Ground Floor Absa Beatrix Building
79 Steve Biko Street Pretoria 0083
PO Box 2697 Pretoria 0001
Tel +27 (0)12 303 2200
Swift Address: ABSA ZA JJ
absa.co.za

Absa Trust

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Posbus 2697 Pretoria 0001
Tel +27(0)12 303 2200
Swift adres: ABSA ZA JJ
absa.co.za

SAVAGE JOOSTE & ADAMS PRETORIA

Ons verwys/Our ref	:	G Kruger
Datum/Date	:	21 May 2014
U verw/Your ref	:	
Direkte lyn / Direct line	:	[012] 303-2714
Direkte faks / Direct fax	:	[086] 7534120
E-pos/E-mail	:	gertkr@absa.co.za

Dear Sir

TRUST FOR:

NTOZAKHE ALFRED NDINISA ID NUMBER: 931105 25890 084

I am an employee of ABSA Trust Ltd and as such a nominee of ABSA TRUST to accept appointments as Trustee and Curator Bonis.

I am in possession of a B-Comm, Trustee Diploma, Advance Certificate in Trust Law and is also a member of the Fiduciary Institute of South Africa. I further have practical experience of 39 years in this field and declare my office willing to administrate the section 17(4)(1) certificate, if issued.

As a Trust Company we can also assist the client in various other services and investments.

In the light of the above, I herewith declare myself willing to act as trustee of a trusts to be set up for the above persons., with a management fee rate of 1% pa plus VAT on the amount under administration.

Yours sincerely



GERT KRUGER

MANAGER : TRUST SERVICES

Member of / Lid van



Absa Trust Limited: Authorised Financial Services Provider Reg No 1915/004665/06
Absa Trust Beperk: Gemagtigde Finansiële diensteverskaffer Reg no 1915/004665/06

CONTINGENCY FEES AGREEMENT IN TERMS OF THE CONTINGENCY
FEES ACT, 1997 (ACT NO. 66 OF 1997)

Done and entered into between Ntozakhe Melinisa

(DATE OF BIRTH: 1983-11-05)

hereinafter called "the Client", and

PODBIELSKI INCORPORATED
355 STATEWAY, DOORN, WELKOM

hereinafter called "the Attorney",

in terms of which the client shall pay the fees agreed to herein to the Attorney for services rendered, if the client is successful in such proceedings to the extent set out in this agreement.

1. It is recorded that in the opinion of the Attorney there are reasonable prospects that the client may be successful in the proceedings mentioned hereunder and the Attorney therefore undertakes to recover no fees from the client unless:
 - 1.1 the client is successful in such proceedings; or
 - 1.2 the Attorney, as set out hereunder, becomes entitled to a fee in the event of partial success in such proceedings or in the event of the premature termination of this agreement.
2. It is further recorded that, before the signing of this agreement and in terms of Section 3(3) of the Contingency Fees Act, 1997 (Act No. 66 of 1997), the client was:
 - 2.1 advised of any other ways of financing the litigation and of their respective implications, namely **loans from financial institutions or instalment payments.**
 - 2.2 informed of the normal rule that in the event of the client being unsuccessful in the proceedings, he/she/it may be liable to pay the taxed Party and Party costs of his/her/its opponent in the proceedings; and
 - 2.3 informed that he/she/it will be liable to pay the success fee in the event of success, by the Attorney.
3. The client acknowledges that he gave a written Power of Attorney to the Attorney to:
 - ** conduct proceedings in/before a court of law having the power to act, on his behalf.

** render professional services to him/her/it, namely the claim for injuries sustained in a motor vehicle collision on the _____.

4. The parties agree that the client:

4.1 shall be deemed to be successful in the aforementioned proceedings if:

- (a) he/she/it receives 80% or more of the claim as assessed by the Attorney;
- (b) he/she/it achieves a saving of 80% or more of the amount claimed.

4.2 shall be deemed to be partially successful in the aforementioned proceedings if:

- (a) he/she/it receives between 10% and 79% of the claim as assessed by the Attorney;
- (b) he/she/it achieves a saving of between 10% and 79% of the amount claimed.

5. The Attorney hereby warrants that the normal fees on an Attorney and own client basis to perform work in connection with the aforementioned proceedings are in the absence of a Contingency Fee Agreement calculated on the following basis: R 2 500.00 per hour.

6. The parties agree that if the client is successful in the aforementioned proceedings:

- (a) the total amount of the "success fee" payable by the client to the Attorney shall not exceed the Attorney's aforesaid normal fees by more than 100%; provided that the total "success fee" shall not exceed 25% of the total amount awarded or the total amount obtained by the client in consequence of the proceedings, which amount shall not for the purpose of calculating such excess, include costs.

7. The parties agree that:

7.1 if the client is partially successful in the aforementioned proceedings:

7.1.1 the client:

shall owe the Attorney an amount to be calculated according to the following method:

- (a) the total amount of the "success fee" payable by the client to the Attorney shall not exceed the Attorney's aforesaid normal fees by more than 100%; provided that the total "success fee" shall not exceed 25% of the total amount awarded or the total amount obtained by the client in consequence of the proceedings, which amount shall not for the purpose of calculating such excess, include costs.

7.1.2 the following consequences will follow in terms of this agreement:

NN

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18 Jun 2013 13:26

and

7.2 in the event of the premature termination of this agreement for any reason:

7.2.1 the client:

** shall owe the Attorney an amount to be calculated according to the following method: On an Attorney and own client scale at the rate reflected in paragraph 5 above; and

7.2.2 the following consequences will follow in terms of this agreement: **Payment must be effected in full before the Attorney will release his file of papers.**

8. Disbursements by the Attorney relating to the matter;

** made on behalf of the client shall be dealt with in the following manner:

i) shall be payable on demand

ii) shall bear interest at the rate of Standard Bank prime plus 2%;

iii) shall be payable regardless of success.

9.

9.1 The client has a period of 14 days, calculated from the date of signing this agreement, during which he/she/it will have the right to withdraw from the agreement by giving notice to the Attorney in writing.

9.2 The Attorney shall, in the event of the withdrawal by the client, be entitled to fees and disbursements in respect of any necessary and essential work done to protect the interests of the client during such period, calculated on an Attorney and client basis.

10. All benefits payable in terms of this Contingency Fee Agreement shall remain the property of Podbielski Incorporated until actually paid over to and received by the client. If the client cannot be traced or if, for any other reason, the amount received cannot be paid to the client, no amount shall be payable by Podbielski Incorporated. The client shall advise Podbielski Incorporated of the details of any unpaid benefits on a monthly basis.

11. If the client feels aggrieved by any provision of this agreement or any fees chargeable in terms of this agreement, the agreement or the fees may be referred for review to the Law Society of which the Attorney is a member and, if an Advocate has been appointed, also to the Bar Council in the area in which the Advocate practises. The professional controlling body concerned may set aside any provision of this agreement or any fees claimable in terms of this agreement if in its opinion such provision or fees are unreasonable or unjust.

12.

12.1 Any amendment or other agreements ancillary to this agreement (including any amendment to such agreements) shall be in writing and comply with the requirements laid down in the Contingency Fees Act, 1997 (Act No. 66 of 1997).

NN

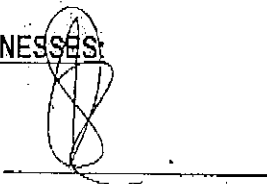
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- 12.2 A copy of any such amendment or other agreements ancillary to this agreement shall be delivered to the client upon the date on which such amendment or ancillary agreement is signed.

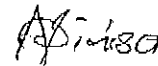
SIGNED BY THE CLIENT AT WELKOM ON THIS THE _____ DAY OF _____ IN THE
PRESENCE OF THE UNDERSIGNED WITNESSES:

AS WITNESSES:

1.



2.

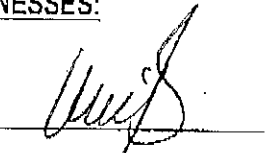


CLIENT

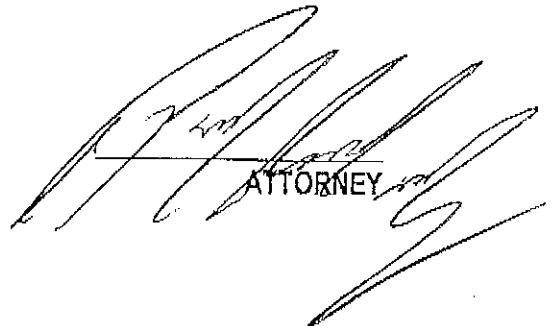
SIGNED BY THE ATTORNEY AT PRETORIA ON THIS THE _____ DAY OF _____ IN THE
PRESENCE OF THE UNDERSIGNED WITNESSES:

AS WITNESSES:

1.



2.



ATTORNEY