REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, PRETORIA)

CASE NO: 88870/2014
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO

In the matter between

KLEINBOOI MSANYANA JIYANE **PLAINTIFF**

And

THE ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

CHESIWE AJ:

[1] The plaintiff claims for damages in terms of the Road Accident Fund Act 56 of 1996, as amended (the Act), pursuant to a motor vehicle accident that occurred on 24 May 2013, at Delmas, Mpumalanga Province.

[2] The plaintiff was a passenger in the vehicle with registration number […] MP, which was driven by Vusi Mbonani (the insured driver).

[3] At the time of the accident, Mr Jiyane was 41 years.

[4] Adv. J.J. Potgieter was appointed as his *curator ad /item.*

[5] The plaintiff sustained the following injuries:

5.1 Fractured vertebral thoracic spine T4 and T5, the plaintiff is semi paraplegic;
5.2 Bilateral haemo- pneumothorax with left lung contusion.
5.3 Left mid-clavicle fracture;
5.4 Sterna fracture;
5.5 Haemorrhagic shock;
5.6 Blunt abdominal trauma and two liver lacerations with haemo- peritoneum;
5.7 Crush injury and acute renal failure with myoglobinaemia;
5.8 Injuries complicated by sacral as well as bilateral trochanteric pressure sores, which resulted in debrided right thigh and right femurectomy (partial removal of femur);
5.9 Head injury and brain injury;

[6] Following the said injuries, the plaintiff was:

6.1. Admitted on the 04 May 2013 at Steve Biko Academic Hospital, he was intubated and ventilated;
6.2. Taken to theatre for exploration under general anaesthetic where a laparotomy was done and the liver was sutured and packed;
6.3. Returned to theatre on the 6 May 2013, for a "relock" laparotomy and packs were removed;
6.4. Operated under general anaesthetic on 10 May 2013 where posterior fusion of the T4 and T5 was performed;
6.5. Developed pneumonia due to the assisted ventilation, and a tracheostomy was performed on the 16 May 2013;
6.6. On 23 May 2013 tracheostomy was removed and the plaintiff was

transferred to a high care ward till 24 May 2013;

6.7. Developed pressure sores and was returned to theatre on 1O August 2013 for sacral and bilateral trochanteric pressure sores debridement;

6.8. A further operation was performed on 17 August 2013 for a debridement of the right thigh as well as a femurectomy;

6.9. A skin graft to the right proximal femur was performed on the 07 October 2013;

6.10. Experienced emotional trauma and would in the future continue to experience further emotional trauma;

6.11. Experienced pain, suffering and discomfort and would continue to do so in the future;

6.12. Has been permanently disabled and has experienced loss of earnings and earning capacity;

6.13. Has sustained substantial loss of enjoyment of amenities of life

[7] The merits were previously adjudicated upon and the court found that the defendant is 100% liable for such damages as the plaintiff had proven that the injuries are from the collusion. (Court order dated 18 October 2016).

[8] The plaintiff in the particulars of claim, claimed

8.1. Future medical expenses in the amount of R2 000 000.00;

8.2. Future loss of income in the amount of R2 000 0 00.00; and

8.3. General damages in the amount of R2 000 000.00.

[9] The defendant in its amended plea, prays that the plaintiff's claim be dismissed with costs, alternatively that the amount of damages to be awarded to the plaintiff be reduced by the Honourable Court in terms of Section 2(4) of Act no 34 of 1956 as amended, to such an extent as this court may deem just and equitable having due regard to the degree of the plaintiff's own negligence.

[10] The issues for determination are the following:

10.1 The amount to be awarded to the plaintiff in respect of his claim for general damages;

10.2 The amount to be awarded to the plaintiff in respect of past loss of income;

10.3 The amount to be awarded in respect of future loss of income;

10.4 Undertaking in terms of section 17(4) (a) of the Road Accident Fund Act 56 Of 19966 ;

10 .5 The issue of costs.

[11] The parties further agreed that the expert reports on which the defendant elected not to appoint counter experts can be argued from the said expert's reports and that the experts do not have to be reserved for that. The defendant admitted to the schooling and educational history of the plaintiff as far as it was confirmed by the defendant's experts. Defendant further admitted the plaintiff's work history, collateral evidence and income evidence from his work, as far as it was confirmed by defendant's experts. Defendant further admitted that the plaintiff will in future suffer loss of income as far as same is confirmed by the defendant's experts.

[12] No oral evidence was led. The evidence and opinions in the bundles of expert reports was placed on record as evidence. The bundles were handed in and admitted into the records.

[13] Plaintiff's counsel submitted that plaintiff sustained a moderate to a severe head injury and has 10 to 15% future risk for seizures as a result of his cranial injuries.

[14] The defendant's counsel argued that plaintiff's injuries, if compared to others cases, are not that severe. He made reference to the case of **Mosupi v Road Accident Fund (11/23686 ZAGPJHC 108 (10 May 2013)**, in which the plaintiff was19 years old and fully paraplegic and was awarded R1 million, (2012). In the case of **Webb v Road Accident Fund 2203/14 [2016] ZAGPPHC 15 (14 January 2016),** the plaintiff was 20 years of age and was awarded R1, 5 million (2013). He was also rendered a full paraplegic. He submitted that the plaintiff in this case is 41 years old. He is stable and able to walk, though only for short distances with crutches, and he still uses the wheelchair if he has to go for longer distances or to places to far from home. He

submitted that plaintiff can continue to run his taxi business.

[15] The defendant’s counsel raised the issue that proof of income was not submitted, neither a bank statement of the plaintiff, but conceded and accepted that the plaintiff does not have a bank account and will therefore accept the plaintiff's submitted proof of income as contained in annexure **"F".** The plaintiff's counsel submitted that the calculations were done based on the defendant's own actuarial report.

[16] Evidence of the Orthopaedic Surgeon

Dr. P. Engelbrecht, an orthopaedic surgeon, interviewed the plaintiff on 19 June 2015 and filed a report on behalf of the plaintiff. The report showed that the plaintiff was admitted at Steve Biko Hospital on 04 May 2013. The plaintiff was taken to theatre on 04 May 2013 for a general exploration of the laparotomy. The liver was sutured while the inferior laceration was packed. The plaintiff went back to theatre on 06 May 2013 for a "relock" laparotomy.

[17] A third operation was done on 10 May 2013 where a posterior fusion of the T4 and TS was performed. Plaintiff developed ventilator assisted pneumonia and tracheostomy was performed on 16 May 2013. The plaintiff was taken off the ventilator and the tracheostomy was removed. The plaintiff was transferred to a high care ward on 23 May 2013, stayed there until 24 May 2013. The plaintiff developed pressure sores and was returned to theatre on 10 August 2013, for a sacral and bilateral trochanteric pressure sore debridement. A further operation was done on 17 August 2013; a debridement of the right thigh and right femurectomy was performed.

[18] On the 07 October 2013, a split skin graft to the right proximal femur was performed. The plaintiff received physiotherapy as well as occupational therapy and was discharged on 19 November 2013. The plaintiff was transferred to the Tshwane Rehabilitation facility on 19 November 2013 where he remained until the 07 February 2014. Upon his discharge the plaintiff made use of crutches interchanging it with a wheel chair.

[19] Dr. Engelbrecht expressed the opinion that the plaintiff, who did not have a proven pre-existing condition now had permanent loss of his proximal femur, leg length discrepancy which should be accepted as permanent disability and further that the plaintiff will require a shoe raise and regular maintenance of orthotics which include a walker and wheel chair.

[20] In a joint minute meeting between Dr. Engelbrecht and the defendant's orthopaedic surgeon, Dr. B.E. Ramasuvha, it was concluded that the injuries sustained by the plaintiff are common cause. They both advised on future treatment.

[21] In the joint minute meeting between the neurosurgeons Drs. D.J.J. De Klerk and N.D. Chula, they both agreed on the injuries as sustained by the plaintiff. Dr. De Klerk expressed the opinion that it was not necessary that a *curator ad litem* be appointed, but that the money awarded by this court should be protected in a trust. Dr. Chula did not address the issue of curatorship.

[22] In the joint minutes meeting between the clinical psychologists, Ms E. Tromp and Mrs A. Cramer, they both agreed that the plaintiff sustained a moderate brain injury comprising of a diffuse concussive injury. The plaintiff had not reported of any pre-accident physical or mental health problems to them. The plaintiff had on-going complaints of pain, limited mobility, cognitive difficulties and neurovegetative changes. They further agreed that the plaintiff has suffered a considerable loss of amenities due to his loss of mobility and the impact on his self-esteem, interpersonal relationship and social functioning, which has diminished. They agreed that the plaintiff's funds need to be protected, by way of creation of a trust.

[23] In the joint minute meeting on the 03 October 2016 between industrial psychologists, Ms Luzette Viljoen and Mrs. Cecile Nel, both indicated that the collateral information obtained by them seemed to be contradictory as far as the employment of the plaintiff is concerned. This places the actual state of employment of the plaintiff at the time of the accident in question. Mr Nkosi indicated that the plaintiff stopped working for him in 2010, further that the plaintiff actually purchased a taxi from Mr Nkosi. According to the information they received from Mr Nkosi and the plaintiff, the plaintiff

became self- employed as a taxi driver. Ms. Cecile Nel indicated that in that case the plaintiff will be required to provide proof of income.

[24] They noted that the plaintiff was registered with the Delmas Taxi Association in 2011. Further proof of vehicle registration, a Toyota Quantum, showed that the plaintiff is the registered owner of the vehicle with engine number of 2TR8353284.

[25] They agreed that for quantificaiton purposes, the plaintiff would have continued to function in his pre-morbid position as a self-employed Taxi Driver/Owner or as Ms Nel said 'as *whatever he was.'* It was noted that the plaintiff informed Drs Greeff (p.01) Engelbrecht (p. 05) and Wiele (p. 04) he was a Taxi Driver. Counsel for the plaintiff submitted that if there is a discrepancy in this regard it can be resolved by contingency.

[26) They further agreed that the plaintiff would have worked until normal retirement age. However, they disagreed with regard to the retirement age. Ms Cecile Nel indicated that it could be sixty (60) to sixty five (65) years. Alternatively, the plaintiff might have opted for an old age grand from the age of sixty (60) years depending on the plaintiff's state of health. Ms Lizette Viljoen indicated that she disagreed on the issue of old age grant by sixty (60) years as the plaintiff had been earning far more than the current pension of R1 500.00 per month.

[27) Ms Lizette Viljoen indicated that far more people retire later than the usual 60 - 65 years of age and made reference to the case **of Mogal v RAF (case 29208/13),** where Castennen, J confirmed the reality and said:

"That people today are healthier and continue to work after the age of 65".

[28] For quantification purposes, they suggested that a earning scale between scales1 & 2 for Taxi Owners (R74 725,00 p.a - 2013) value as a baseline with an annual CPI percentage increase until normal retirement age of 60 - 65 years and sixty five years (LV/KP) with a contingency deduction in place for the discrepancy and any unknown factors.

[29] The Occupational Therapists, Ms Adroos and Ms Montwedi also stated that the plaintiff is only suited for a sedentary work. He is unable to function as a taxi driver or any postural demands that will allow him to sit for most periods of the day or requiring a physical input that is more than sedentary in nature.

[30] Based on the above expressed views of the experts, which were largely common cause the pertinent question arose as to what award would be fair and adequate compensation for the plaintiff in respect of loss of earning and earning capacity as well as general damages.

[31] Counsel for the plaintiff submitted that R2 000 000.00 for general damages would be a fair award as the plaintiff s injuries are permanent. It was submitted that the plaintiff accepts Scenario 2 as calculated by the actuarial as well as a 5% contingency deduction in the part concerning the income, taking into consideration the discrepancies

GENERAL DAMAGES

[32] The basic principle underlying an award for general damages in such actions is that the compensation must be assessed as to place the plaintiff as far as possible in the position he would have been had the wrongful act causing him injuries not been committed. The assessment of compensation is done by comparing the plaintiff's "properties" meaning a universitas or complex of general relations, including the plaintiff's rights and duties, as it is after the commission of the wrongful act with its projected state had the wrongful act not been committed. **(See Union Government (Minister and Harbours v Warneke 1911 AD 657 at 665.)**

[33] It is correct that notwithstanding the best available medical treatment that the plaintiff have receive and will still receive in the future. The plaintiff's current condition will never be restored to its original position. The difficulties he now has following the motor vehicle accident, he will always have to depend on other people around him to help him to move around. Though not a full paraplegic, he will still have to make use of a walker or crutches.

[34] In **Protea Insurance Company v lamb 1971 (1) SA 530 (A) at 534H** and **Road Accident Fund v Marunga 2003 (5) SA 164 (SCA) at 23,** it was stated that: " A claim for general damages comprises of pain and suffering, disfigurement, permanent disability and loss of amenities of life."

[35] In **Southern Insurance Association Limited v Baliey N.O. 1984 at 99H** the following was stated:
"The AD has never attempted to lay down rules as to the way in which the problem of an award of general damages should be approached. The amount to be awarded as compensation can only be determined by the broadest general consideration and the figure arrived at must necessarily be uncertain depending upon the Judges's view of what is fair in all the *circumstances of the case."*
That does not mean of course that the function to be served by an award of damges should be excluded from consideration. That is something which may be taken into account together with all the other circumstances.

[36] The opinions of the various experts who examined the plaintiff indicates that the plaintiff sustained a severe brain injury with the following *sequelae:*

Orthopeadic *Seguelae*

36.1 Plaintiff uses wheelchair (Report of Dr. Engelbrecht on p.16),
36.2 Plaintiff uses up to four types of tabletseveryday as well as analgesic tablets (Report of Dr. Engelbrecht on page 6 of the bundle marked "D"),
36.3 8.5 cm shortening to plaintiff left leg,
36.4 Lower back movement impaired,
36.5 The left hip joint is totally non-functional as part of the femur had been rejected, and
36.6 Plaintiff is unable to walk independently without the assistance of a walker.

Brain injury *Sequelae*

36.7 The plaintiff's recorded Glasgow score was 8/10.

36.8 The plaintiff experiences headaches every day and has a problem with memory as there has been a decline in his short term memory.

[37] Dr. De Klerk is of the opinion that the plaintiff sustained moderate diffusec traumatic brain injury. According to the defendan'ts neurosurgeon, Dr. Child, the plaintiff sustained a moderate to severe head injury and has 10 - 15% future risk for seizures in relation to his cranial injury.

[38] According to Ms. Annelies Cramer (plaintiff's appointed clinical psychologist, the plaintiff appears to have sustained a mild to moderate primary head/brain injury and that the plaintiff's attention is average, processing of information is below average, planning and problem solving abilities are below average , verbal fluency is below average and his manual dexterity has been reduced.

[39] When considering aspects like pain and suffering and loss of amenities of life in order to determine general damages, it is not possible to measure these losses in certain and precise measured financial terms or by reliance on other cases. In many of these cases the difficulty that was expressly mentioned in the matter **of Sgatya V Road accident Fund** (Eastern Cape Division dated 4 July 2001) Jennet J stated as follows: "There are of course no scales upon which one can weigh things like pain and suffering and amenities of life nor is there a relationship between either of them and money which makes it possible to express them in terms of money with any approach to certainty".

[40] In the matter of **Road Accident v Marunga 2003 (5) SA 164 (SCA),** is the authority for the approach that all assessments of general damages were historically too low and should be adjusted significantly upward. The upward tendency, it must be added, is but one of the factors to be considered in the exercise of the courts discretion in assessing the amount of general damages, and should only be applied, if the facts of the matter warrants such an approached.

[41] It is also undisputed that the plaintiff suffered pain at the time of the accident. He is still in pain and shall continue to suffer pain in future.
It is stated in Dr. Engelbrecht’s report that the plaintiff takes up to four tablets and

analgesic every day. It is undisputed that the plaintiff continues to from recurrent headaches. The neurosurgeon’s opinion - which I accept - is that:
"In my opinion there is significant cognitive abnormality. Given the information regarding the head injury diffuse brain trauma is likely a factor influencing his ability although other factors might have some significance in this patient. My concern is however, that he also has frontal brain dysfunction and poor control and planning ability".
The brain injury therefore has resulted in increased risk of developing late post traumatic epilepsy.

[42] It is evident from the reports of the experts that the plaintiff has suffered and will continue to suffer loss of amenities. The *sequelae* of injuries as considered by the experts in their joint minutes show that the plaintiff is permanently unemployable and is disabled. He is also at risk of developing further ailments due to his cranial injuries. The plaintiff has suffered the loss of his independence and enjoyment of life.

[43] The evidence is undisputed as the defendant's own appointed experts are in agreement with the injuries; I am thus inclined to accept it for purposes of quantifying the damages. Also taking into consideration that the plaintiff's wife had left him after the accident, due to the permanent disability and/or disfigurement. The plaintiff is now without spousal support and therefore has to depend on other people for any assistance.

[44] The above having been said, I am mindful of the caution in **De Jong V Du Pisane N.O 2005 (5(SA 547 (SCA) at paragraph 60** wherein the court after noting the tendency towards increased awards in respect of general damages in recent times was readily perceptible, the court re-affirmed conservatism as one of the multiple factors to be taken into account in awarding damages. The court concluded that the principle remained that the award should be fair to both sides, it must give just compensation to the plaintiff, but not pour out largesse from the horn of plenty at the defendant expense as was also pointed out in **Pitt v Economic Insurance Co LTD 1975 (3) SA 264 (N) at 267.**

[45] There is no doubt that the plaintiff sustained fatal and irreversible injuries as a

result of the accident. Furthermore the pain and loss of amenities suffered by the plaintiff are overwhelmingly stated. The plaintiff was hospitalised for a period of more than six month and even continued with physiotherapy post his discharged from hospital. Due to these injuries the plaintiff cannot even manage and take care of his personal affairs, resulting in the appointment of a curator ad litem.

[46] Having regard to the above in my opinion an award of R1,600 000 would be a fair compensation in relation to general damages.

LOSS OF INCOME

[47] It is common cause that at the time of the accident the plaintiff was self-employed as a taxi driver and this was also confirmed by the defendant's' experts. Dr Daan De Klerk (Plaintiff's expert witness) stated that: "In my opinion he will not be employed again. I am of the opinion that he will not even be competitive in the labour market section for disable individuals".

[48] Dr JA Smuts stated that the plaintiff has cognitive problems as well as serious personality changes and physical impairment that make working most likely impossible. In his opinion the plaintiff is permanently disabled.

[49] Ms Abida Adroos is of the opinion that from a practical perspective, when taking into consideration the injuries of the plaintiff, his limited educational level, work experience, as well as declined with the plaintiff’s cognitive functions he will not be employable in the open labour market.

[50] The joint minutes of the Orthopaedic Surgeons of both the plaintiff and the defendant experts confirmed that the plaintiff remains unemployable and is permanently disabled and will therefore not manage to go back to work. The joint minutes of the Industrial Psychologists shows that for quantification purposes they agreed that the plaintiff would have to continue to function in his pre-morbid position, though they disagreed on the retirement age of the plaintiff.

[51] With regard to an appropriate retirement age, there is a general understanding that the "normal" retirement age is 55, 60 or 65, but this understanding is too vague to be useful in specific instances. As in this case the plaintiff is a taxi driver/Owner. As a self-employed person, he could have chosen any reasonable age to retire, depending on his health, or if he was not involved in an accident. The plaintiff could either draw a state pension. The taxi industry is unregulated with regard to retirement age. Retirement age is regulated in the formal employment with regard to the Government Employees Pension Fund and Provident Fund for employees in the private sector. In the matter of **Mogal v RAF (case 29208/13),** where Castennen, J confirmed the reality and said: "that people today are healthier and continue to work after the age of 65".

[52] I am therefore inclined to accept the retirement age on the pre- morbid scenario of the industrial psychologist of the plaintiff that he would have retired at age 65.

[53] The plaintiff's loss of earning since the collision and his future loss of earning capacity have been calculated by an actuary instructed by the defendant. It is evident from the actuarial report that the defendant specifically instructed the calculation be taken in consideration with regard to scenario 2. The industrial psychologists suggested that for quantification purposes the earnings at a scale between point 1 and 2 for taxi owners be used as a baseline, with an annual CPI percentage until normal retirement. The actuarial calculations applied a 5 % contingency to past loss earnings as indicated by the Plaintiff's industrial psychologist amounts to R152 086 (160 091-5%). And applying a contingency deduction to the actuarial calculation of the defendant's industrial psychologist for past loss of earnings amounts to R261 719, 30 (R275 494 - 5%).

[54] The plaintiff must prove that he will probably suffer financial loss or diminution of his income. In **Sandler v Wholesale Coal Suppliers Ltd 1941 (A) 194** it was stated that:
"It is no doubt exceedingly difficult to value the damage in terms of money, but that does not relieve the court of the duty of doing so upon the evidence placed before it. This is a principle which has been acted on in several cases in South African courts."

[55] In **Rudman v Road Accident Fund 2003 (2) SA 234 (SCA)** at para [11] the court

said.

"There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss."

[56] In **Road Accident Fund v Delport 2005 (1) SA 468 (SCA) and De Kok v Road Accident Fund 2009 9851/07,** the SCA stated that:

> "A claim for loss of earning and loss of earning capacity, cannot exist without the other. Therefore any patrimonial claim of this kind requires;
>
> (a) Loss of earning capacity as a result of a damage causing event ; and
>
> (b) An actual patrimonial loss of income as a result of the above mentioned loss of earning capacity in which case neither the one nor the other may be claimed for the same amount."

[57] Without loss of income the loss of earning capacity becomes a misnomer and remains a non-patrimonial loss at best that cannot be quantified in money because it has truly led to monetary loss(this is true for future scenarios as well). Likewise, without loss of earning capacity as a result of damage causing event, it is difficult to say that any patrimonial loss of income was caused by such damage causing event. Thus loss of earning capacity in my view acts as somewhat of a causal link between the damage causing event and the patrimonial loss suffered through the loss of earnings. Thus I am of the view that loss of earnings and loss of income are part and parcel of the same concept are vital for each other's existence.

[58] According to the calculations when applying the contingency deduction of 10 % and the post morbid scenario as indicated by the plaintiff's industrial psychologist amounts to a future loss of earnings will be an amount of R1 003 950. If one applies a contingency deduction of 1O % to the actuarial calculation of the defendant, and the post morbid scenario as indicated by the defendants' industrial psychologist, amounts to future loss of earnings in the amount of R942 247.80. It is evident that from the two amounts there is a mere R61 702, 20 differences in the two scenario in respect of future loss of income.

[59] The total loss according to the plaintiff industrial psychologist is R1 003 950 + R152 086. 45 = R1 156 036. 45 and the total loss according to the defendant's industrial psychologist is R 942 247. 80 + R261 719 . 30 = R 1203 967. 10

[60] In **Southern Insurance Association Ltd v Bailey No 1984 (1) SA 98 {A) at 114 C-D,** Nicholas JA Said:

> "In a case where the court has before it material on which an actuarial calculation can be usefully 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. **(see Goldie v City Council of Johannesburg 1948 (2) SA 913 (W) at 920).**

[61] It is trite that contingency deductions are whether the discretion of the court and depends upon the Judge's impression of the case. Contingencies are normally calculated at 5% for post loss and 15% future loss of earning capacity, (See Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A).

[62] Ms. Lizette Viljoen, Industrial Psychologist, in her report recommended that the normal pre-morbid contingency deduction should be applied. She further recommends a significantly higher contingency than the pre-morbid contingency for the period 01 January 2014 to December 2017 due to the high risk profile of the plaintiff and rightly so, she mentions that the contingences is the prerogative of the court together with the negotiations between the parties.

[63] The actuarial report of Mr. T. Doubel, did not make any contingency adjustments to the loss of income. It stated that these contingencies are not determined by actuarial calculations but are decided upon by the court or by agreement.

[64] Factors which the court must take into consideration when determining contingencies are: the possibility that the plaintiff may eventually have less than a

normal expectation of life, and that he or she may experience periods of unemployment by reason of incapacity due to illness, or accident or to labour unrest or general economic conditions. The amount of the discount may therefore vary, depending upon the circumstances of each case **(see Bailey above at 116 G-H).**

[65] Counsel for the defendant submitted that a higher deductions should be allowed as the plaintiff can still walk, even if it with assistance of a walker. The plaintiff can follow discussions and can therefore continue to run his taxi business.

[66] When a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. Bearing in mind that contingencies are not always adverse, the court should exercise its discretion and lean in favour of the plaintiff as he would not have been placed in that position where his income would have to be the be subject of speculation if the accident had not happened.

[67] Under the circumstances therefore, I am of the view that the actuarial calculations depicted above are fair and equitable and will serve to balance the interest of both parties.

[68] The plaintiff's claim is calculated as follows:

General Damages	R1 600 000
Past Loss of earnings	R261 719. 30
Future Loss of Earnings	R 1 203 967 .10

COSTS

[69] The plaintiff seeks punitive costs against the defendant. Counsel submitted that the pre-trial was held on 20 December 2016 and that the plaintiff was ready to proceed with the trial. Counsel indicated that the defendant was in possession of all the reports as well as the calculations, but the defendant failed to tender for future medical expenses. Counsels further submitted that the defendant works with public funds and should minimise unnecessary litigation. It us for this reason that punitive costs should be awarded against the defendant.

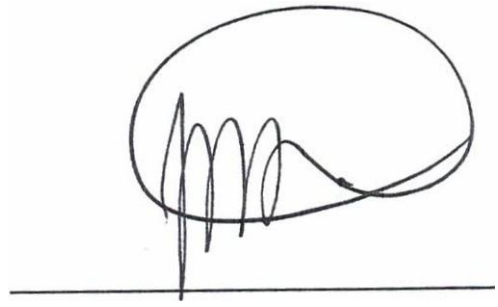
[70] Counsel for the defendant argued that the matter is before court for the first time and that no court time was wasted. Counsel submitted that the defendant had a legitimate point to raise with regard to the plaintiff's proof of income and bank account that were not submitted Therefore the defendant was unable to make proper calculation in that regard. Counsel submitted that there is therefore no justification for a punitive cost order against the defendant.

[71] Under the circumstances, the defendant's argument with regard to costs was a legitimate point as it is for obvious reason difficult to work on calculations if there was no proper proof of income. I am of the view that a punitive costs order is not warranted.

[72] Therefore defendant shall pay the plaintiff costs on a party and party scale.

[72] Accordingly I make the following order.

a) The draft order as amended marked with an "X" and initialled by me is made an order of this court.



S CHESIWE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 16 MAY 2016
Date of judgment: 26 July 2016

For the plaintiff:
Instructed by:
For the defendant:
Instructed by:

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

ON THIS THE 26th DAY of JULY 2017 AND BEFORE THE HONOURABLE CHESIWE

Case Number: 88870/2014

In the matter between:

ADV JJ POTGIETER N.O
KLEINBOOI MSANYANA JIYANE **PLAINTIFF**

and

THE ROAD ACCIDENT FUND **DEFENDANT**

DRAFT ORDER

After heard of counsel read the papers filed and considered the matter, **IT IS ORDERED THAT:**

1. The Merits were previously adjudicated upon and found that the Defendant is liable for 100% of the Plaintiffs proven and/or agreed damages.
2. The Defendant shall pay to the Plaintiff the sum of:

2.1 R261 719 + R1 203 967,00 = R1 465 686 in respect of general damages;

2.2 R1,6 million in respect of general damages;

3. The amounts mentioned in paragraphs 2 above in the sum of R1 465 686,00 is to be paid to the Plaintiff within 14 (FOURTEEN) days of the date of this Court Order;
4. In the event of the aforesaid amount not being paid timeously, the Defendant shall be liable for interest on the amount at the rate of 10,5% per annum, calculated from the 15th calendar day after the date of this Order to date of payment.
5. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 for payment of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him resulting the injuries sustained by the Mr. Jiyane in the motor vehicle accident that occurred on the 4th of May 2013, to compensate the Plaintiff in respect of the said costs after the costs have been incurred and upon proof thereof.
6. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs costs - on the High Court scale, subject thereto that:

6.1 In the event that the costs are not agreed

6.1.1. The Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;

6.1.2. The Plaintiff shall allow the Defendant 7 (SEVEN) Court days from date of allocator to make payment of the taxed costs.

6.1.3. Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10,5% per annum on the taxed or agreed costs from date of an agreement being reached and/or from date of the allocatur to date of final payment.

6.2 Such costs shall include but not be limited to:

6.2.1. The costs incurred in obtaining payment of the amounts mentioned above;

6.2.2. The costs of and consequent to the employment of Counsel, including counsel's charges in respect of her full day fee for 16

MAY 2017, as well as reasonable preparation;

6.2.3. The costs of all medico-legal radiological, actuarial, accident reconstruction, pathologist and addendum reports obtained by the Plaintiff, as well as such reports furnished to the Defendant and/or its attorneys, as well as all reports in their

6.2.4. The reasonable costs incurred by and on behalf of the Plaintiff in, as well as

the costs both parties.

consequent to attending the medico-legal examinations of

6.2.5 The costs consequent to the Plaintiff's trial bundles and witness bundles if any;

6.2.6 The cost of holding all pre-trial conferences, as round table meetings between the legal representatives for both the Plaintiff and the Defendant including counsel's charges in respect thereof;

6.2.7 The cost of and consequent to compiling all minutes in respect of pre-trial conferences

6.2.8 All cost incurred in the appointment of and subsequent thereto by the

Curator ad Utem

4. The amounts referred to above will be paid to the Plaintiff's attorneys, Spruyt Incorporated as per Aiinexure "A" hereto (The consent ana instruction), by direct transfer into their trust account, details of which are the following:

Standard Bank

Account number: […]

BARNCH CODE: Hatfield (01 15 45)

REF: SO 1813

5. There is no contingency agreement applicable.

6. The Defendant is liable for payment of 100% of the reasonable costs of the Trustee to be appointed herein, in respect of establishing a Trust and any other reasonable costs that the Trustee may incur in the administration thereof including his/her fees in this regard, which shall be recoverable in terms of the Undertaking issued in terms of Section 17(4)(a), and which costs will also include and be subject to the following:-

6.1 The fees and administration costs shall be determined on the basis of the directives pertaining to curator's remuneraiton and the furnishing of security in accordance with the provisions of the Administration of Deceased Estates Act, Act 66 of 1965, as amended from time to time;

6.2 The monthly premium that is payable in respect of the insurance cover which is to be taken out by the Trustee to serve as security in terms of the Trust Deed;

6.3 All the above mentioned costs shall be limited to payment of the reasonable costs which the Defendant would have had to pay regarding appointment, remuneration and disbursements had the Trustee been appointed as a *Curator Bonis;*

1O. The costs associated with the yearly audit of the Trust by a chartered accountant as determined in the Trust Deed.

11. That the nett proceeds of the payment referred to above as well as the Plaintiffs taxed or agreed party and party costs payable by the Defendant, after deduction of the Plaintiffs attorney and own client legal costs (the "capital amount") , shall be payable to a Trust, to be established within six months of the date of this order. The following shall apply to the trust:

11.1 The trust's main objective will be to control and administer the capital amount on behalf of the Plaintiff;

12. Should the aforementioned Trust be established within the six month period, the

Trustee thereof is authorised to pay the Plaintiffs attorney and own client costs out of the Trust funds in so far as any payments in that regard are still outstanding at that stage.

13. Should the aforementioned Trust not be established within the six month period:-

13.1 The Plaintiff is directed to approach the court within six months thereafter in order to obtain further directives in respect of the manner in which the capital amount is to be utilized in favour of the Plaintiff;

13.2 The Plaintiffs attorneys are prohibited from dealing with the capital amount in any other manner unless specifically authorised thereto by this court subject to the provisions contained in paragraphs 4 to 6 -- hereof.

14. The Plaintiffs attorneys are authorised to invest the capital amount in an interest bearing account in terms of Section 78(2A) of the Attorneys Act to the benefit of the Plaintiff with a registered banking institution pending the establishing of a trust.;

15. Until such time as the Trustee is able to take control of the capital sum and to deal with same in terms of the trust deed, the Plaintiffs attorneys are authorised and ordered to make any reasonable payments to satisfy any of the Plaintiffs needs that may arise and that are required in order to satisfy

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BY ORDER OF THE COURT

APPEARANCE FOR THE PLAINTIFF:
Adv. C Spangenberg
079 507 4819

APPEARANCE FOR THE DEFENDANT:

Adv. Tshabalala

082 510 2398