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

Case No: **39463/2019**

- (1) REPORTABLE: YES/~~NO~~  
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~  
(3) REVISED

.....  
**SIGNATURE**

.....  
**DATE**

In the matter between:

**ADV.SAYED N.O  
(CURATOR AD LITEM NP K[....])**

**PLAINTIFF**

and

**ROAD ACCIDENT FUND**

**DEFENDANT**

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## **JUDGMENT**

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### **TSATSI AJ**

#### **INTRODUCTION**

1. This application has been heard in a virtual hearing via Microsoft Teams.
2. The Plaintiff, 20-year-old adult female, NP K[...] (“the Plaintiff”), instituted a claim for loss of earnings against the Road Accident Fund.
3. The Plaintiff was born on 6 November 2001 and was involved in accident on 19 August 2016. She was 15 Years old at the time of accident. The Plaintiff was a passenger at the time of the accident.
4. The Plaintiff is represented by Adv. Sayed (“the curator ad litem”) who was appointed as curator ad litem by way of a Court dated 2 December 2020.
5. Both the issue of merits and quantum remain in dispute.

#### **BACKGROUND**

6. According to the curator ad litem’s report, the motor vehicle accident occurred on 19 August 2016 at approximately 16h30, on the N11 between Ermelo and Hendrina, Mpumalanga. A motor vehicle collision took place involving a motor vehicle with registration letters and numbers [.....] driven by T. Cornelius and motor vehicle with registration letters and numbers [...] driven by E.G. Sibeko in which the Plaintiff was a passenger at the time of the accident.
7. In its plea the Defendant denies liability about merits and quantum. The Defendant even puts the Plaintiff’s locus standi in her representative capacity into question.

8. The Defendant was not represented. The Defendant filed a plea. However, if the Defendant wanted to oppose this matter and put its version before Court it should have done so but failed.

### **SUBMISSIONS ON BEHALF OF THE PLAINTIFF**

9. As a result of the accident the Plaintiff suffered the following injuries (but not limited to):
  - 9.1 Severe head injury with GCS of 5/15.
  - 9.2 Structure of the right clavicle necessitating osteotomy and ORIF.
  - 9.3 Large laceration to head necessitating sutures and drainage and
  - 9.4 Various contusions and lacerations with resultant scarring.
10. Various experts compiled experts reports. In summary the Plaintiff suffering from neuro cognitive, neuro behavioral and neuro psychiatric difficulties. In addition, the Plaintiff is suffering from symptoms of post-traumatic stress disorder, functional symptoms of a depressive disorder and mild neuro cognitive disorder due to traumatic brain injury with behavioral symptoms.
11. The Plaintiff has scarring over her right forehead and into her right frontal and parietal scalp. There is a large 15cm scar that is visible and very unsightly. The Plaintiff has also a 15cm X 5 Cm scar on her right arm. She has a 6.5 cm surgical scar on her right clavicle.
12. The Plaintiff has multiple abrasions and lacerations on both knees. She was pregnant at the time of the motor vehicle collision and suffered loss of the foetus.
13. Counsel for the Plaintiff submitted that the scars on the Plaintiff's face will affect herself image and confidence. It will give a bad impression about her as if she was involved in criminal activities.
14. The Plaintiff was pregnant at the time of the motor vehicle accident, and she was 15 years at the time. The Plaintiff's injuries resulted in loss of a foetus. It was submitted on behalf of the Plaintiff that a claim for loss of a foetus will not be pursued.

15. It was further submitted on behalf of the Plaintiff that she struggles to control her emotions and that she has behaviour difficulties.
16. The curator ad litem submitted that the Plaintiff is said to be playing truant and not attending school regularly. The curator ad litem further submitted that the Plaintiff is sometimes not staying at home with her mother and disappear for some time her mother not knowing the Plaintiff's whereabouts. This kind of behaviour by the Plaintiff cause tension between the Plaintiff and her mother and the two are struggling with relationship post- accident.
17. It was submitted that the Plaintiff's behavioural change including the tendency of disappearing may be attributed to the injuries that she suffered during the motor vehicle collision. The Plaintiff had taken to drinking and smoking cigarette.

### **ISSUES**

18. The issue in dispute is both merits and quantum and whether the Plaintiff is entitled to loss of earnings in her representative capacity.
19. The issue of general damages is postponed *sine die* as the Defendant is not yet satisfied that the matter is serious.

### **THE LAW**

20. In terms of section 17 of the Road Accident Fund Act 56 of 1996 the Defendant is obliged to compensate any person for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle. The RAF Act does not

therefore preclude the Plaintiff from bringing a claim for loss of earnings.

21. The issue of diminished earning capacity is trite. The mere fact of physical disability does not necessarily reduce the estate or patrimony of the person injured. Put differently, it does not follow from proof of a physical injury which impaired the ability to earn an income that there was in fact a diminution in earning capacity<sup>1</sup>.
22. The principles for an assessment of loss of earnings or earning capacity were set forth by the then Appellate Division in ***Southern Insurance Association Ltd v Bailey*** 1984 (1) SA 98 (A): "*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....*"
23. Contingencies must be determined by the presiding officer. The parties' views play a role in the determination of contingencies. Those views however, are not binding. Contingencies are arbitrary and highly subjective. It is for this reason that a trial court has a wide discretion when it comes to determining contingencies<sup>2</sup>.
24. In a recent judgment of the Supreme Court of Appeal<sup>3</sup>, Willis, JA referred to the normal range of contingencies in respect of future loss of earnings as between 15 and 20%.
25. In ***M v Road Accident Fund*** (14250/2016) [2020] ZAGPPHC 96 (17 April 2020), in 2019 a 28 year old woman who suffered blunt abdominal trauma; forehead lacerations; and pelvic fracture was awarded an amount of R486 948.00 for past loss of earnings and R6667 532.00 for future loss of earnings. **In this case the Plaintiff was a passenger and lost a 28 week**

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**foetus as a result of the collision.** At the time of the accident the Plaintiff was 23 years old.

26. In **Mohapi v Road Accident Fund** (2017/22595) [2020] ZAGPJHC 40 (10 February 2020), a 44 year old Plaintiff, following the accident, he sustained a moderate traumatic brain injury and a C7 vertebral fracture, as well as facial injuries, lacerations to the forehead, dislocated knee and a fracture of the right acromion (right shoulder). His orthopaedic injuries are rated at 40% Whole Person Impairment (WPI), thus entitling him to a claim for general damages. The Plaintiff was awarded an amount of R1.6 million for future loss of earnings.
  
27. The Plaintiff a 39 years old woman was involved in a motor vehicle accident that occurred on 8 July 2016. She was 36 years old at the time of the accident and a passenger in the insured motor vehicle. The plaintiff's neurologist diagnosed a brain injury of moderate severity whilst the defendant's neurosurgeon opined that such injury was of a mild nature. The Plaintiff was awarded an amount of R570 506 (Five Hundred and Seventy Thousand Five Hundred and Six Rand) for loss of earnings ( see; **Yimba v Road Accident Fund** (44866/2017) [2019] ZAGPPHC 485 (19 September 2019).
  
28. In **Berry NO obo P v Road Accident Fund** (1189/2014) [2018] ZAFSHC 117 (5 July 2018), a claim was instituted by a mother on behalf of her minor son as long ago as 2014. She was run over by a motor vehicle whilst eight months pregnant. She was found to have suffered from an abruptio placenta and an emergency Caesarian section was done. The foetus suffered from fetal distress and the child was later diagnosed with cerebral hypoxia and epilepsy. The live dispute was the percentage of contingencies to be applied to the claim for loss of income.
  
29. In **Berry NO obo P v Road Accident Fund(supra)** the Defendant was ordered to pay to the Plaintiff the amount of R784 257.00 (Seven hundred and eighty four thousand two hundred and fifty seven Rand) together with interest

at the prevailing rate from a date 14 (fourteen) days after judgment to date of final payment.

30. In **M v Road Accident** (12601/2017) [2018] ZAGPJHC 438 (18 June 2018), the Plaintiff, aged 27 at the time of the motor vehicle accident, his bodily injuries were described as follows: As a result of the aforesaid collision, Plaintiff sustained severe bodily injuries consisting of: Severe head injuries characterized by: a period of loss of consciousness; a period of post-traumatic amnesia; resultant brain damage; resultant neuro-cognitive deficits involving: Impaired memory and concentration; poor mental; persistent dilapidating headaches. Neurobehavioral deficits, involving: A change of personality; aggressive behaviour; short temperedness; Irritability, multiple lacerations and abrasions. The Plaintiff was employed as a stock clerk at Lewis Stores (Bears) at the time of the accident. He was earning a gross salary of R4 102.04 per month. The Plaintiff would most probably have continued working until the retirement age of 60/65 years, depending on the employer's retirement age policy." He was temporarily totally disabled at the time of hospitalization.

31. The Plaintiff was awarded the sum of R2 129 817, 00 (two million one hundred twenty nine thousand, eight hundred and seventeen rand) in respect of loss of earnings and earning capacity.

32. In **N C OBO N Z v Road Accident Fund** (26302/15) [2018] ZAGPJHC 63 (4 April 2018) the Plaintiff in her capacity as a mother and guardian of a minor child, who was aged 13 years at the time of the motor vehicle accident, sustained a laceration of her tongue and a serious head injury with neurological, neurophysical and neuropsychological fallout. Judgment was granted in favour of the Plaintiff in the amount of R708 249.00 in respect of future loss of income.

33. In **Mokwena v Road Accident Fund** (75931/2017) [2020] ZAGPPHC 320 (3 July 2020), the Plaintiff was 37 years old at the time of the motor vehicle accident. The Plaintiff suffered the following injuries: a right compound

humerus fracture above the elbow. An open reduction and internal fixation surgical operation was performed on the 28<sup>th</sup> of February 2017. A left closed fibula fracture. An open reduction and internal fixation surgical operation was performed on the 28<sup>th</sup> of February 2017. A head injury. His GCS was 13/15 and this deteriorated to 8/15. He was intubated in casualties because of the low-level GCS. A CT scan was taken and an angiogram done. Soft tissue neck injury: The Plaintiff was placed in a Philadelphia neck collar. The Plaintiff was awarded an amount of R996. 731 for future loss of income.

34. In casu, there is no verified specialist radiology report to confirm the alleged “severe brain damage” allegedly suffered by the Plaintiff. The specialist radiology report is the report that would have been the one confirming the clinical diagnosis of the alleged “severe brain damage” allegedly suffered by the Plaintiff. This report is supposed to contain the Plaintiff’s brain images showing the alleged brain damage.

### **APPLICATION OF THE LAW TO THE FACTS**

35. In order to have regard to the Plaintiff’s loss of income, the Court must have regard to her status in life, to what she has been used to in the past and the comforts, conveniences and advantages to which she has been accustomed to (see ***Wigham v British Traders Insurance Co Ltd*** 1963 (3) SA 151).
36. There is no pass loss of earning or earning capacity due to the age of the Plaintiff. It was not submitted that the Plaintiff was granted a bursary prior to the accident. There is no guarantee that the Plaintiff would have been granted a bursary after the accident.
37. The educational psychologist Dr Seabi, stated on paragraph 5.8.2 of the report that the Plaintiff only returned to school the following year and was promoted to grade 10 based on her “excellent performance”. This is indicative

of the fact that the Plaintiff has a potential to improve her school performance.

38. Dr Seabi also indicated that although the Plaintiff did not do well in the first term in grade 12, she passed grade 12 with an endorsement for admission to study Bachelor's degree.
39. There is no indication of the name, qualifications and experience of the specialist diagnostic radiologist who performed the CT- scan. The dates when the CT- scan was performed are not indicated on the radiology reports. It is not clear when the first and subsequent CT- scan were performed. The diagnostic radiologist's report is not included on the *curator ad litem's* report neither is there any affidavit by the diagnostic radiologist's report confirming the contents of the CT- scan report.
40. I am of the considered view that it is difficult to consider the alleged severe brain damage and link same to the motor vehicle accident without the verified report of a qualified diagnostic radiologist. I am of the view that the verified report of the qualified diagnostic radiologist and or an affidavit by a qualified diagnostic radiologist confirming the contents of the radiology report, confirming the clinical findings, would have assisted the Court in this regard.
41. The verified report of a specialist radiologist would have been compiled from images verifying the alleged "severe brain damage". The name of the specialist diagnostic radiologist is not contained in the draft order which may be an indication that such report was not considered.
42. The reports of the following specialists contained in the Court papers were considered: Dr P. Engelbrecht, the orthopaedic surgeon; Dr TP Moja, Neurosurgeon; Dr I Jonker, Neuropsychologist; Dr J A Smuts, Neurologist; Dr M Naidoo, Psychiatrist; Dr J Seabi, Educational Psychologist; Dr JPM Pienaar, Plastic Surgeon; Dr C Weitz, Ophthalmologist; Dr Burgin, Gynaecologist; Mr Sissison, Clinical Psychologist; Dr GM Fredericks, Disability and Impairment Assessor; N September, Occupational Therapist; B

Maritz, Industrial Psychologist and G Jacobson, Actuary.

43. In Road Accident Fund matters an individual who has allegedly sustained a brain injury and, having been examined by medical specialists who are of the opinion she/he is unable to manage his/her affairs may be represented by a *curator bonis* preceded by a *curator ad litem*. In *casu*, it has been submitted that the Plaintiff has allegedly suffered a “severe brain injury”, and therefore would need a *curator ad litem* to represent her.

44. The Plaintiff’s level of education including injuries as indicated, means that she may not be able to obtain the highest paying stable employment. She may only qualify for certain types of work with concomitant prejudice of a lower salary and the possibility of more frequent periods of unemployment.

45. I am of the view that the Plaintiff being unemployable does not mean that she would not obtain employment at all, but merely that the employment that she might obtain might be for temporary periods and on a low remuneration scales, than expected.

46. It is trite that contingency deductions are within the discretion of the Court and depends upon the judge’s impression of the case. Having read the papers filed of record, having considered case law and submissions made by the Plaintiff’s Counsel and the *curator ad litem* I am of the considered view that the below order is reasonable.

47. I accordingly mark the draft order "X" and it is made an order of Court.

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**E.K TSATSI**

**ACTING JUDGE OF THE HIGH COURT**

**For the Plaintiff:** Adv C.M. Dredge

**Instructed by:** Ehlers Attorneys

**For the Defendant:** No appearance

Date of Hearing:	7 June 2021
Date of Judgment:	28 June 2021

This judgment was handed down electronically by circulation to the parties' representatives via email and by uploading on case line

- 1) Union & National Insurance Co Ltd v Coetzee 1970(1) SA 295 (A) at 300A.
- 2) RAF v Kerridge (1024/2017) [2018] ZASCA 151 (01 November 2018) at 42.
- 3) NK v MEC for Health, Gauteng 2018 (4) SA 454 (SCA) at par [16].