

SOUTH AFRICA / JUDGMENT

Gianni N.O obo R.M v Road Accident Fund (RAF 49/2020) [2023] ZANWHC 217 (22 November 2023)

[2023] ZANWHC 217

COURT

North West High Court, Mafikeng

BEFORE

J L Khan

CASE / FILE NUMBER

RAF 49/2020

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IN THE NORTH WEST HIGH

COURT, MAHIKENG

Case no: RAF 49/2020

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Magistrates: YES / NO
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Magistrates: YES / NO

In the matter between:

ADV
DS GIANNI N.O. obo R[...]
M[...]
Plaintiff
and
THE
ROAD ACCIDENT
FUND
Defendant
Delivered: This judgment
is handed down electronically by circulation to the parties through
their legal representatives'
email addresses. The date for the
hand-down is deemed to be 22 November 2023.
ORDER
KHAN
AJ
Consequently,

the following order is
made:

(a)
The Defendant is to pay the Plaintiff the amount of R1 277
143,50, comprising General Damages in the amount of R600 000,
and
Loss of earnings in the amount of R677 143.50 in full and
final settlement.
(b)
The Defendant is ordered to furnish the Plaintiff with
an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund
Act, 56 of 1996.

JUDGMENT

Introduction

- [1] The Plaintiff, Advocate DS Gianni sues in her capacity as Curatrix ad Litem to R[...] M[...], ("R[...]") a minor born on the 7 November 2007, who is presently 15 years old.
- [2] R[...] was involved in a vehicle collision on the 27 July 2009, at Ganyesa, At the time of the collision he was being carried on the back of his late mother, K[...] V[...] M[...], who was crossing the road when a motor vehicle with registration letters and numbers D[...] 7[...] N[...], driven by E X Moswang collided with her. R[...] was taken to the hospital and was discharged later that day.
- [3] When the matter was heard on the 29 May 2023 and 30 May 2023, an application was brought in terms of Rule 42(1)(b) to vary the Order appointing the Plaintiff as the curatrix ad litem, in terms of which R[...] is referred to as "an adult female with Identity Number: 4[...]". The application sought to simply delete this incorrect description and to replace it with "a minor male with identity number 0[...]". I granted the order as prayed, in order to give effect to the

order of the Court which was to appoint Advocate Gianni as the curatrix ad litem to R[...] M[...], a minor male with identity number 0[...]. The referral to an adult female was a patent error and one which went unnoticed at the time.

- [4] The Plaintiff in addition brought an application in terms of Rule 38(2) for the admission of the evidence of its experts reports on Affidavit. The reports of the Plaintiff's experts

had been served on the Defendant and filed at court. The Defendant did not instruct any experts and was not in a position to contradict

the reports of the Plaintiff's experts. I granted this application believing that sufficient cause was established which

would obviate the expense and the need for the experts to physically attend court and to simply regurgitate the contents of their reports in the absence of legitimate opposition.

- [5] The Court was informed but the parties that the issue of merits had become resolved and the court was accordingly only required to make a determination in respect of the Plaintiff's claims for general damages and loss of earnings. The Court was further advised that the Defendant had made an offer in respect of general damages and loss of earnings but that such offer was rejected. The Defendant had allegedly made an election in terms of section 17(1)(A) of the Road Accident Fund, Act 56 of 1996, and the Plaintiff's entitlement to general damages was not disputed by the Defendant's Representative.

- [6] The case for the Plaintiff is as follows: -

6.1 According to the Neurosurgeon, Jacques Du Plessis, ("Du Plessis") R[...] was carried on his mother's back when she was struck by a bakkie. He was 1 year and 10 months old at the time. He was transported by ambulance to the emergency unit of Ganyesa district Hospital. He sustained an isolated injury to his head. A Glasgow coma scale ("GCS") of 13/15 was recorded when he arrived at the hospital. He was crying actively; no sign of external injury was noted except for his mouth. According to his sister, Ms. O[...] M[...], he was examined and kept for observation for 3 days. He was referred for x-rays to his chest, cervical spine and pelvis, the results of such x-rays were not recorded, and neither can it be confirmed that R[...] was kept for 3 days.

6.2 His sister, indicates that she saw him for the first time when he was discharged from hospital, he was not unconscious and was mobile, he was tearful and struggled with epistaxis.

6.3 R[...] was born prematurely and was admitted at the hospital for a week. (Du Plessis opines that it would be unusual for a newborn with a birth mass of 1,8kg or 1.9 kg to be discharged from a neonatal unit a week after birth). He was not able to speak when the accident happened, he only started speaking for the first time at 2 years, 8 months of age. He had an HIV test but was negative.

6.4 On examination, his height is 1.16 m, his mass 20 kg and his skull circumference 48 cm. All these measurements were well below the 3rd percentile for his age. His height and mass are that of a 6-year-old and his skull circumference is that of an 18-month-old child. He is small for his

age and has a small head. The MRI brain scan does not show signs of abnormal brain development due to pre-maturity or perinatal insult to his brain. Several scars are noted on his head and face, his sister is not certain whether this was caused by the accident. No bruises, wounds or bleeding was noted by the nurse who examined him.

6.5 Du Plessis concluded that if it is correct that he was born prematurely and started speaking when he was 2 years and 8 months of age, this could indicate that one is dealing with a brain well below average potential before the accident.

6.6 The GCS score of 13/15 confirms that his level of consciousness was not normal. Based on that, he sustained a mild to moderate concussive brain injury in the accident. His brain was at a vulnerable stage of development when the accident happened. The recent MRI brain scan has ruled out a significant focal brain injury. The possibility of secondary brain damage is unlikely, his conscious level was not severely depressed, and he did not sustain a chest injury.

6.7 R[...] has not suffered any neurophysical impairment due to a brain injury. Part of his reported cognitive difficulties could be the result of the head injury that he sustained in the accident under discussion. It is expected that he had moderate pain and discomfort for a few weeks after the accident, post-traumatic headache is not a problem. It is unlikely he will suffer from post-traumatic epilepsy in future.

6.8 The Addendum report by Du Plessis confirms that R[...] was probably cognitively vulnerable before the accident, this is supported by the fact that his skull circumference is still well below average and in keeping with his low birth weight and delayed developmental milestones. With the limited information available, (a GCS score of 13/15) it is concluded that he sustained a mild to moderate concussive brain injury in the accident. His brain was vulnerable for trauma in view of his young age when the accident happened and also in view of the fact that he was born prematurely. He did not sustain a focal brain injury or secondary brain damage in the accident. He has not suffered any objective neurological deficit as a result of the accident. Minimal body scarring has occurred, he struggles with posttraumatic headaches.

6.9 The RAF4 form completed by Du Plessis, indicates that R[...] will suffer severe long term mental or severe long term behavioral disturbance or disorder and qualifies for general damages on the narrative test. His whole person impairment ("WPI") is measured at 35%. Du Plessis indicates that an apportionment should be applied because he was cognitively vulnerable before the accident.

6.10 Menachem Mazabow, ("Mazabow") the neuropsychologist, indicates that the hospital records from Ganyesa hospital recorded R[...]’s GCS at 15/15 at 13h30. His half-sister says that she first saw him at 17h00 after he returned home from hospital, around 10 hours post-accident. The hospital records however confirm that he was still at the hospital at 19h42 and there is a note that no doctors responded to the nurses’ calls. Mazabow opines that from a neuropsychological perspective it is noted that cognitive and behavioral impairments would be expected following a pediatric concussive brain injury of that nature, sustained at a particularly vulnerable stage of brain development (22 months of age).

6.11 In addition it is noted that he may have been more cognitively vulnerable at the time of the accident given his reportedly slowed speech development, following a premature birth with low birth weight (1.9 kg). The presence of a pediatric brain injury at that vulnerable age would have significantly worsened any such pre-existing weaknesses.

On cognitive evaluation, R[...] presented with a number of marked cognitive impairments and it is reported that he has memory and concentration difficulties both at home and in the school context and that he is socially withdrawn and subject to irritability/short temper, (according to the half-sister).

6.12 In keeping with the neuropsychological impairments evident on formal testing he presents with a history of very dismal scholastic performance. In particular he has thus far failed grade R, grade 2, grade 3 (3 times) and grade 4 and complaints have been made consistently about his poor concentration and comprehension with recommendation for special schooling having also been made by his teachers since 2017 or 2018. The above pattern of cognitive/behavioral impairments and scholastic difficulty would be attributed to a significant pediatric traumatic brain injury, which was sustained at a vulnerable age by a more vulnerable individual.

6.13 With regards to his clinical psychological profile he is experiencing a chronic mood disturbance with depressive symptoms and with dysthymic effect/emotional state also evident during the evaluation. His scores on the Depression Scale and Self-Concept Scale of Becks Youth Inventory are in keeping with a significant mood disturbance and there is also an indication of significant anxiety symptoms on the anxiety scale which are associated with the depression. This depression is attributed by R[...] himself to his repeated failures at school about which he is self-conscious, and which has resulted in his experience of teasing from the other children and this has lowered his self-confidence. He is also saddened by the absence of mother and father figures, and he thinks frequently about his late mother. R[...]’s neuropsychological impairments are unfortunately permanent given that more than 12 years have elapsed since the accident. He is also a poor candidate for specialized education.

6.14 Linda De Rooster, (“Rooster”), the educational psychologist, opined that R[...] was probably completely vulnerable pre-morbidly due to his premature birth and low-birth-weight, delay in speech and language development, poor socio- economic circumstances, disadvantaged education, probable pre-morbid cognitive delays and his family’s concern regarding special school placement.

6.15 Post morbid R[...] has acquired very little scholastic skills. His overall IQ falls within the severely impaired range, he is intellectually disabled, illiterate, hails from poor social economic circumstances and disadvantaged education and sustained a mild to moderate traumatic brain injury. Ideally R[...] would be better placed in a school for learners with special educational needs. He should be referred to the district office of the Department of basic education for the appropriate placement. This will probably not happen as he and his guardian are opposed to special school placement.

6.16 De Rooster indicates that it is important to note that the development history was provided by R[...]’s sister. R[...]’s parents are deceased and therefore the information regarding the pregnancy, birth history and early development must be perceived with the above mentioned in mind. R[...]’s father killed his mother by strangling her, he was 3 years old at the time. His father was reportedly abusive and an alcoholic and passed away in 2019. R[...] has four older maternal half siblings all of whom have the same father. Neither of his parents completed primary school. His father left school after grade 4 and his mother after grade 3. His half siblings all passed grade 12. There is no history of tertiary education in the family. He lived with his grandmother and the extended maternal family while his mother stayed with her partner. He was very young when his mother died and regards his half-sister as his mother. The family live in the grandmothers 8 roomed brick house

in Ganyesa, they have electricity, a tap and a pit toilet in the yard. Their circumstances can be regarded as poor.

6.17 R[...] was born prematurely at 8 months gestation via a normal delivery and had a low birth weight of 1.9 kg. He was born at home and taken to the hospital by ambulance. He was discharged after a day. He reportedly reached most of his developmental milestones at the appropriate age but was not yet speaking at the time of the accident, indicating a probable cognitive vulnerability pre-morbidly. He was 1 year, 10 months old at the time of the collision and in the full-time care of the maternal family. Neither of his parents completed primary school. The combination of the aforementioned factors implies pre-morbid cognitive vulnerability. His pre-accident cognitive function was probably borderline impaired.

6.18 He did not attend creche and commenced with grade R at M[...] S[...] Primary school at the age of 5 years and 1 month. His half-sister is called to school every year and told that he is a very slow learner. He can copy work and write his name and surname but cannot read. His English proficiency is very poor. He is very unhappy at school, but neither him nor his half-sister wants him to go to the special school in the area due to the stigma associated with these schools.

6.19 If the accident had not occurred, he would probably have struggled to cope with the demands of the mainstream. However, as can be seen from his current situation no support is given to these learners in their disadvantaged schools and he would probably have been allowed to remain in mainstream but would have failed and repeated several grades. He would also not have been referred to any special school due to his families concern about the stigma attached to the schools in the community. He may have been condoned to grade 10 but would not have been able to progress any further and would probably have left school with a grade 10 qualification. However, with the attainment of such a qualification he would not have been able to realise this level (NQF2/grade 10) educational standard due to the lack of proven scholastic proficiency. He would have been dependent on his physical strength to find employment.

6.20 Post morbidly, R[...] sustained a mild to moderate traumatic brain injury on an already vulnerable brain. With regard to the accident-related symptoms, he presents with physical, cognitive and psychological symptoms. In terms of physical symptoms, he suffers from nocturnal

nosebleeds and fatigue. In terms of post-accident behavior and personality changes his emotional development is delayed, he cries when reprimanded and is very unhappy at school because of being punished for his poor performance. Despite this he wants to continue to go to school. With regard to his post-accident scholastic skills, he failed grade 1, repeated grade 3 twice and also failed grade 4. He has acquired very little scholastic skills and is functionally illiterate at the age of 13 years.

6.21 His overall IQ Falls within the severely impaired range. It is difficult to say to what extent this implies a deterioration in his cognitive functioning, as he was already cognitively compromised pre-morbidly. If he does not leave school early as a result of his unhappiness and poor performance, he will probably be allowed to remain at the primary school until completion of grade 7. Ideally he would be better placed in the school for learners with special educational needs, however due to the ineptitude of the school principal and the fact that both him and his half-sister do not want him to be placed at the special school due to the stigma around special school placement, such a placement will probably not realise and he will remain in mainstream probably until he reaches 16 years old (the age at which learners are not of compulsory school going age any longer) and he will probably not progress further than grade 7.

6.22 Anneke Greef ("Greef"), the occupational therapist opines that R[...] would have been dependent on his physical strength to find employment, within this scenario he probably would most likely only have qualified for employment in the medium and heavy ranges of the labour market, such as merchandiser, plumber assistant, mechanic assistant, boilermaker assistant, unskilled construction worker. Impairment on the day of assessment revealed that his pencil grip from the onset was weak and he kept his eyes too close to the page. He failed all the criteria on the LOTCA battery. His ability on the Chessington Occupational Therapy Neurological Assessment Battery fell in the functional ranges, confirming practical inclination, but his speed of execution however was slow and he required guidance to enable completion of the activity. Although he completed one transfer of the Valpar VCWS 9 whole body range of motion test, boredom became evident after 5 minutes of execution, probably because of the monotonous nature of the test. The results secured correlate with those secured by Ms. De Rooster and Dr Mazabow, indicating that he has limited skills/abilities and developing of such will require continual facilitation, albeit still with a guarded prognosis on success postulated.

6.23 As he is only 13 years old, alternative placement for him should be secured and the writer supports and echoes the comment by Ms. De Rooster that he should be referred to the district office of the Department of Basic Education for appropriate placement. It is however accepted by the writer that this will probably not happen as R[...] and his guardian are opposed to special school placement. Evidence indicates that he will probably only manage to enter the labour market as an unskilled employee. Organic fatigability will probably prevent him during his adult life from coping with employment that falls in the medium/heavy ranges, especially with efficacious. It is accepted that he during his adult life will probably only qualify for sympathetic, unskilled, supported, simple and supervised employment. As already alluded, he presents with seeming dislike for performing menial repetitive and more so mundane type tasks typically

found in sheltered and protected working environments. It is thus accepted that he probably is at significant risk to during his adult life find himself unemployable and one would not expect him to be able to work in stressful occupations and he will probably never attain the ability to sustain employment over any period of time.

6.24 Dr J S Enslin, the ear nose and throat surgeon, opines that the cause of the nosebleeds is the Staphylococcal Vestibulitis (infection of the interior 10 to 15 mm of the nasal cavity) and not related to the accident. From an ear, nose and throat specialist's perspective, R[...]s life expectancy was not directly affected by the accident, he did not sustain any physical permanent disability, he did not suffer any cosmetic disability due to the mentioned accident and did not suffer any loss of amenities.

General damages

- [7] The Plaintiff submits that an amount of R850,000 would be a fair and reasonable sum in respect of general damages. The court has been referred to the 2015 decision of *Mohale v Road Accident Fund*, 2015 (7A4) QOD 15 (GNP), in which the court awarded an amount of R650,000 which updates with inflation to R1 011 000.00. The Plaintiff was a 10-year-old girl who sustained a moderately severe head injury and an associated moderately severe brain injury, together with an injury to her neck, back and head. The Plaintiff suffered from headaches, behavioural and neurocognitive changes, back and neck pains with a slightly increased risk of developing epilepsy.
- [8] Closer examination of this decision revealed that the clinical notes from Sebokeng hospital indicated that the plaintiff had bruising to the scalp and face. On initial examination she had a Glasgow Coma Scale (GCS) score of 10/15. She was referred to Chris Hani Baragwanath hospital neurosurgery where on initial examination the Plaintiff's GCS score was 7/15. She was unconscious but breathing well. Her right pupil was larger than the left, but both were reactive. A left hemiparesis was recorded, a CT brain scan showed a right temporo-parietal extradural haematoma, a craniotomy for drainage of the extradural haematoma had been performed. Following surgery the plaintiff was awake, talking and moving all limbs. Her pupils were equal and reactive to light and a GCS score of 15/15 was recorded. The neurologist, Dr Smuts, opined that the patient sustained a moderately severe head injury and an associated moderately severe brain injury. The most significant problems are at a cognitive and behavioural level. My impression is that this could be a frontal type of brain injury.' The Neurologists both agreed that the head injury was severe in nature, and resulted in the plaintiff having headaches and a slightly increased risk of the plaintiff developing epilepsy. The plaintiff presented with behavioural problems.
- [9] It is evident that the Plaintiff in the *Mohale v Road Accident Fund* matter sustained a severe head injury and in this regard this decision is not significantly comparable with the Plaintiff whose injuries are regarded as a mild to moderate concussive brain injury in an individual who was cognitively vulnerable before the accident.

- [10] The Court was in addition refer to the matter of Ngobeni v Road Accident Fund, 2017 (7A4) QLD 68 (GJ) the Plaintiff in this matter was a 13-year-old boy who sustained a mild to moderate brain injury and orthopaedic injuries, more specifically a proximal tibia fracture. The Plaintiff presented with neuro cognitive impairment, post-traumatic vascular headaches and symptomatic epilepsy. The court awarded an amount of R600,000 which updates with inflation to R853,000. The experts in this matter however confirmed that there was no reported developmental history or psychiatric condition that would affect neuropsychological functioning or neurological insult prior to the accident.
- [11] The court finds that the Ngobeni v Road Accident Fund is more comparable to the injuries sustained by R[...] herein. The court notes that according to his sister, who is the only historian, R[...] was examined and kept for observation for 3 days (indicated to Du Plessis in his first report). This later changed to R[...]’s aunt fetched him from Ganyesa Hospital after a day (communicated to De Rooster) and subsequently when narrated to Du Plessis (in the addendum report) that when she saw him, he was released at 17h00 on the day of the collision, communicated to Mazabow as well. It can thus be accepted that R[...] was admitted and discharged the same day.
- [12] R[...]’ cognitive impairments, memory and concentration, social withdrawal, irritability/ short temper and scholastic difficulties, dysthymic effect/emotional state is attributed to a significant pediatric traumatic brain injury, chronic mood disturbance with depressive symptoms which was sustained at a vulnerable age by a more vulnerable individual. It is evident that the injuries were inflicted on a vulnerable individual and the full extent of the sequelae is difficult to establish having regard to the pre-existing vulnerability. Du Plessis suggest that an apportionment should be applied because he was cognitively vulnerable before the accident, the Court cannot fault this reasoning.
- [13] The Court is accordingly of the view that the amount of R600 000,00 will fairly and appropriately compensate the Plaintiff for the general damages that R[...] suffered because of the accident and will also take into account his pre-existing vulnerabilities which are not accident related.

Loss of earnings

- [14] The Plaintiff claims an amount of R812 572.00 in respect of loss of earnings and/ or earning capacity. The Industrial Psychologist, Renee Van Zyl (“Van Zyl”) postulates the following, that pre-morbid R[...] would probably have left school with a grade 10 (NQF2 status) level of education at the end of 2027. However, he would not have been functioning at this level. He would then have entered the labour market in January 2028. Upon his entry into the labour market, he would probably have experienced a period of unemployment for 8 years functioning on an ad hoc basis during this time. Thereafter he would probably have secured employment, first in a temporary capacity for 7 years and then in a permanent capacity within the non-corporate sector of the labour market functioning in an unskilled capacity until his retirement. Individuals in entry-level unskilled positions are usually the most

vulnerable during economic cycles. Therefore, some periods of unemployment cannot be disregarded. His pre-morbid retirement age would have been 65 years. It is recommended that higher pre-morbid contingency to be applied to address periods of unemployment.

- [15] Post Morbidly it is opined that R[...], after discontinuing schooling will struggle to secure and more so, sustained employment. His moderate career impediments, in combination with his pre-morbid cognitive vulnerability, educational background and the current realities within the South Africa labour market, have probably rendered him functionally unemployable. It is suggested that R[...]'s post morbid retirement age will be at age 65.
- [16] An actuarial calculation was compiled by Algorithm Consultants & Actuaries, (report dated 24 April 2023) on the basis of Van Zyl's report, in terms of which R[...]'s loss of income is determined at R902 858.00 less 10% contingency deduction, total of R812 572.00. During argument it was suggested that the contingency of 10% applied is appropriate and that the Court should accordingly award the amount of R 812 572.00 in respect of loss of earnings.
- [17] The approach in generally assessing damages for loss of earnings has been stated in Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A), in which the Appellate Division held:-

....Where the method of actuarial computation is adopted, it does not mean that the trial Judge is 'tied down by inexorable actuarial calculations. He has 'a large discretion to award what he considers right' (per Holmes JA in Legal Assurance Co Ltd v Botes 1983 (1) SA 608 (A) at 614 F). One of the elements in exercising that discretion is the making of a discount for 'contingencies' or the 'vicissitudes of life'. These include such matters as the possibility that the Plaintiff may in the result have less than a '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 rate of the discount cannot of

course be assessed on any logical basis, the assessment must be largely arbitrary and must depend upon the trial Judge's

impression of the case."

- [18] In Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 199, Watermeyer JA held that, "the amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the Judge's view of what is fair in all the circumstances of the case." Contingency deductions allow for the possibility that the Plaintiff may have less than "normal" expectations of life and that she may experience periods of unemployment by reason of incapacity due to illness, accident, labour

unrest or general economic conditions (see for instance *Van der Plaats v Southern Africa Mutual Fire & General Insurance Co* 1980 (3) SA 105 (A) at 114-115), “matters which cannot otherwise be provided for or cannot be calculated exactly, but which may impact upon the damages claimed by a party, are considered to be contingencies and are usually provided for by deducting a stated percentage off the amount of specific claims (*De Jongh v Gunter* 1975 (4) SA 78 (W) at 80 F).”

[19] In *Goodall v President Insurance Company Limited* 1978 (1) SA 389 (W). Margo J stated, “ in the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a certain

type of almanack, is not numbered among the qualifications for judicial office. In *De Jong v Gunther and Another A* , 1975 (4) SA 78 (W), NICHOLAS, J., said, at p. 80, "In a case where a plaintiff sues for his own future loss of earnings it is only contingencies which affect him personally which have to be considered. In his judgment in *Van Rensburg v President Versekeringsmaatskappy*, (W.L.D. 21.11.68), quoted in *Corbett and Buchanan*, *The Quantum of Damages*, vol. 2, at p. 65, LUDORF, J., referred to the fact that it has become almost customary, at any rate in this Division of the Supreme Court, for the Court to make a deduction for unforeseen circumstances of life of one-fifth. That is, it is true, a rough and ready approach, but the nature of the problem is such that one can do no better than adopt a rule of thumb of this kind." In *Van Rensburg's* case the plaintiff was 25 years old, and in *De Jongh's* case, which was a claim by dependants for loss of support, NICHOLAS, J., C adopted the figure of 20 per cent of contingencies in relation to the deceased's earning power, the deceased having been approximately 25 years of age at the time of his death. *Van Rij, N.O. v Employers' Liability Assurance Corporation Ltd.*, 1964 (4) SA 737 (W), but reported on this point only in *Corbett and Buchanan*, vol. 1 at p. 618, is another instance of 20 per cent being allowed for contingencies, the plaintiff in that case being a minor who had not yet embarked on a firm career.”

[20] In *Road Accident Fund v Guedes* 2006 (5) SA 583 (A), Zulman JA referred to, ‘the author Koch describes his work as ‘a publication of financial and statistical information relevant to the assessment of damages for personal injury or death’. The page in question is headed ‘General Contingencies’. 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; . . . There are no fixed rules as regards general contingencies. The following guidelines can be helpful.’ Then follows what is termed a ‘sliding scale’ and the following is stated:, Sliding Scale: ½ per cent for year to retirement age, ie 25 per cent for a child, 20 per cent for a youth and 10% in middle age (see *Goodall v President Insurance* 1978

(1) SA 389 (W) . . .’.”

[21] Having regard to the aforesaid I am not convinced that a 10% or 15% contingency as argued for will adequately address R[...]’s pre-existing vulnerabilities. R[...]’s pre-existing vulnerabilities call for higher than normal contingencies and this is supported by Van Zyl who suggests that a higher pre-morbid contingency be applied to address periods of unemployment. Contingencies remain in the discretion of the Court. The Court is of the view that the appropriate contingency to be applied is 25% which amounts to R677 143.50 in respect of loss of earnings.

Consequently, the following order is made:

- (i) The Defendant is to pay to the Plaintiff the amount of R1 277 143,50, comprising general damages in the amount of R600 000, and loss of earnings in the amount of R677 143.50 in full and final settlement directly into the trust account of Savage, Jooste and Adams attorneys, being:

Savage, Jooste and Adams attorneys

Bank: Nedcor- Arcadia

Branch code: 1[...]

Account number: 1[...]

Reference. Mr Makole/AM/KM503

- (ii) The Defendant will be liable for interest on the capital in terms of Act 56 of 1996 (as amended), calculated at the applicable mora rate.

- (iii) The award pertaining to R[...] M[...], is to be protected by means of a trust.

- (iv) It is hereby ordered that Celeste du Plooy of Standard trust, is to be the trustee of the Trust and is to establish and administer the Trust of which R[...] shall be the sole beneficiary, until his death.

The appointment of the Trustee is subject thereto that the Trustee shall furnish security to the satisfaction of the Master of the High Court.

- (v) The security so furnished with respect to the Trust shall be adjusted from time to time, at least once per year to reflect the decrease or increase of the capital and income.

- (vi) The Defendant is to provide an Undertaking as contemplated in section 17(4)(a) of the Road Accident Fund Act 56 of 996 (as amended) to compensate R[...] for the cost of future caregiving, case management and future accommodation of R[...] in a hospital and/ or nursing home and or institution and/or treatment of or rendering of a service

and/or supplying goods to R[...] after the costs have been incurred and on proof thereof resulting from the injuries sustained as a result of the motor vehicle collision which took place on 27 July 2009.

(vii) Miss Anneke Greef is appointed as case manager to R[...].

(viii) The Plaintiff's attorneys of record shall retain the capital amount, net of the attorney's fees and cost, in an interest-bearing account in terms of section 86(4) of the Legal Practice Act, for the benefit of R[...], pending the creation of the trust referred to and the issuing of Letters of Authority.

(ix) The Defendant is ordered to make payment of the Plaintiffs taxed or agreed cost on the High Court scale, which shall include the cost of 29 and 30 May 2023, which costs includes:

1. The fees consequent upon the employment of two Counsel,
2. The reasonable taxable transportation, accommodation and other costs incurred by R[...] in attending the medicolegal appointments.
3. The cost of the following expert reports, addenda and RAF4 serious injury assessment reports.

Dr JJ Du Plessis - neurosurgeon

Dr M Mazabow - Neuropsychologist

Dr JS Enslin- Ear, Nose and Throat surgeon

Dr Mogoru

Ms L De Rooster - Educational Psychologist

Ms Anneke Greeff- Occupational Therapist

Mr G Whittaker- Algorithm Consultants and Actuaries.

4. They cost of the Curatrix ad litem, including but not limited to her appointment (including the drafting the moving of the application) attendance at consultations, the compilation of her report and her fees consequent upon the attendance at trial.
5. The cost of the Plaintiff's instructing Attorney and Correspondent attorney, which includes but is not limited to reasonable travelling cost, cost of preparing for Pre-trial conferences, cost for actual attendances at Pre-trial conferences, cost of drafting Practice notes, Pre-trial agendas and Pre-trial minutes, cost for preparation for and attending of Judicial Case Management conferences, cost of preparation for and application for Case Management meetings (if any), drafting of all Notices in terms of the Rules of court as well as attendance at court.
6. All radiological expenditure, including the obtaining of CT and MR scans as requested by the medico-legal experts.
7. The reasonable taxable transportation, accommodation and other costs incurred by R[...], in attending the trial.

8. Should the Defendant fail to pay the Plaintiff's party and party costs as taxed or agreed within 14 (fourteen) days from the date of taxation, alternatively date of settlement of such cost, the Defendant shall be liable to pay interest at the applicable prescribed rate per annum, from the date of settlement up to and including the date of final payment thereof.
9. The Plaintiff shall, in the event that the parties are not in agreement as to the costs, serve the notice of taxation on the Defendant Attorneys and shall allow the Defendant fourteen court days to make payment of the taxed costs.

J L KHAN

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING: 29 and 30 MAY 2023 DATE OF

JUDGMENT:

22 November 2023 COUNSEL FOR THE PLAINTIFF: ADV G W ALBERTS SCA ADV DP VILLER
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