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

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

CP Bhoola

SIGNATURE

30 August 2021

DATE

CASENO: 61470/2017

N[....] S[....] OBO MINOR

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

BHoola AJ

INTRODUCTION

- [1] The plaintiff in this matter, Ms. N[...] S[...] obo Minor, in her representative capacity as biological mother, sued the defendant in terms of *the Road Accident Fund Act 56 of 1996 (Act)*, for damages sustained by her minor child, (a pedestrian), arising out of a motor collision which occurred on the 21 July 2016 at Siwisa location, Bizana, Eastern Cape .
- [2] On the 31st May 2021, the matter came before me, and unsurprisingly, there was no appearance on behalf of the defendant. The defendant, was initially represented by their panel attorneys, however the defendant terminated its mandate with their erstwhile panel of attorneys due to a policy decision for the defendant to deal with the claims and litigation arising therefrom internally without the assistance of the panel of attorneys. The panel attorneys of record for the defendant, had not withdrawn as attorneys of record and made no appearance in court. I am mindful of the fact that in this instance the court deals with public funds and therefore a measure of caution should be applied in finalising and not labour the matter on technical issues.
- [3] A pre-trial conference was held on the 13th November 2019, where the parties agreed that the minor child was six years old at the time of the collision and was *doli incapax*. Consequently, the defendant conceded negligence and agreed to pay plaintiff's proven or agreed damages resulting from the aforesaid motor collision.
- [4] A second pre- trial conference was held on the 13th May 2020 and the following became common cause between the parties, *locus standi*, that the motor collision occurred in accordance with the plaintiff's statutory affidavit in terms of section 19(f) of the Act.
- [5] There were joint minutes filed by the clinical psychologists, Dr. Mureriwa and Dr. Motsoaledi on the 18th February 2019 and by the educational psychologists, Dr Kekana and Ms Monyela on the 12th May 2020.
- [6] From the order granted on 26th May 2020 by the Honourable court, the merits were settled by the defendant at 100% in favour of the plaintiff. This was subsequently accepted by the plaintiff. Additionally, the issue of general damages became settled in an amount of R1 000 000 .00 (one million rand) and the loss of earnings were postponed *sine die*. The defendant was also ordered to provide the plaintiff with an undertaking in terms of section 17(4)(a) of Act, for the cost of future accommodation of the minor child in a hospital or nursing home, or the treatment of or rendering of a service or supplying of goods to him arising out of injuries sustained by the minor child in the motor collision which occurred on 21st July 2016.
- [7] On the trial date, the plaintiff moved an application to lead evidence by way of affidavit in support of the claim in accordance with Rule 39(1) and Rule 38(2) of the Uniform Rules. In the light of Covid- 19 protocols and the issued Directives

by the Judge President of this Honourable Court, I ordered that plaintiff may proceed by way of affidavits. There was no representation or evidence presented by the defendant.¹

PLAINTIFF'S CASE

COMMON CAUSE FACTS

- [8] Jurisdiction, *locus standi*, legislative requirements and compliance with time periods were admitted
- [9] The minor child was six years and five months old, was a grade 1 learner at [...] Primary School in Eastern Cape. He is currently in grade 5 at [...] Primary School. At the time of the motor collision he sustained severe bodily injuries consisting of head injuries and multiple lacerations on the head.
- [10] The joint minute of the clinical psychologists dated 18 February 2019 reveal that the minor child was too young to determine the pre- accident scholastic potential. Both clinical psychologists agreed that based on the medical and social history prior to the accident, there were no indicators to suggest cognitive or behavioral deviations from the normal. They were also in agreement that the clinical history suggested that the minor child sustained significant traumatic brain injury at a very young age and there was a high probability that his school performance will get worse in higher grades.
- [11] The joint minute of the educational psychologist report of 12 May 2020 confirmed that the minor child sustained significant traumatic brain and severe head injury. They were optimistic that the minor child could probably obtain an NQF level 5 qualification pre-accident. They also opined that since it has been more than two years since the accident occurred, it is unlikely that the minor child will evidence significant spontaneous improvement in neuropsychological status. Ultimately, they concluded that the accident has rendered the minor child academically vulnerable and he will not be able to cope in mainstream education. They were in agreement that the minor child should be referred to a special school for Learners with Special Education Needs (LSEN) where he will be able to follow a vocationally orientated skills course in the year in which he turns thirteen.

PLAINTIFF'S FACTS

- [12] The minor child was born on [.....] He is accordingly (eleven) 11 years of age and was six (6) years and five (5) months at the time of the motor collision. On the day of the collision he was a pedestrian, crossing the road, on his way home

¹ *Madibeng Local Municipality v Public Investment Corporation Ltd* 2018 (6) SA 55 (SCA) PER Plasket AJA (Ponnan JA, Wallis JA, Willis JA, and Makgoka AJA concurring), para 26 (page 60 G-H:

from school, when he was hit and dragged by a truck. He was transported by ambulance from the scene of the collision to St. Patrick's Hospital. Thereafter, he was transferred the same day from St. Patrick's Hospital to Nelson Mandela Hospital and referred back to St. Patrick's Hospital. The minor child was in Intensive Care Unit for approximately six (6) weeks. After the collision, he was hospitalised from 18 October 2016 and discharged on 28 November 2016. The diagnosis was that he sustained a severe traumatic brain injury with Glasgow Coma Score of 8/15.

- [13] The plaintiff served her RAF – 1 form on the RAF on 11th October 2017. According to the RAF-1 the minor child sustained a head injury and multiple lacerations on the head.
- [14] This minor child's hospital records reveal the following injuries sustained by the minor on admission: head and haemorrhaging with multiple injuries on the front and back of his head. Additionally, the hospital records reflect *"airway is self-maintained, receiving oxygen, pupils responsive to light, head trauma and x rays were taken of the skull, chest, pelvis and limbs."*
- [15] The plaintiff subsequently, issued summons on 20 August 2019 and pleaded that as a result of the accident the minor child sustained a head injury with multiple lacerations on the head. The plaintiff's claim for damages was for R 6 500 000.00 which comprised of future medical expenses of R500 000,00, future loss of earnings R4 000,000.00 and R 2 000 000, 00 for general damages.
- [16] The plaintiff delivered and subsequently served the summons on the defendant, by sheriff on the 21st August 2019. In the absence of filing its plea timeously, The defendant was served with a notice of bar on the 13th September 2019 and ultimately served its plea on the plaintiff on the 19th September 2019. In its plea, the defendant denied negligence and pleaded the Apportionment of damages Act 34 of 1956.
- [17] There was no replication filed by the plaintiff.
- [18] The Plaintiff relied on a number of expert witnesses, to discharge the onus on a preponderance of probabilities. In relation to the nature, extent and the severity of the injuries sustained by the minor child, the plaintiff relied on the affidavit by the plaintiff, pre-trial conference minutes, the joint minutes, the opinions expressed by the uncontested expert witnesses employed by the plaintiff and actuarial calculations.

Medico -Legal Evidence

Dr A.B. Mazwi, Neurosurgeon

- [19] The report of the neurosurgeon, Dr Mazwi, who consulted with the minor child on 4th June 2018 reveals that the minor child has permanent serious disfigurement, significant long term mental disturbances, severe head injury, significant loss of amenities of life and has reached maximal medical improvement and concludes that there is a causal connection between the accident and the injuries sustained by the minor child.

Dr J. F Mureriwa, Clinical Psychologist

- [20] On the 5th June 2018, Dr Mureriwa, the clinical psychologist assessed the minor child. His report reveals the minor child is alert and cooperative, but easily distracted. He required redirection and his cognitive functioning, memory and concentration appears to be severely impaired and impacts his academic performance adversely. His observance of the minor child's significant brain slowing, is consistent with the history of severe traumatic brain injury, poor performance on neuropsychological problems and behavioural problems. His testing revealed the minor child's academic performance has declined, he has loss of self-esteem due to a speech impediment, as well as facial and scalp scars. He expressed the opinion that as a result of these symptoms, the minor child is unlikely to attain his full pre- accident educational, occupational and social potential.

Ndzungu & Associates, Occupational Therapist

- [21] Ndzungu & Associates; Occupational Therapists, assessed the minor on 11th March 2021. They report that the minor child is currently in grade 5 and has performed poorly after the accident. His teachers have complained stating that he is slow and forgetful. The minor child reports persistent headaches, significant cognitive limitations and forgetfulness. They opine that the minor presents with cognitive deficits that are expected to affect his overall academic potential and future occupational perspectives. They conclude that given his presentation, the minor child is likely to continue to struggle with mainstream education. He continues to perform with unsatisfactory marks and continues to demonstrate significant cognitive and psychological limitations. He is unlikely to complete grade 12 and will be considered as an unskilled worker.

Dr. I. T. Kekana, Educational Psychologist

- [22] A few days later, the educational psychologist, Dr. I .T. Kekana, consulted with the minor child on the 23rd March 2020. According to him, the minor child has a low average intellectual ability and his performance on memory is below average. He expressed the opinion that considering the minor child's pre accident status and taking into account his educational potential, environment, socio – economic

factors of the family the minor child could probably pass grade 12 and obtain admission to a higher certificate study.

- [23] When considering the post- accident status of the minor child, he postulates that the minors severe head injury and his emotional problems as a result of the accident will impact negatively on his scholastic progress. He is of the view that the minor child will experience more challenges as he progresses into the senior phase where Further Education Training and higher order learning skills will come into operation . He opines that the accident rendered the minor child academically vulnerable. He will not achieve his pre accident potential. He posits that the minor child will not reach grade 12 and he would be referred to a special school for Learners with Special Education Needs (LSEN) where he will be able to follow a vocational orientated skills course in the year he turns 14 (fourteen).

Dr Talifhani Ntsieni, Industrial Psychologist

- [24] Dr. Ntsieni, the Industrial Psychologist consults on 16th October 2020, and agrees with the findings of the educational psychologist that the minor child could probably pass grade 12 and obtain a higher certificate study.
- [25] According to him, in the pre-morbid scenario if the minor had completes grade 12 and obtains admission to a Higher Certificate, he would have probably entered the labour market as a semi-skilled worker where he would have been paid a basic salary according to the Paterson scales at a B3 level, and most probably progressed up to a C1/C2 medium quantile level, total package, at the approximate age of 40-45 years. Any increases in his income thereafter would have been limited to inflationary increases. His pre accident retirement age would have been at the approximate age of 65 years.
- [26] He postulates, the post morbid scenario indicates that he is unlikely to complete grade 12 and will be considered as an unskilled worker. Ideally, he would benefit from remedial/special education interventions and scholastic assistance where the focus is more on one on one learning. The expert opines that the cognitive deficits would have a negative impact on his scholastic abilities and future employment. His future occupational prospects will be directly linked to the level of education he would manage to achieve. He refers to (Kock, 2020) suggested earnings for unskilled labourers within the non-corporate sector as R21 600 -R37 900 - R86 000 per year. He postulates that the minor is no longer performing at his pre-accident potential as a result of the accident. He is likely to suffer a future loss of earnings to be calculated per the difference between his pre- accident earning potential and his post earning potential.
- [27] It is evident from the expert's opinions that the injuries sustained from the accident has a causal link with the injuries sustained, and a negative and restrictive impact of the minors level of physiological, neurosurgical, psychological, educational and occupational functioning.

FUTURE LOSS OF INCOME

- [28] Munro Forensics provided an actuarial report dated 26th March 2021. According to them, the minor's future uninjured earnings was projected from Paterson at B3 at R275 000.00 per year from January 2029, with a ceiling income from Paterson at C1/C2 of R478 500.00 per annum being reached in the year September 2052. His projected income was estimated at R 6 437 600 and earnings inflation was allowed until retirement age of 65.
- [29] The minor's future injured earnings were projected as follows. If he leaves school without a grade 12 in December 2028 and is unemployed for 5 – 7 years and in 2035 he is employed as an unskilled (lower) employee, he will earn R21 400 per year. The earnings inflation will be allowed until his retirement age of 65. A suggestion was made for contingencies to be applied as usual since the RAF Amendment Act cap does not have an impact on this scenario.
- [30] Since the correctness of these three reports was neither challenged nor were alternative scenarios presented to me I must decide the case on these facts.

ISSUES IN DISPUTE

- [31] The crisp issue before me is to ascertain the quantum in respect of loss of earnings or earning capacity of the minor child.

LAW

Loss of Earnings

- [32] It is accepted that earning capacity may constitute an asset in a person's patrimonial estate. If loss of earnings is proven the loss may be compensated if it is quantifiable as a diminution in the value of the estate.² It must be noted, a physical disability which impacts on the capacity to an income does not, on its own, reduce the patrimony of an injured person. It is incumbent on the plaintiff to prove that the reduction of the income earning capacity will result in actual loss of income.³

² *Prinsloo v Road Accident Fund* 2009 5 SA 406 (SECLD) at 409C-41A

³ *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) at para 11, *Union and National Insurance Co Limited v Coetzee* 1970 (1) SA 295 (A) AT 300A.

- [33] In quantifying such a claim an Actuary is often used to make actuarial calculations based on proven facts and realistic assumptions regarding the future. The role of the Actuary is to guide the court in the calculations to be made. Relying on its wide judicial discretion the court will have the final say regarding the correctness of the assumptions on which these calculations are based. The court should give detailed reasons if any assumptions or parts of the calculations made by the actuary are rejected. It must be borne in mind that the actuary depends on the report of the Industrial Psychologists, who in turn are dependent on the information provided by the claimant.
- [34] The learned author Dr R.J. Koch in *The Quantum of Damages Year Book* states at page 118 that the usual contingencies which the Road Accident Fund accepts is 5 % on the past income and 15 % on the future income. The aforesaid is only a guideline, but it indicates the general approach adopted by the defendant in similar matters. The learned author continues on page 118 to suggest (based upon the authorities of *Goodall v President Insurance* and *Southern Insurance Association v Bailey N.O.*⁴ that as a general rule of thumb, a sliding scale can be applied, i.e. “1/2% per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in middle age.”
- [35] The court, in the case of *Road Accident Fund v Guedes*⁵ at paragraph [9] referred with approval to *The Quantum Yearbook*, by the learned author Dr R.J. Koch, under the heading 'General Contingencies', where it states that:
- “...[when] assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court...” [my emphasis]
- [36] The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%, depending upon the facts of the case.⁶
- [37] The importance of applying actuarial calculations and its advantages was discussed in the case of *Southern Insurance Association v Bailey NO*⁷ the court referred with approval to the case of *Hersman v Shapiro and Company*⁸ at 379 per Stratford J where the following was said:
- ‘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

⁴ 1984 (1) SA 98 (AD)

⁵ 2006 (5) SA 583 (SCA)

⁶ (See *AA Mutual Association Ltd v Maqula* 1978(1) SA 805 (A) 812, *De Jongh v Gunther* 1975(4) SA 78 (W) 81, 83, 84D, *Goodall (supra)*, and *Van der Plaats v SA Mutual Fire & General Insurance Co Ltd* 1980(3) SA 105(A) 114-115A-D).

⁷ *Ibid* footnote 4

⁸ 1926 TPD 367.

even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.'

"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."

- [38] Ultimately, the award for future loss of earnings or earning capacity must be based on good medical evidence and corroborating facts. There must be some reasonable basis for arriving at a particular figure. In the event of a mathematical approach, one has to first work out what the third party's earnings would have been but-for the accident (that is, if the accident had not occurred), and secondly, one has to calculate what the plaintiff's earnings are now that the collision has occurred (having regard to the accident) and the difference between these two amounts will then represent the loss.⁹

APPLICATION OF LAW TO FACTS

- [39] The minor child's future loss of earnings or capacity to earn has been actuarially calculated and the basis of such calculations, which is discussed below are consistent with the facts and probabilities in the matter.
- [40] The plaintiff's case remains undisputed. There was a joint minute in respect of the clinical and educational psychologists. The minor child was normal and not born prematurely with any complications. There is also no evidence before me that prior to the collision the minor child had any developmental problems. The fact

⁹ *Potchefstroom Electronic Law Journal (PELJ)* On-line version ISSN 1727-3781, PER vol.18 n.7 Potchefstroom 2015

that he was six years and five months and in grade 1 (one) shows that he was a bright young lad.

- [41] In so far as the injuries are concerned, it has not been disputed that the minor child sustained severe traumatic head injury (with 8/15 GCS) and multiple scalp lacerations and scars which was consequent to the motor collision. It remains undisputed that the minor child's neuropsychological, neurocognitive and neurobehavioral arising from the accident has been impaired.
- [42] In regard to the minor's education, he is in mainstream school. He was in grade one at the time of the accident. It is also undisputed that the minor child did not complete grade one and remained at home for the rest of the year in 2016 to recuperate since the accident. There is a possibility that this could be the contributing reason why he failed grade two.
- [43] The educational psychologists, expressed the opinion that the minor child could probably pass grade 12 (twelve) and could probably obtain a NQF Level 5 qualification. However, all the other experts were of the view he would be able to at least complete grade 12 and obtain a higher certificate study pre- accident. The view expressed by the experts were that the accident has rendered the minor child academically vulnerable and he will not achieve his pre-accident potential and in all likelihood be referred to special school for learners with special educational needs (LSEN) for the higher grades, where the school work is more challenging.
- [44] The occupational therapist opines that the cognitive deficits would have a negative impact on his scholastic abilities and future employment. His future occupational prospects will be directly linked to the level of education he would manage to achieve.
- [45] The industrial psychologist's uncontested postulations regarding the pre and post morbid future loss of earnings prior to and but for the accident is the only evidence that is before me which I must accepted.
- [46] I accept that the minor child would require an understanding employer who will be willing to accommodate his cognitive limitation should he secure work in future. His working environment would also need to be less cognitively demanding as he would struggle to perform with the pressures of work. I have also considered that he is no longer performing at his pre-accident potential as a result of the accident. The minor child is therefore likely to suffer a future loss of earnings to be calculated as the difference between his pre-accident earning potential and his post-accident earning potential.
- [47] I am mindful that the minor child will be an unequal competitor at the open labour market compared with his healthier peers and that he will not be able to

perform functions efficiently and effectively as compared to his counterparts. The injuries sustained from the accident will hinder his career and future employability. The minor has suffered a medically justifiable loss of earnings or work capacity as a direct result of the accident.

- [48] I find that the plaintiff's expert witnesses remain the only evidence before this me. The submissions made by industrial psychologist is clear, reasonable and persuasive. I therefore find that the evidence before me is credible and I accept it as reliable and plausible.
- [49] According to the actuarial calculations by Munro Forensics dated 26th March 2021, the minor's future uninjured earnings was projected from Paterson at B3 at R275 000.00 per year from January 2029, with a ceiling income from Paterson at C1/C2 of R478 500.00 per annum being reached in the year September 2052. They projected the minors income was estimated at R 6 437 600.00. The earnings inflation was allowed until retirement age of 65.
- [50] The minor's future injured earnings were projected to the extent that if he leaves school without a grade 12 in December 2028 and is unemployed for 5 – 7 years, then in 2035, as an unskilled (lower) employee, he will earn R21 400 per year and earnings inflation was allowed until the retirement age of 65.
- [51] Plaintiff's counsel submitted that contingencies are to be applied as usual since *the Road Accident Fund Amendment Act 19 of 2005* cap does not have an impact on this case. In this regard counsel argues the contingency deductions of 25% on uninjured earnings and 15% on injured earnings should be applied.
- [52] The loss of earnings after the above-stated contingency deductions amount to R 4 793 700.00 (Four million seven hundred and ninety three thousand and seven hundred rand only). The calculations were on the basis that the minor is not expected to reach the suggested pre-accident career potential and that he might suffer losses that are not directly quantifiable and should be address via contingencies. The retirement age is at 65 years.
- [53] It is trite that in considering what damages to award in damages claims, the court exercises discretion.¹⁰ In doing so, the court has to ensure that the award for damages made is fair and reasonable. This is usually achieved through judicial precedent. The actuaries recommend the so called normal contingencies apply as discussed above.
- [54] When considering the contingency deductions to be applied on actuarial calculations of loss of earnings, allowance for contingencies involves, by its very nature, a process of subjective impressions or estimations rather than objective

¹⁰ Radebe obo TD v Road Accident Fund [2013] ZAGPPHC 84 at paragraph 12

calculations¹¹. The so-called normal contingencies referred to takes into account that a plaintiff might ordinarily sustain some loss in his future income by virtue of: falling sick from time to time; the prospect of unemployment and an inability to secure alternate employment immediately; the prospect of being injured in circumstances where the plaintiff would receive no compensation from any source; the saved costs of unemployment. I applied my mind to the minor child's circumstances. I have considered the minor child's background and family history. Additionally, I have considered the following factors :

- [55.1] The fact that no one in the minor child's immediate family has completed grade 12.
- [55.2] The minor child lives in overcrowded conditions in a four room home with extended family and shares a room with his mother and siblings. He comes from an impoverished background and his mother and grandparents were unemployed at the time of the accident not able to support him to improve his academic performance.
- [55.3] Prior to the accident, he was an average learner. The possibility exists that even without the accident he may not have completed grade 12 nor would he obtain a certificate considering the families historical and socio economic background.
- [55.4] Even though the minor child failed grade two, I have considered that, notwithstanding the fact that the accident occurred on 21 July 2016, the minor child did not attend school for a period of 6 months year ending 2016 and was promoted to grade 2. This could have created the vacuum resulting in his failure due to the fact that he did not complete the grade 1(one) foundational year syllabus which resulted in him not grasping the concepts for grade two (2) thereby encountering difficulty.
- [65.5] That when the Actuary postulated loss of earnings these amounts were considered from Paterson's figures relating to corporate survey earnings which may not be applicable to the minor child.
- [66.6] He will not attend a mainstream school and when he turns 14 (fourteen) he has to attend to a special needs school (LSEN).
- [66.7] I have also considered the fact that the minor child is in grade five and has not repeated a year since grade two.
- [66.8] His pre- accident and post-accident life expectancy remains unchanged.

RULING

¹¹ 1979 (3) SA 953 (AD) at p965G

- [69] Bearing in mind the “sliding scale” principle a 25% contingency deduction for a child is not unusual. In matters such as these, as was the case in *RAF v Guedes*¹², different contingency percentages may be applied to pre-morbid and post-morbid income.
- [70] I am mindful that the court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant’s expense.¹³
- [71] I am also cognisant of the view expressed in *Hulley v Cox*¹⁴ “we cannot allow our sympathy for the claimants in this very distressing case to influence our judgment”.
- [72] Consequently, I have applied a 30% contingency deduction to the pre- morbid earnings and agree with the plaintiff in respect of a 15% contingency for post - morbid contingency deduction. I am satisfied that the contingency deduction in respect of both pre-morbid and post-morbid income would be just and fair.¹⁵
- [73] The calculations are as follows R 6 787 600.00 Applying the 30% contingency deduction the amount is reduced to R6 787 600.00 x 30% (R6 787 600 – R2 036 280) = R 4 751 320.00.
- [74] In relation to the post-accident income or earnings based on the assumption that the minor child will be employed until the age of 65 years, the probable amount of R350 000,00 is applicable. Applying the 15% contingency deduction post-accident result in the net loss of R 350 000.00 x 15% = (R 350 000.00 – R 52 500.00 = R 297 500.00).
- [75] The nett future loss of earnings is R4 751 320.00 – R 297 500 = R 4 453 820,00. I find that the balance of probabilities favours awarding compensation for loss of earnings or earning capacity to the plaintiff on behalf of the minor child in the amount of R 4 453 820.00. I have one further problem in that according to the pleadings before me, the plaintiff seeks an amount of R4 000 00.00 and no subsequent amendment is before me in terms of Rule 28 of the Uniform Rules. The plaintiff is therefore only entitled to a claim of R4 000 000.00 (four million rand only).
- [76] Counsel requested that the aforesaid funds be protected by means of payment being made directly to the plaintiff. There was no submission by the plaintiff for the appointment of a *curator ad litem* or the creation of a trust. I do not believe that the objects would be achieved if the plaintiff was entrusted with the administration of the award. The reasons include amongst others, a lack of knowledge or proficiency to administer such a large sum of money, the non- separation of the award and personal funds, creditors access to the award and a lack of supervision.

¹² 2006 (5) SA 583 (SCA)

¹³ *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (D) at 287E–F

¹⁴ 1923 AD 234 at 246:

¹⁵ *Nkuna obo N v Road Accident Fund* (99671/2015)[2019] ZAGPPHC 335,

- [77] The other available option is the possibility to deposit the award into the Guardians Fund. The guardian's fund was created by section 91 of the Administration of Estates Act 24 of 1913 ("the previous Act") and in terms of section 86 (1) of the Administration of Estates Act 66 of 1965 ("the new Act"), continued in existence after the previous Act was revoked by the enactment of the new Act.¹⁶
- [78] The guardian's fund consists of all moneys:
- [78.1] In the Guardian's Fund at the commencement of the new Act; or
 - [78.2] Received by the Master under the new Act or in any law or in pursuance of an order of Court; or
 - [78.3] Accepted by the Master for any known or unknown person.
- [79] I am of the view considering the interest to be earned and monthly claims that may be required for the maintenance of the minor child, that the award would be better protected in the Guardian's Fund as opposed to such large sums being in possession of the plaintiff.

ORDER

- [80] In the result, I make the following order:
- [80.1] The merits were settled at 100% in favour of the plaintiff in respect of loss of earnings or earning capacity.
 - [80.2] The defendant shall pay to the plaintiff the total capital amount of R4 000 000.00 (four million rand only) in respect of loss of earnings or earning capacity, together with interest a *tempora morae* calculated in accordance with the Prescribed Rate of Interest Act 55 of 1975, read with Section 17 (3)(a) of the Road Accident Fund Act 56 of 1996.
 - [80.3] The defendant shall pay the capital amount of R4 000 000 .00 (four million rand only) within 180 (one hundred and eighty) days from the date hereof.
 - [80.4] The plaintiff shall allow the defendant 14 (fourteen) days to make payment of the taxed costs.
 - [80.5] The Defendant shall pay the aforesaid in (2) above into the Plaintiff's attorneys of record's trust account as follows: -
 - Name of Bank : First National Bank
 - Account Holder : Sotshintshi Attorneys

¹⁶ Nyambe Petros Sibanda o.b.o R[.....] S[.....]

Account Number : [...]
Branch Number : 252145
Type of Account : Trust Account
Branch Name : Hatfield (PRETORIA)

- [80.6] The Defendant is ordered to pay the Plaintiff's agreed or taxed High Court costs as between party and party, such costs to include the costs of counsel's day fee for 31 May 2021 and day fee for 1st June 2021, the qualifying fees of the experts, consequent upon obtaining plaintiff's reports as well as the plaintiff's reasonable travel and accommodation costs to attend the defendant and own experts examinations.
- [80.7] After the deduction of the agreed contingency fees or the attorney and client fees (whichever is applicable in law and shall not exceed 25% of the Capital amount), the net amount of the award shall be paid into and administered by the Guardians Fund.
- [80.8] The proof of payment thereof is to be filed with the Registrar of the High Court Gauteng Division, Pretoria within two weeks of receipt of monies into the plaintiff's attorneys Trust Account.
- [80.8] There is a valid Contingency Fee Agreement.



C. B. Bhoola

Acting Judge of the
High Court of South Africa
Gauteng Division, Pretoria

Delivered: This judgment was prepared and authored by the Judges whose names is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on

CaseLines. The date for hand-down is deemed to be 30 August 2021.

APPEARANCES

Counsel for the Applicant	: Advocate Resenga
Instructed by	: Sotshintshi & Partners

Counsel for the Respondent	: No appearance
Instructed by	: No appearance

Date of Hearing (via MS Teams)	: 01 June 2021
Date of Judgment	: 30 August 2021