



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: 13777/2016

In the matter between:

J[....] B[....]

on behalf of **D[....] R[....] B[....]**

First Plaintiff

ZAYTOEN CORNELISSEN

Duly appointed as Curatrix ad litem to

A[....] J[....]2 B[....]

Second Plaintiff

("The Patient")

and

THE ROAD ACCIDENT FUND

Defendant

Coram: Justice J Cloete

Heard: 10 and 11 August 2022

Delivered electronically: 2 September 2022

JUDGMENT

CLOETE J:

[1] The only remaining issue in this claim for damages arising from a personal injury is the percentage contingency to be applied in respect of the patient's past and future loss of earnings. Given that he is represented by a curatrix ad litem I will, for sake of convenience, refer to him as A[....].

[2] On 10 July 2015, A[....] along with his mother and younger brother sustained injuries when the driver of the vehicle in which they were travelling as passengers failed to stop at a T-junction in the Botriver area and thereafter lost control. A[....]'s mother and brother also sustained injuries, but his were far more severe, and the two neurosurgeons appointed by the parties respectively, namely Drs Edeling and Parker, concluded that A[....] (who was born on 5 April 1998 and was 17 years old at the time of the accident) suffered a severe closed traumatic brain injury with intracranial haemorrhage and features of diffuse axonal injury.

[3] Action was instituted against the defendant ("RAF") on 2 August 2016 by A[....]'s mother in her personal capacity and on behalf of his younger brother, as well as A[....] himself. As previously mentioned a curatrix ad litem was subsequently appointed to represent and assist A[....] in this litigation. The RAF, having properly conceded the merits (given that all three were passengers) agreed to an order which was granted on 2 September 2021 which resolved the claims of A[....]'s mother and brother and in addition certain of A[....]'s claims.

[4] His claim for general damages was settled in the sum of R1.8 million and he was furnished with the usual statutory undertaking for future treatment in terms of s 17(4)(a) of the Road Accident Fund Act¹. As far as his claim for past medical and related expenses is concerned, this was postponed for a short period for quantification, and subsequently agreed in the sum of R534 706.84.

[5] The two industrial psychologists appointed by the parties respectively, namely Mr Benade and Dr Rungqu-Mshumpela, agreed in a joint minute that A[....]:

¹ No. 56 of 1996.

5.1 Left school as a result of his injuries during 2015 when he was in grade 11;

5.2 Would otherwise have completed grade 12 in 2016 and thereafter studied towards a tertiary qualification (diploma/degree);

5.3 Most probably would thereafter have managed to progress in his career and reached his career ceiling at the age of 45 to 50;

5.4 Would have commenced his career earning at the Paterson B5 band in an operational position, progressing to the Paterson C3 band in an advanced skills position, and reaching his career ceiling at the Paterson C4 band in an advanced operational position at the age of 45;

5.5 Would have retired at the age of 65; and

5.6 Is unemployable in the open labour market.

[6] These two experts also agreed to adopt the earnings levels contained in Koch: The Quantum Yearbook 2022 as follows:

6.1 In 2020, at age 22, R383 000 per annum, with straight line increases to the age of 31;

6.2 From 2030 until 2043, from age 32 to 45, R596 000 per annum with straight line increases; and

6.3 From 2043 until 2063, from age 45 to 65, R710 000 per annum with Consumer Price Index increases.

[7] In addition, after conclusion of the evidence and argument, the parties agreed that A[...]'s past loss of income (as at 11 August 2022) is R600 200, as well as the amount to be awarded for future loss of income, depending upon the percentage contingency to be applied to both as determined by the court, in accordance with a revised actuarial calculation provided by Mary Cartwright Consultants CC. (The assumptions made by the actuary are not contentious, it having been agreed that they are assumptions usually made in these types of matters).

[8] The evidence adduced on behalf of A[....] was that of Ms Mignon Coetzee, a registered clinical and neuropsychologist with particular expertise in neuropsychology, and Mr Benade. The RAF closed its case without adducing evidence. Given the extent of agreement between the industrial psychologists, it is not necessary to deal with Mr Benade's evidence, save to state that in his opinion A[....] is not only unemployable in the open labour market but also in a sheltered and sympathetic work environment, having regard to the report and testimony of Ms Coetzee which I deal with below.

[9] Ms Coetzee testified that she carried out her assessment of A[....] on 9 May and 2 August 2019 to determine the nature, extent and severity of any psychological and/or neuropsychological sequelae of the injuries sustained by him. She was informed by A[....]'s mother that he had a normal delivery, was a healthy infant and reached all his developmental milestones within the normal range. At the time of the accident, when A[....] was at school in grade 11, he had successfully completed each academic year. After the accident he did not return to school as he underwent a protracted period of rehabilitation. In 2016, A[....] was enrolled in a grade 12 equivalent learnership program, but he did not complete it. He has not been employed in the formal labour market.

[10] Ms Coetzee referred to the conclusion reached by Drs Edeling and Parker in relation to A[....]'s injuries. She administered the South African normed Wechsler Adult Intelligent Scale test, and A[....] obtained scores for verbal and performance IQ within the average range (61st percentile). The index scores varied from the 10th percentile (processing speed) to the 82nd percentile (perceptual organisation).

[11] Her evidence was further that estimating pre-morbid cognitive functioning forms an integral part of any neuropsychological evaluation. An estimate of A[....]'s intrinsic, pre-morbid cognitive potential was reached by considering his higher scores on current testing as well as his pre-morbid developmental history. In her opinion, pre-morbidly, A[....] would have had the cognitive potential to matriculate and obtain a tertiary qualification. As previously indicated, this is what the two industrial psychologists also concluded.

[12] Ms Coetzee found that A[...] has enduring cognitive difficulties, but it was evident from the distribution of scores across a range of tests that there are preserved areas of intellectual capacity. However, A[...] also presents with significant neuropsychological deficits, especially in the domain of executive function. As executive abilities allow one to plan, organise and successfully execute adaptive, goal-directed and future-orientated actions, this is an impairment which significantly obstructs A[...]’s ability to utilise his inherent intellectual potential in an effective manner.

[13] In her opinion, A[...]’s deficits are such that they preclude him from being gainfully employed as well as leading an independent life in future. His executive deficits in particular are a major obstacle in terms of his work ability even within a sheltered and sympathetic work environment.

[14] The following opinions expressed by Ms Coetzee in her report and subsequent testimony are of particular relevance in placing the extent and impact of A[...]’s deficits in perspective.

[15] His preserved intellectual capacity in a sense makes it more difficult for A[...] to cope with his executive dysfunction (coupled with his physical and emotional difficulties) since he is aware that, but for these, he would be capable of achieving so much more. He has *‘a deep understanding of being lost in his own head...’* and is *‘very aware of the inconsistency of his brain function, which is typical of a frontal lobe injury... There is a flicker of light but it cannot go on’*.

[16] When she asked A[...] to reflect on any difficulties he experiences on a day-to-day basis, he stated that the constant *‘fluctuation’* in his brain is a problem for him. He is very easily distracted, and cannot concentrate for long. He used to be an avid reader (Ms Coetzee gave examples of his advanced vocabulary) but as he cannot stay focused he can only now manage to read short passages. He described marked fluctuations in his ability to focus on tasks. No matter how hard he tries to stay on course, it is as if his mind will not let him. He forgets to do things. Afterwards he feels bad, as he does not mean to be forgetful. He added that some days are better than

others in this regard. He sometimes misreads or mispronounces words and, according to Ms Coetzee, he has pronounced expressive difficulties.

[17] During the course of her assessment, A[....] launched into a lengthy and convoluted discussion of his personality, using the novel *Lord of the Flies* as a point of reference. He stated that his personality '*was fractured by the accident*', and that '*pieces are slowly coming back together again*', although in Ms Coetzee's opinion, this was overly optimistic on A[....]'s part. He likened himself to the character Piggy, who was, in his words, '*loyal, intelligent and pure*'. However, since the accident, he has become a different person, more like Ralph, the original, ill-fated leader in the story. He stated '*Ralph was the leader. It was the face I put on, like in the book they killed Ralph... I was robbed. No matter how good you are, bad will happen*'. In Ms Coetzee's opinion this demonstrates a looseness of association in A[....]'s speech, coupled with valuable content about his subconscious, inner stresses.

[18] It also explains why A[....] dropped out half-way through the grade 12 alternative learnership course, having described himself as intellectually advanced compared to his fellow learners; and why he also dropped out only two months into an alternative program which his mother managed to procure for him.

[19] The collateral information provided by A[....]'s mother reinforced Ms Coetzee's opinions. His mother reported that it takes A[....] a long time to formulate what he wants to say and, even then, he delivers in a stop-start fashion. He never used to have any hesitation in terms of his speech, and was in fact quite articulate with an excellent vocabulary. He struggles to function in group settings. It is A[....]'s mother's opinion that his slowed speech causes him to drop out of the conversation. By the time he has formulated what he wants to say, it has already moved to the next topic. He has problems in understanding what other people mean, unless they keep their communication simple and straightforward. He cannot retain instructions unless they are written down, and has difficulty in terms of thinking ahead, planning and problem-solving and making decisions. He finds it hard to stop repeating what he is saying or doing and is easily distracted.

[20] Ms Coetzee also noted that about a year after the accident A[....] became severely depressed. He explained to her that the onset of his depression was precipitated by the realisation that he would never be able to attend a matric dance. It appeared to Ms Coetzee that, while on one level A[....] has this deep understanding of his deficits, he also expresses unrealistic expectations about his future, which is indicative of the '*disconnect*' and demonstrates the complexity of his condition as well as its devastating, permanent consequences to A[....].

[21] In Ms Coetzee's opinion A[....]'s most severe impairment lies in his behavioural and personality changes as a result of his brain injury. He is slightly detached from reality, has impulsive and poor social judgement, and his major drawback is his executive dysfunction. As she put it, even though A[....] '*has intrinsic receptive ability he is not able to use it*' because of his profound executive deficits.

[22] Her evidence was further that A[....] displays signs of depression. He is '*socially adrift and clearly lacked peace of mind*'. Based on what was observed about the content and structure of his thought processes, he is considered vulnerable to more severe mental illness. There are two elements which are strong indicators of this. The first is that the level of his insight into his losses is enough to cause psychiatric illness. The second is that the nature of his brain injury is such that he is in any event highly susceptible to such an illness, and it is very unlikely that he will respond adequately to treatment.

[23] According to Ms Coetzee, research shows that it usually takes around 8 years post-injury for the full realisation to dawn on the affected individual that this is permanent and, coupled with the '*dream world*' he occupies, there is a concern that this could lead to psychosis.

[24] During cross-examination Ms Coetzee was referred to the report of educational psychologist Dr Pinchuck who was appointed by A[....]'s attorneys and conducted his assessment on 15 September 2016 when A[....] was 18 ½ years old. Dr Pinchuck's mandate as reflected in his report was '*to determine his current intellectual strengths and weaknesses as well as future potential*'.

[25] After having conducted various tests Dr Pinchuck concluded that A[....]: (a) has good verbal, visual and spatial reasoning skills; (b) experiences word reading, phonics and reading comprehension difficulties which affect his ability to learn; and (c) has difficulty with short timed fine-motor tasks including his writing. Dr Pinchuck also concluded that nonetheless, and with assistance, A[....] had the ability to complete a 3 to 4 year tertiary qualification.

[26] Ms Coetzee's response was as follows. Dr Pinchuck as she understood it assessed A[....] to identify areas of deficits and weaknesses in the event that he pursued tertiary studies. A[....] had not even completed grade 11 at the time of that assessment. She assessed A[....] roughly 3 years later and had approached her assessment, not from the perspective of an educational psychologist, but from that of a neuropsychologist, i.e.:

'...how the brain changes due to a brain injury, so one looks at a much broader range of cognitive domains... to ascertain how a person will function in life. This goes well beyond IQ and learning difficulties. So while I'm in agreement with Dr Pinchuck in terms of [A[....]'s] intellectual potential and learning difficulties, the neuropsychology of what underpins these difficulties is broader – and that broader foundation in A[....]'s case involves processing speed difficulty, attention difficulty and most importantly executive dysfunction... His failed attempts at completing courses demonstrate how his executive dysfunction derails his attempts to reintegrate into society.'

[27] When asked to explain the nature of A[....]'s preserved intellectual capacity in light of the scores he achieved in the tests administered by Ms Coetzee, she replied that achieving a score on a subtest in a controlled clinical space only tells half the story. The other half entails determining whether the preserved intellectual capacity can be used in a way that makes for a productive life. In her words *'his residual intellectual ability is actually pretty useless to him because of his predominant executive deficiencies'*.

[28] Turning now to the applicable percentage contingency deduction. In *D'Oliviera v RAF*² it was stated that:

‘[8] The purpose behind applying a contingency deduction in an award for damages is to take account of the unpredictable “vicissitudes of life”. These include—

“the possibility that the plaintiff may in the result have a less than ‘normal’ expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions.”

The quantification of the extent of the contingency lies entirely within the discretion of the court and must be determined upon the court’s impression of the case. In fixing the contingency deduction, a court will have regard to objective factors present, common logic, expert evidence and the like.’

[29] Also relevant is the monetary limit or “cap” set by s 17(4)(c) of the Road Accident Fund Act which, along with other amendments, came into operation on 1 August 2008. This provides in relevant part as follows:

‘(4) Where a claim for compensation under subsection (1) –

. . .

(c) includes a claim for loss of income or support, the annual loss, irrespective of the actual loss, shall be proportionately calculated to an amount not exceeding---

(i) [Rx] per year in the case of a claim for loss of income; and

(ii) [Rx] per year, in respect of each deceased breadwinner, in the case of a claim for loss of support.’

[emphasis supplied]

² 2019 (2) SA 247 (WCC) at para [8].

[30] In terms of s 17(4A)(a) the amounts referred to in the subsection are determined by notice in the Government Gazette, and adjusted quarterly in order to counter the effect of inflation. In addition, in terms of s 17(4A)(b) the applicable cap is that as *‘set out in the last notice issued prior to the date on which the cause of action arose’*.

[31] In *RAF v Sweatman*³ the Supreme Court of Appeal, confirming that the “Morris method” should be followed, stated that:

‘...Accordingly, following the Morris method, if in each year after the accident the actual loss exceeds the annual loss determined at the date of the accident, the Fund is liable to pay only the lesser amount – the annual loss...’

[32] This was the approach taken by the actuary in the present matter. In a supplementary report, the actuary stated that:

‘The limit just prior to the accident (with no inflationary adjustment) applies to the loss of income each year, net of tax and after the application of contingency deductions, mortality and discounting. As the accident occurred on 10 July 2015, the limit as at 1 May 2015 applies, i.e. R228 430 per annum.’

[33] The reference in the report to “contingency deductions” is to the range helpfully provided by the actuary in quantifying what sum is to be paid to A[....] depending on the percentage determined by the court. The earnings bands agreed upon by the industrial psychologists have been used. The calculations also include those to which the cap has already been applied in arriving at the net amounts.

[34] *Mr Corbett SC* who appeared for A[....] submitted that the appropriate contingency deduction should be 20%, in light of the following positive and negative factors:

³ 2015 (6) SA 186 (SCA) at para [12].

30.1 A[...] (given his pre-morbid intellectual capacity) may have followed a career path which would have entailed a higher income than that predicted by the industrial psychologists;

30.2 He may also have progressed more rapidly or favourably than they predicted;

30.3 He is currently 24 years old and, adopting the approach favoured by Koch,⁴ a deduction of 0.5% per annum would equate to 20.5% in respect of future loss of income until his anticipated retirement age of 65 (i.e. 41 years x 0.5%); and

30.4 The ordinary vicissitudes of life such as accident, illness or unemployment, which in any event could have occurred.

[35] On the other hand *Mr Goosen* who appeared for the RAF submitted that the appropriate contingency deduction should be 35%. He emphasised that the Koch approach is a guideline only; that in *Bee v RAF*⁵ the Supreme Court of Appeal made clear that *'the younger the [accident] victim, the longer the vicissitudes of life will operate and the greater the uncertainty in assessing the claimant's likely career path'*; and placed reliance on the decision in *RAF v Kerridge*⁶ where the appeal court increased a contingency deduction from 15% to 35%.

[36] I am mindful that the Koch approach is a guideline only, but it cannot be gainsaid that it is a useful one, and has been quoted with approval by at least one other court in this Division.⁷ I also acknowledge, and am of course bound by, what the Supreme Court of Appeal had to say in *Bee*.

[37] As far as *Kerridge* is concerned, the factors appear to have been materially different from those in the matter before me. At the time of the accident Mr Kerridge was 23 years old. He was enrolled at a Technical College training to be a motor mechanic. It was common cause that a National Training Certificate (N1) is the

⁴ Quoted with approval in *D'Oliviera (supra)* at para [10].

⁵ 2018 (4) SA 366 (SCA) at para [116].

⁶ [2019] 1 All SA 92 (SCA).

⁷ See fn 4 *supra*.

equivalent of a Technical grade 10, N2 the equivalent of a Technical grade 11 and N3 the equivalent of Technical grade 12 or matric. Up to that point Mr Kerridge had taken 7 years to complete his N1 certificate and had passed only 2 courses towards his N2 certificate, despite being described by his wife as *'diligent and dedicated'*.

[38] The majority of the court found it could not accept the scenarios postulated by the industrial psychologist who testified on Mr Kerridge's behalf, since he had assumed that Mr Kerridge would complete his N3 within three years of the accident and thereafter enter the job market, progressing commensurately in the years that followed until he reached his career ceiling. The court stated:

[47] ...These are highly optimistic assumptions. Based on his past academic endeavours, the likelihood that Mr Kerridge would have obtained an N3 in that time period, or at all, is in my view remote. The undisputed evidence of Mr De Vos, a qualified motor mechanic and businessman with 24 years of experience in the motor industry in the Port Elizabeth area, was that after an N3 qualification it would take a person approximately two and a half years to do the voluntary trade test. The major dealerships which he had contacted required an NTC3 [i.e. N3] Grade 12 with Mathematics and Science to qualify as a diesel mechanic. None would employ anyone with an N1...

[55] In this matter there are various considerations which impact on the contingency deduction. Firstly, Mr Kerridge was 23 when the collision occurred on 28 November 2009. He has a greater chance of being subjected to the vicissitudes of life. Further, given his limited employment history, there is greater uncertainty in assessing his career path. Mr Kerridge has no real work record. Since failing Grade 9 and leaving school at the age of 15 in 2001 he attended... College in 2002 and 2003. He and his brother helped his father in their laundry business. There is no evidence of how long they ran the business while their father was ill in January 2003. Mr Kerridge assisted in the laundry business in 2004 and 2006 to 2009. There is also no evidence as to whether he worked every day in his father's laundry, or the nature and extent of that work. At the time of the collision Mr Kerridge did not

have good prospects of achieving success in his field, as is evidenced by his academic record referred to above. And he is particularly subject to normal negative contingencies relevant to a wage earner such as employability and loss of employment. Secondly, his pre-morbid earnings have, in my view, been inflated, even on the so-called conservative scenario, for the reasons set out above. Finally, there is undoubtedly some residual earning capacity which was not considered.'

[39] In the instant matter it cannot seriously be disputed, in light of the evidence of Ms Coetzee, that A[....] was pre-morbidly possessed of an intellectual capacity that excluded the prospect of a slow progression in whatever his chosen career path might have been. Accepting this, one cannot ignore the possibility, as *Mr Corbett* submitted, that A[....] may have earned a higher income and progressed more rapidly and favourably than predicted by the two industrial psychologists.

[40] What also needs to be factored into account is that, unlike Mr Kerridge, A[....] is not '*particularly subject to normal negative contingencies relevant to a wage earner such as employability and loss of employment*'. Moreover, unlike Mr Kerridge, the experts have all agreed that A[....] has no residual earning capacity whatsoever.

[41] As pointed out by the minority in *Kerridge*,⁸ a 15% contingency for future loss of earnings has become accepted as '*normal*'. By applying a 20% contingency deduction, this too takes A[....]'s youth into consideration when it is balanced against the other positive factors. It is also slightly less than 20.5% adopting the Koch approach. Accordingly, and having regard to all of the above, I am unable to agree with *Mr Goosen* that a 35% contingency deduction would be appropriate, and find that one of 20% is fair, reasonable and just.

[42] On 11 March 2022 an order was granted by agreement in terms of which an interim payment was made by the RAF of R1.2 million, to be set off against the final amount '*either as agreed between the parties or proven*'. The order that follows takes this interim payment into account.

[43] **The following order is made:**

⁸ At para [30].

1. The defendant shall pay to the second plaintiff the sum of R8 030 406.84, calculated as follows:

1.1 R534 706.84 in respect of past hospital and medical expenses; and

1.2 R8 695 700 (after having applied a 20% contingency deduction to past and future loss of income) less the interim payment of R1 200 000 in terms of the order granted by agreement on 11 March 2022 (“the March order”).

2. Save as already dealt with in the March order, the defendant shall pay the second plaintiff’s costs of suit, on a party and party scale, including the costs of the postponement of the trial on 7 March 2022, the fees of one senior counsel, and the reasonable and necessary qualifying expenses of the following expert witnesses:

2.1 Dr Herman Edeling, neurosurgeon;

2.2 Ms Mignon Coetzee, neuropsychologist;

2.3 Ms Celeste Jordaan, occupational therapist;

2.4 Dr Carol Legg, speech and language therapist;

2.5 Dr David Pinchuck, educational psychologist;

2.6 Mr Johan Benade, industrial psychologist; and

2.7 Mary Cartwright Consultants CC.

3. The payment provisions contained in paragraph 4 of the March order shall apply to paragraphs 1 and 2 above.

J I CLOETE

For applicant: Adv Peter **Corbett SC**, 424 0981, 083 556 9418,
corbett@capebar.co.za;

Instructed by: Malcolm Lyons & Brivik Inc., T Brivik, 425 5570, 082 7788844,
tzvi@lyonsbriviklaw.com.

For respondent: **Mr Flip Goosen RAF attorney**

Claims Handler Mr Brett **Lategan** (RAF), 408 3435, 064 766 7377, BrettL@raf.co.za.
Ref: 503/12299615/53/0, Link no. 3723117578072

Instructed by: