

SOUTH AFRICA / JUDGMENT

# Makhubele v Road Accident Fund (77208/2014) [2017] ZAGPPHC 736 (23 November 2017)

**[2017] ZAGPPHC 736****COURT**

North Gauteng High Court, Pretoria

**BEFORE**

Van der Schyff

**CASE / FILE NUMBER**

77208/2014

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**Policy****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO.: 77208/2014****In****the matter between:**

GABATSHEPE  
JOSEPH  
MAKHUBELE PLAINTIFF  
and  
ROAD  
ACCIDENT  
FUND DEFENDANT

**Heard:**

Delivered  
12  
October 2017  
23  
November 2017

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**JUDGMENT**

VAN DER SCHYFF AJ

[1] This is an action for damages instituted by the Plaintiff, an adult male, arising from injuries sustained when a collision occurred

between himself and an identified motor vehicle. The accident occurred on 21 February 2005 when Plaintiff was approximately 9 years

and 7 months old. The claim thus falls to be decided disregarding the amendments to the Road Accident Fund Act 56 of 1996 which came into effect on 1st August 2008.

[2] Advocate De Wet Keet N.O. acted as curator ad litem for the Plaintiff.

[3] The Defendant conceded the merits portion of the claim. Defendant agreed to furnishing Plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996 in respect of 100% of the costs of future medical treatment in a hospital or nursing home resulting from the accident that occurred on 21 February 2005. The quantum portion of the claim pertaining to general damages could not be settled. This matter came before me on the basis that neither of the parties would lead oral evidence and that they would rely on the contents of the various medico-legal reports commissioned on behalf of the parties, and joint minutes compiled by the overlapping experts. Both counsel agreed that there were no factual disputes that justified the leading of evidence.

[4] It is trite that in the case of delictual liability for bodily injuries all non-patrimonial loss as well as future loss are

classified as general damage (JM Potgieter, L Steinberg and TB Floyd Visser and Potgieter Law of Damages 3rd ed, Juta, p23). When the award for general damages is considered, a differentiation is made between the non-pecuniary component of general damages constituted inter alia by loss of amenities of life and pain and suffering, and the pecuniary aspect of general damages consisting of loss of earning capacity.

Non-pecuniary component of general damages

[5] When the quantification of a claim for non-pecuniary loss is undertaken it is important to remember that the mere physical injury

does not per se constitute non-patrimonial loss. As stated in *Sigoumay v Gillbanks* 1960 (2) SA 552 (A) at 571: 'Injuries may leave after-effects and may cause mental anxiety but they are not themselves pain'. The highly personal nature of pain and suffering is emphasised by the dicta in *Radebe v Hough* 1949 (1) SA 380 at 385 that someone's social and financial status or his race cannot give an indication of his pain and suffering. The amount awarded for pain and suffering depends on the extent of pain and suffering caused by the delict, and nothing else. Pain can exist only in so far as it is actually experienced (*Sigoumey v Gilbanks*, supra, 571). In light hereof a

court is potentially in a very difficult position regarding the calculation and determination of an award for a claim for non-pecuniary damages when no evidence is led by or on behalf of a Plaintiff pertaining to the actual suffering of pain or loss of amenities. Despite the fact that it seems to have become an accepted *modus operandi* to merely argue the issue of general damages while relying on the contents of the various medico-legal reports commissioned on behalf of the parties and joint minutes compiled by the overlapping experts, I am not convinced that this is an acceptable way of dealing with claims of non-pecuniary nature. The court is basically forced to revert solely to previous awards made in more or less similar matters when exercising its discretion since the Plaintiff's very personal experience of pain and suffering or loss of amenities of life cannot be discounted.

[6] There is no evidence from the Plaintiff himself before me. Although a court is guided by previous awards when the fair compensation for pain and suffering is assessed, the subjective and actual experience of the plaintiff is of paramount importance when the claim is quantified (*Visser and Potgieter Law of Damages supra par 15.2.4.1*). The Court only has the hearsay evidence of the experts who confirm that they have been informed by the Plaintiff that he suffers from headaches after the accident. The severity of these headaches and their frequency and duration have not properly been established. Despite being pertinently questioned by the Court in this regard, counsel for the Plaintiff maintained that the reports of the expert witnesses would provide sufficient proof for this claim. I am of the view that a claim for non-patrimonial damages can only properly be quantified through the leading of evidence by or on behalf of the Plaintiff. If evidence was tendered by or on behalf of the Plaintiff, the consideration for this claim would not have posed any difficulties. Plaintiff's saving grace is however the fact that the Defendant conceded the existence of the claim, and confirmed that the hearsay evidence contained in the expert reports may be taken into consideration for quantification purposes.

[7] From the various expert reports it can be established that in the time following the accident the Plaintiff experienced pain that was treated with Voltaren drops and Panado. He suffered neck pain and was given a neck brace to wear for two weeks. He suffered severe acute pain for a period between 2 days and two weeks and moderate pain for up to four weeks following the injuries he sustained. Despite the neck pain he was able to walk. He presently complains of scalp pain and intermittent headaches that occur more or less once a week. According to Dr. Tladi, a specialist orthopaedic surgeon, the sequelae of Plaintiff's orthopaedic injuries have not resulted in significant loss of amenities, independence and enjoyment of life. Plaintiff's life expectancy is not influenced by his injuries. This view is corroborated by Dr. N Mosad, a neurosurgeon, who states in his report that amenities of normal living were lost during the period of hospitalization which lasted for approximately 1 day. Dr.

Kritzinger who examined Plaintiff about two months later than the previously mentioned specialists also confirms complaints of chronic headaches for which the Plaintiff takes very little medication. He explained that post-traumatic headaches appears to be more likely to develop following mild traumatic brain injury compared to moderate or severe brain injury. Based on the

reports of these experts I can accept that the Plaintiff is indeed chronically plagued by mild headaches up to three times a week. These are relieved by taking Panado. A grimmer picture is however painted by the educational psychologist, M Mantsena who consulted with the Plaintiff and his mother during April 2017. Through her report the Court is informed of the Plaintiffs mood swings, irritability, increased anger and frustration, nose bleeds, neck cramps, anxiety when traveling, and moderate depression. Her observation that Plaintiff suffers mild depression is corroborated by an earlier report from Dr. Peche, a clinical psychologist and neurotherapist.

- [8] The determination of general damage has never been an easy task as there is neither mathematical nor scientific formulae to compute the monetary value on pain and sufferings, and loss of amenities of life. See *A A Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A).
- [9] The court has a wide discretion to award what it considers to be a fair and adequate compensation to the injured. This discretion may be exercised with the guidance of previous awards made in comparable cases. See *Van Dyk v Road Accident Fund* 2003 (SES) QOD 1 (AF).
- [10] It should be noted that the use of comparable cases is not a hard and fast rule that should be strictly applied. Two cases can never be the same, hence the need for judicial adjudication in cases for general damages. See *Road Accident Fund v Marunga* 2003 (5) SA 165 (SCA) 169G-H.
- [11] It is trite that the award of general damages must be fair to both the plaintiff and the defendant. See *De Jongh v Du Pisani* 2005 (5) SA 457 (SCA).
- [12] The only comparable case I have been referred to by Plaintiffs counsel regarding an award in respect of general damages for pain and suffering and loss of amenities of life is *Modan v Road Accident Fund* (14435/2009) [2011] ZAGPHJC 192 (7 December 2011). In this case the Plaintiff was about 4 and a half years old when she suffered

her injury. At the time of the hearing, 8 years later, she still suffered from neurocognitive deficits associated with attention

disorder, memory dysfunction, uncooperative and aggressive behaviour and headaches. An amount of R350 000.00 was awarded under this heading. In *Makupula v Road Accident Fund* (1635/07)

- [2010] ZAECHMHC 17 (8 April 2010) Nhlangulela J awarded an amount of R300 000.00 as general damages for a 5 year old boy who suffered a mild to moderate diffuse axonal concussive brain injury which resulted in neurocognitive deficits associated with attention deficit hyperactivity disorder, memory dysfunction and behavioural problems.

- [13] In light of the circumstances of this case as set out in paragraph 7 above, and considering the previous awards, I am of the view that an amount of R440 000.00 is a fair and reasonable award for the non-pecuniary loss suffered by the Plaintiff.

#### Loss of earning capacity

- [14] A claim for loss of earning capacity should be differentiated from a claim for loss of income (D Millard 'Loss of earning capacity: The difference between the sum-formula approach and the "somehow-or-otherwise" approach' 2007 (1) Law, Democracy and Development 15-32). As Millard aptly states 'Loss of the capacity to earn income is a loss of capacity and not a loss of income, even though the loss is calculated by using expected income as a measure' (Millard p17).
- [15] There are essentially two methods employed by court when a claimant's loss of earning capacity is assessed. These were set out in Southern Insurance Ass Ltd v Bailey 1984
- (1) SA 98 (A) at 113-114 and confirmed in Road Accident Fund v Guedes 2006 (5) SA 583 (SCA) at 586. The first approach is for 'the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. This is entirely a matter of guesswork, a blind plunge into the unknown'. The second approach 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'.
- [16] Corbett and Buchanan (Corbett MM, Buchanan JL & Gauntlett JJ The Quantum of Damages in Bodily and Fatal Injury Cases (General Principles) 3ed Juta, 1 48) provides a basic formula to assess loss of earning capacity: '(a) calculate the present value of the future income which the plaintiff would have earned but for his or her injuries and consequent disability; (b) calculate the present value of the plaintiff's income, if any, having regard to his or her injuries and disabilities; (c) subtract the figure obtained in (b) from the figure obtained in (a); adjust the figure obtained as a result of this subtraction in light of all relevant factors and contingencies'
- [17] The uncertainty factor in the case before me pertains to the calculation of the present value of the future income which the

plaintiff would have earned but for his injuries. The plaintiff was still relatively young when the accident happened. Scant information

is available on his scholastic progress before the accident happened. None of the experts were able to state with certainty and conviction what the Plaintiffs scholastic capacity was before the incident. Dr. Peche, a clinical psychologist, expressed the view that '[i]t is highly probable that the accident has aggravated an already vulnerable brain.' All the expert reports however echoed to a greater or lesser extent the view that there is a possibility that the Plaintiffs memory functioning has been affected in a negative way by the accident. This impacted on his general cognitive functioning. The expert reports all indicate that the injuries he sustained could result in

prolonged neurocognitive impairment, explaining the failure to progress scholastically. In their joint minutes, Ms. Mqhayi and Dr. Peche note that the Plaintiff 'sustained a mild head injury, which at present impacts negatively on his neurocognitive functioning...'. Dr. Kritzing, the neurologist, opined that there is a 5% to 10% chance that the Plaintiffs future academic performance 'will be affected by the accident,' and 'a 10% chance that there will be decreased cognitive functioning and concentration.' I find his view to corroborate Dr. Peche's observation that '[i]t is highly probable that the accident has aggravated an already vulnerable brain.'

[18] M Mantsena, an educational psychologist also provided a report. The Plaintiffs educational history as related in this report differs from information gleaned from other reports in that it is stated here that the Plaintiff repeated grade 9, grade 10 and gr 11, the latter thrice. In this report the assumption is made that the Plaintiff's scholastic history indicates that he has been progressing well before the accident because he never repeated a grade before the accident. It must be taken into account that no school reports were available from which the quality of the Plaintiffs pre-accident scholastic progress can be deduced. Neither is any information available regarding the quality of education provided at the school at which the Plaintiff was enrolled. I accordingly find that the educational psychologist's submission that '[h]ad it not been for the accident, Joseph would have ... likely obtained a Diploma or Higher Certificate endorsement' is without substance and not properly substantiated.

[19] In light of the exposition above, the expert reports did not convince me that the Plaintiff would have been able to successfully complete any level of tertiary education if the accident did not occur, and the question that I need to answer is whether he would have succeeded in completing grade 12 but for the injuries sustained in the accident.

[20] In deciding this question I take into consideration the views expressed by the educational psychologist, and Ms. N Brink and Ms. F Chamisa-Maulane, both industrial psychologists. Both industrial psychologists accept that it would have been possible for the Plaintiff, but for the injuries sustained, to successfully complete grade 12. They base their opinion on the educational psychologist's

report. I also take into account the fact that the Plaintiffs mother, father, two siblings and other family members did indeed complete a grade 12 level of education. In addition, Ms. Chamisa-Maulana correctly indicated that the educational landscape in South Africa has changed to provide better access to education and support to students to complete their secondary studies successfully. Although I could not assess the Plaintiff in court, the majority of the experts reported that he was neatly dressed, and presented himself in a respectful manner during the respective interviews. An independent occupational therapist, AT Shibambo, additionally reports that although the Plaintiff displays poor attention and concentration 'he really does put his best efforts forward to make up for the shortfall in attention span.' Based on this, I find that the Plaintiff would have had the necessary motivation and support to complete his grade 12 education, if not for the accident.

- [21] The aspect of contingencies is also a matter which falls within the discretion of the Court. I have been referred to a number of authorities by the Plaintiff that provide guidelines for the contingency deduction that I have to determine. As stated in *Oosthuizen v Road Accident Fund* (2014/04972) [2015] ZAGPJHC 172 (15 July 2015 '[t]he percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%, depending upon the facts of the case - (*AA Mutual Association Ltd v Maqula* 1978 (1) SA 805 (A) 812; *De Jongh v Gunther* 1975
- (4) SA 78 (W) 81, 83, 840; *Goodall v President Insurance Company Limited* 1978 (1) SA 398 (W) 393; *Van der Plaats v SA Mutual Fire & General Insurance Co Ltd* 1980 (3) SA 105 (A) 114-115A-D).
- [22] It has been stated in *Pierre v Road Accident Fund* (44981/2013)
- [2015] ZAGPJHC 159 (11 June 2015) that: 'When a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to minimize the adverse hazards of life rather than to accept them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should in exercising its discretion lean in favour of the plaintiff as he would not have been placed in the position where his income would have to be the subject of speculation if the accident had not occurred.'
- [23] After considering all the expert's opinions I agree with the actuarial calculations of the plaintiff that the value of the past loss of income but for the accident is R220 414.00 and for having regard to the accident R5616.00. A 5% contingency deduction in both scenario's leads to a net past loss of R 204 058.00. This calculation is based on the view that the Plaintiff would have completed Grade 12.
- [24] After considering all the experts' opinions I agree with the actuarial calculations of the plaintiff that the value of the income but for the accident is R3 373 288.00 and for having regard to the accident is R 596 907.00. This calculation is based on the view that the Plaintiff would have completed Grade 12. I am however also of the view that a contingency deduction of 20% for the 'but for the accident' scenario and 20% for the 'having regard to the accident', will fairly compensate the plaintiff for the loss suffered as a result of the accident. There is no indication in any of the reports that the accident affected the health or longevity of the Plaintiff in such a manner that it would warrant a greater contingency adjustment than in the 'but for the accident' calculation. There is no basis for differentiating between contingencies for future loss in these scenarios. This leads to a net loss of earning capacity of R2 221 104.00 The Plaintiff's total net past and future loss of earning capacity is then established at R2 425 162.00.

[25] It should be noted that counsel for the Defendant argued that a more substantial contingency deduction should be made due to the fact that it is mentioned in one or two of the expert reports that the Plaintiff had been involved in a prior-accident. This has just been mentioned in passing in some of the expert reports and no basis has been laid for the court to take this into consideration in determining the extent of the contingency factor.

[26] The curator ad litem has requested that a trust, known as the Makhubele Family Trust, be registered to administer the money awarded to the Plaintiff. The curator ad litem recommended that three trustees be appointed to wit, Mr C Wilsenach; an independent auditor to be appointed by the Plaintiffs attorney of record Mr. GP Venter, and the Plaintiffs mother, Mmathapelo Sarah Makhube. Plaintiff's counsel attached a Deed of Trust to a Draft Order handed up to the Court. This Deed of Trust does not provide for three trustees to be appointed, but only for the

appointment of one Trustee, Mr Constant Wilsnach. I support the curator ad litem's recommendation herein.

[26.1] A new Deed of Trust should be drafted to the approval of the curator ad litem to provide for the appointment of three trustees, one being Mr Wilsnach (if he still feels so inclined) or his replacement as determined in accordance with section 4 of the Draft Trust Deed attached, one being an independent auditor and the other the Plaintiffs mother.

[26.2] The Trust Deed must sufficiently provide for the replacement of any of the designated trustees, and must set out their respective powers clearly. Decisions may be taken by majority vote but special care should be taken to ensure that the Plaintiff's mother is at all times properly informed of the nature and consequences of every decision taken.

[26.3] Since the Defendant is ordered to pay the Plaintiffs costs in this matter, the Trust will only be obliged to pay the difference between the Plaintiff agreed or taxed party and party costs on High Court scale and the taxed attorney and own client account. I take note of the fact that it is mentioned in the Draft Order that the Plaintiff's instructing attorneys acted in terms of a fee agreement in this matter. This fee agreement is however not before me and I cannot take cognisance thereof when making this order. The confirmation of the attorney and own client account in terms of the fee agreement is left to the discretion of the Taxing Master, who may defer the matter to the Court.

ORDER:

In light of the aforesaid it is ordered that:

1. The Defendant shall pay the sum of R 2 865.162.00 into the trust account of the Plaintiffs attorney of record GP Venter Attorneys.

This amount represents non-pecuniary damages in the sum of R440 000.00 plus nett past and future loss of earning capacity in the amount of R2 425 162.00.

The details of the trust account are as follows:

GP VENTER ATTORNEYS

STANDARD BANK HATFIELD

BRANCH CODE: 011 545

ACCOUNT NUMBER: [...]

REFERENCE: MAK 5/1

2. The Defendant shall furnish the Plaintiff with an Undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, No 56 of 1996, in respect of 100% of the costs of the future accommodation of the Plaintiff in a hospital, or nursing home, or treatment of or the rendering of a service or supplying of goods to the Plaintiff, resulting from the accident that occurred on 21 February 2005, after the costs have been incurred and on proof thereof.
3. The Defendant is liable for payment of 100% of the reasonable costs of the Trustees appointed in terms of paragraph 4 hereof, in respect of establishing a Trust and any other reasonable costs that the Trustees may occur in the administration of the Trust, including their fees in this regard, which shall be recoverable in terms of the Undertaking in terms of section 17(4)(a), and which costs shall also include and be subject to the following:
  - 3.1. The fees and administration costs shall be determined on the basis of the directives pertaining to a curator's remuneration and the furnishing of security in accordance with the provisions of the Administration of Deceased Estates Act, Act 66 of 1965, as amended from time to time, and shall include but not be limited to disbursements incurred and collection commission calculated at 6% on all amounts recovered from the Defendants in terms of the Section 17(4)(a) Undertaking;
  - 3.2. The monthly premium that is payable in respect of the insurance cover which is to be taken out by the Trustees to serve as security in terms of the Trust Deed;
  - 3.3. All the above mentioned costs shall be limited to payment of the reasonable costs which Defendant would have had to pay regarding appointment, remuneration and disbursements had the Trustees been appointed as a curator bonis;
  - 3.4. The costs associated with the yearly audit of the Trust by a chartered accountant as determined in the Trust Deed;
  - 3.5. The appointment and reasonable costs of a case manager.
4. The net proceeds of the payments referred to above in paragraph 1 of this order (the capital amount) shall be payable to a Trust, to be established within six months of the date of this order. This Trust will:

- 4.1. contain provisions similar to the provisions set out in the Draft Trust Deed attached hereto, with the exception that the content of paragraph 26 of this judgment must be discounted in the Final Trust Deed to the approval of the curator ad litem;
- 4.2. have as its main objective to control and administer the capital amount on behalf of the Plaintiff;
- 4.3. have three Trustees with the powers and abilities akin to the powers and abilities as set out in the Draft Trust Deed attached hereto;
- 4.4. with the exception of the Plaintiff's mother, the Trustees will be obliged to furnish security to the satisfaction of the Master of the High Court of South Africa for the assets of the Trust and for the due compliance of all their obligations towards the Trust.
5. Should the aforementioned Trust be established within the required six month period, the Trustees are authorised to pay to the Plaintiff's attorney of record the difference between the Plaintiff's reasonable agreed or taxed party and party costs on the High Court scale, and the Plaintiff's taxed attorney and own client account as set out in paragraph 26 above;
6. Should the aforementioned Trust not be established within the six month period after receipt of the payment from the Defendant:
  - 6.1. The Plaintiff's attorneys are directed to approach the court within six months thereafter in order to obtain further directives in respect of the manner in which the capital amount is to be utilized or managed in favour of the patient;
  - 6.2. The Plaintiff's attorneys are authorised to invest the capital amount in an interest- bearing account in terms of section 78(2A) of the Attorneys Act, with a registered banking institution to the benefit of the Plaintiff, pending the finalization of the directives referred to in paragraph 6.1 of this order;
  - 6.3. The Plaintiff's attorneys are prohibited from dealing with the capital amount in any other manner unless specifically authorised thereto by this court, subject to the provisions contained in paragraphs 4 to 7 of this order;
7. Until such time as the Trustees are able to take control of the capital sum and to deal with same in terms of the Final Trust Deed, the Plaintiff's attorneys are authorized and ordered to pay from the capital amount:
  - 7.1. Any reasonable payments to satisfy any of the Plaintiff's needs that may arise and that are required in order to satisfy any reasonable need for treatments, care, aids or equipment that may arise in the interim;

7.2. The difference between the Plaintiffs reasonable agreed or taxed party and party costs on the High Court scale, and the Plaintiff's taxed attorney and own client account as set out in paragraph 26 above;

7.3. Such other amounts as may reasonably be indicated and/or required for the wellbeing of the Plaintiff and/or in his interest which a diligent curator bonis would have paid had such curator been appointed.

8. The Defendant must make payment of the Plaintiffs taxed or agreed party and party costs on the High Court scale which costs shall

include the following:

8.1. The fees of Senior-Junior Counsel on the High Court Scale, inclusive of his full day fee for 9, 10 and 12 October 2017, and his fee for the preparation of Heads of Argument, if any;

8.2. The fees of the curator ad litem on the High Court scale, inclusive of his reasonable day fee for 9, 10 and 12 October 2017, and the preparation of his curator ad litem's report;

8.3. The reasonable taxable costs of obtaining all experts, medico-legal, addendum medico-legal and actuarial reports from the Plaintiffs

experts which were furnished to the Defendant;

8.4. The reasonable taxable preparation, qualification, travelling and reservation fees, if any, of the following experts:

8.4.1. Dr. Annemarie Peche (Clinical Psychologist);

8.4.2. N L Brink (PC Diedericks) (Industrial Psychologist);

8.4.3. G W Jacobson (Actuary).

8.5. The reasonable travelling and subsistence costs for the Plaintiff, GABATSHEPE JOSEPH MAKHUBELE and his mother MMATHAPELO SARAH MAKHUBELE attending court who is hereby declared necessary witnesses, as well as the fees of the interpreter PL TLHAKO;

8.6. The costs of a consultation between the Plaintiff, and his mother and his attorney to discuss the terms of this order;

8.7. The reasonable taxable accommodation and transportation costs (including Toll and E-Toll charges) incurred by or on behalf of the Plaintiff in attending medico- legal consultations with the parties' experts, consultations with the legal representatives and the court proceedings the quantum of which is subject to the discretion of the Taxing Master;

8.8. The above costs will also be paid into the aforementioned trust account.

8.9. It is recorded that the Plaintiff's instructing attorneys act in terms of a fee agreement in this matter.

9. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:

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

9.2. The Plaintiff shall allow the Defendant 10 (TEN) court days to make payment of the agreed or taxed costs from date of settlement or taxation thereof;

9.3. Should payment not be effected timeously, Plaintiff will be entitled to recover interest at the applicable rate on the taxed or agreed costs from date of allucatur to date of final payment.

E VAN DER SCHYFF

Acting Judge of the High Court

“A”

To be amended in accordance with the court order.

DEED OF TRUST

WHEREAS

A. the High Court of South Africa, on the nett proceeds of the settlement in the matter of GABATSHEPE JOSEPH MAKHUBELE case number 77208/2014 form part of the trust to be administered, such trust is hereby created by the Founder Constant Wilsnach;

AND WHEREAS

B. for the purpose of certainty and for the better administration of the Trust to be created the following terms shall govern the

administration of the Trust:

REGISTRATION OF THE TRUST

The Trustee shall pay the amount of R100.00 to the Master of the High Court for the registration of this Deed.

1. NOW, THEREFORE, IT IS CONFIRMED THAT

once the Deed has been registered with the Master of the High Court and Letters of Authority have been issued to the Trustee, the nett proceeds ("the proceeds") of the settlement of the matters referred to in A above being a common law action for compensation for injuries sustained by the Beneficiary shall, pursuant to the direction / order of the said Honourable Court be paid to the Trustee in trust on the terms and conditions

hereinafter set out, which proceeds shall thereupon vest in the Trustee and which proceeds the Trustee by his signature to this Deed undertakes to accept for and on behalf of the Beneficiary upon the terms and conditions set out herein.

## 2. NAME OF TRUST

The trust shall be known as the GABATSHEPE JOSEPH MAKHUBELE TRUST.

## 3. INTERPRETATION

In this Deed, unless the context otherwise requires, words importing the singular shall include the plural and vice versa, and words importing the masculine

gender shall include the feminine gender and vice versa. The following expressions used in the Deed shall have the meaning hereinafter assigned to them unless the context otherwise requires.

3.1 "Beneficiary" shall mean GABATSHEPE JOSEPH MAKHUBELE or any other person as set out in paragraph 6 below. The Beneficiary shall be entitled to receive the income and capital of the Trust upon the terms and conditions set out in the Deed and shall be entitled to the capital of the Trust upon its termination.

3.2 "Trust Fund" shall mean the sums to be settled on the Trustee in terms of the said order of Court, in particular the award referred to in paragraph 3.1 hereof together with any additions or accruals thereto; all assets which shall from time to time be acquired by the Trustee for the purposes of this Deed including, without being limited thereto, capital assets and all income thereon whether capitalised or not.

3.3 The phrase "maintenance, education and advancement of life" shall be interpreted in the widest sense wherever it appears in this Deed of Trust so as to include, for example, attendance at schools, colleges, finishing schools and universities anywhere in the world; remedial teaching of any nature whatsoever, specialised tutoring, occupational therapy of any nature whatsoever, training in craft, hobby or trade, music, art, dancing, sports, as well as sciences, travel, both national and international accommodation lodgings, food, clothing and medical expenses and general well-being of the Beneficiary including the setting up in business or profession.

## 4. APPOINTMENT OF TRUSTEE

CONSTANT WILSNACH, an attorney and director in the firm of Pretorius & Wilsnach Incorporated, is hereby nominated first administrative and sole Trustee and in the event that it is not possible for him to take the appointment or to continue with his duties for whatever reason,

his successor in practice or, failing him, a director or employee nominated by the managing partner of Pretorius & Wilsnach Incorporated or, failing this, a person nominated by the Master of the High Court, for the purpose of this Deed. CONSTANT WILSNACH or any other Trustee shall be authorised to sign all documents relating to the administration and investment of the Trust capital and shall be entitled to charge such fees and to recover from the Trust such remuneration as he would have received if they had

been administrators administering a testamentary trust. The said CONSTANT WILSNACH by his signature to this Deed accepts office as such and undertakes to carry out all the duties and obligations encumbered upon them hereunder.

#### 5. INCOME

The Trustee shall collect the income accruing from the investment of the Trust Capital and after making provision for payment of all necessary expenses, interest due, taxation, premium of the bond of security and Trustee's fees, the nett income shall be accrued to and invested as part of the Trust Capital, for the benefit of the Beneficiary: Provided that the Trustee may in his entire discretion pay the whole of such nett income or any portion of the Trust Capital as may

be necessary to the Beneficiary and/or apply the same for maintenance, education and advancement in life of the Beneficiary and may at their discretion (whilst any Beneficiary is still a minor) make payment to such Beneficiary's parent or guardian on his/her behalf, in such manner and upon such conditions and in such proportions and at such times as the Trustee may in his absolute discretion decide. The Trustee may, in his entire discretion, allow the Beneficiary hereunder free use and enjoyment of all assets owned by the Trust and may decide whether the Trust or the Beneficiary concerned should be responsible for the maintenance of such assets and also for the payment of any rates, insurance premium and other similar charges.

#### 6. TERMINATION OF TRUST

In the event of the Beneficiary dying intestate, the Trust Capital shall devolve according to the terms of Intestate Succession.

In the event of Beneficiary dying, leaving a valid Will, then the Trust Capital shall be distributed to his estate and shall be dealt with in terms thereof.

#### 7. POWER OF TRUSTEE

The Trustee shall be vested with the following powers:

7.1 To invest and re-invest the Trust Capital in such manner and in such assets whatsoever as they in their absolute discretion may deem fit, with power to realise or vary any investment from time to time. The Trustee will not be entitled to invest the Trust Capital in shares of public companies and private companies and any other companies.

7.2 To form companies for the purpose of the Trust and to act as initial subscriber thereto.

7.3 To purchase or otherwise acquire any assets whatsoever, movable or immovable, on such terms as to payment and with or without security or pledge of all or any of the assets of the Trust as they in their absolute discretion may deem fit.

7.4 In his absolute discretion to exchange, sell, lease or otherwise deal with any of the assets from time to time forming part of the Trust Capital.

7.5 To borrow upon security or otherwise and at interest or otherwise in such manner as the Trustee may deem fit.

7.6 For and on behalf of the Trust, to commence and prosecute or defend action, suit, compulsory sequestration, liquidation or other proceedings before any Court or any other competent body or person.

7.7 To accept further amounts in terms of any new or further judgement and/or any further gifts and bequest from any other person in favour of the Trust without the necessity of entering into a formal Deed of Donation.

7.8 To acquire and/or purchase and/or effect life assurance policies on the life of any party with an interest of whatsoever nature in the Trust and pay all premiums accruing thereto.

7.9 To sign as surety for and on behalf of a Beneficiary of the Trust, or any company in which the Trust or Beneficiary may have an interest, as the Trustee in his absolute discretion may think fit.

7.10 To open bank accounts in the name of the Trust and to maintain and run such accounts in such manner as the Trustee may deem fit.

7.11 To pass bonds over any immovable property held in Trust by him.

7.12 To execute any act of deed required to be lodged, or registered in any deed Registry or Mining Title Office and generally to do or cause to be done any act whatsoever in any such office.

7.13 To exercise all voting or other rights attaching to shares and other securities from time to time forming part of the Trust Capital in such manner as he shall consider fit and to cause or consent to any re-organisation, consolidation or merger of any company or its capital in which the Trust holds shares and securities from time to time.

7.14 To determine, as he shall consider fit, whether receipt shall be treated as capital in respect of any liquidation dividend or return of capital paid by companies in respect of shares forming part of the Trust Capital, and generally to decide, by apportioning in such manner as he may deem fit, should any difficulty arise, as to what constitutes capital and what constitutes income.

7.15 To change the name of the Trust.

7.16 In the event of a national calamity in the Republic of South Africa or elsewhere or of a Beneficiary emigrating from the Republic or for any reason which in the discretion of the Trustee renders it expedient or desirable so to do, provided the necessary exchange control approval is obtained, to create or cause to be created a Trust or Trusts anywhere in the world upon the same terms as this Trust mutatis mutandis for the benefit of any Beneficiary of this Trust who shall be natural persons only and to transfer to any such Trust or Trusts such portion of the Trust Capital as shall in the sole and absolute discretion of the Trustee, represent the share of the Beneficiary concerned in this Trust.

7.17 To enter into contracts on behalf of the Trust.

7.18 Resolutions in writing by the Trustee shall have the same force and effect and be as binding as a resolution taken at a meeting of Trustees.

7.19 All documents of transfer in respect of the purchase or sale of stock, shares and securities and immovable property shall be signed by the Trustee provided that the Trustee has by resolution agreed the purchase or sale of the asset in question and the terms of purchase or sale thereof.

7.20 To adopt, ratify and confirm with or without modification any contract entered into for and on behalf of the Trust prior to its creation.

7.21 The powers and authorities herein granted to the Trustee may be exercised in any part of the world and not only within the Republic of South Africa.

7.22 The Trustee or any members or partner of his firm may be employed to act in any matter relating to the administration of the Trust and shall in addition to any remuneration payable to such Trustee in his capacity as such, be entitled to charge and be paid for any services rendered by him or his firm in a professional capacity.

7.23 Generally, the Trustee is, in fact, to have the same absolute control over and unfettered powers of investment and re-investment of the Trust assets as if he had been absolutely and beneficially entitled to the Trust Capital and he is specially indemnified against any claim arising from the loss of income or capital as a result of the bona fide exercise of the discretion hereby granted to them.

## 8. LIABILITY

The Trustee shall -

8.1 perform his duties and exercise his powers with the care, diligence and skill, which can reasonably be expected of a person who manages the affairs of another and shall be liable for breach of trust where he fails to show the degree of care, diligence and skill required;

8.2 be liable for losses as may arise from or be occasioned by his own dishonesty, wilful misconduct or this negligence/or that of his employees;

8.3 subject to the provisions of section 9 of the Trust Property Control Act number 57 ("the Act") of 1988, not be liable for any act of dishonesty or any other misconduct committed by any of his agents unless he knowingly allowed it or was an accessory thereto;

8.4 subject to the provisions of section 9 of the Act, be indemnified out of the Trust assets against all claims and demands of whatsoever nature that may be made upon him arising out of the exercise or purported exercise of any of the powers hereby conferred upon him;

8.5 the Trustee holding office shall be required to furnish either individually or collectively to the Master of the High Court, security for the administration of the Trust hereby created, as the Master may deem fit.

## 9. NOMINEE REGISTRATIONS

All investments or other assets acquired by the Trust may be registered in the name of the Trust without specifically naming the Trust, or in the name of the nominee company, or in such manner as the Trustee may deem expedient from time to time.

## 10. EXCLUSION OF MARITAL POWERS

The rights of any amounts paid to any Beneficiary under this Trust shall in no way form part of any community of property or joint estate or accrual system of such Beneficiary, and the husband of a female Beneficiary shall, whether his marriage to her be in or out of community of property, not have or acquire any marital powers, control or power of administration over any such rights or amounts.

## 11. INDEMNITY - INCOME TAX

In the event of the Beneficiary hereunder becoming legally liable in any statutory year to tax upon the whole or any portion of the income arising from the Trust Fund to which he has not received the benefit by reason of any provision in any law hereafter in force, in terms of which the aforesaid person is rendered liable for tax on such income, then, in such circumstances, it shall be competent for the Trustee to pay out of the income or capital of the Trust, the amount of the additional tax which the beneficiary is obliged to pay as aforesaid. For the purposes of this clause the expression "tax" shall be deemed to include all Income Tax, Imports and other duties levied by the State or other competent authority.

## 12. ACCOUNTING

The Trustee shall cause proper records, which may be wholly or partially computerised, to be kept of all affairs and dealings of the Trust. The records of the Trust shall be submitted to accountants to be audited and vouched for at the end of each financial year, which shall be regarded as being the last day of February, of any other day which may be selected by the Trustee and shall be submitted within six months of each financial year-end.

## 13. PAYMENT AND DELIVERY

In the paying out of any amount of capital or income of the Trust to or for the benefit of a Beneficiary, the Trustee shall be empowered to make the said payments in whole or in part by delivery of an asset or assets or share in an asset or assets having a value equivalent, in the opinion of the Trustee, to the payment effected by such delivery.

## 14. UNDERTAKING

The undertaking contemplated by section 17(4) (a) of Act 56 of 1996 as set out above, shall be administered by the Trustee, and the Trustee shall be entitled to payment of 100% of the prescribed remuneration for the administration of the undertaking.

## 15 . AMENDMENTS

This Deed of Trust may not be amended or added to, save by way of an order of Court.

16. GENERAL

16.1 The interest of the Beneficiary in terms of this Trust shall not be capable of being ceded, assigned, transferred, pledged and hypothecated or in any way alienated without the prior written consent of the Trustee and the Master of the High Court or by order of Court.

16.2 The rights, benefits or interests conferred on the Beneficiary under this Deed shall not be capable of being exercised or claimed in any way by anyone other than such Beneficiary or being attached at the instance of any creditor or vesting in any other person whomsoever in any capacity.

16.3 Until any benefit or reward is actually paid over to the Beneficiary nothing herein contained nor any resolution, deed or act of the Trustee shall create or confer upon any person any claim or right enforceable at law to any benefit or award hereunder.

16.4 Howsoever or wherever the assets may be held or registered they shall

be held on and for the account of the Trust and at no time shall the Trustee be deemed to acquire for himself or his personal account any vested right or interest in the Trust Fund.

The aforesaid CONSTANT WILSNACH has declared to accept office as Trustee and promised to undertake diligently to perform the duties hereinbefore imposed upon him.

THUS DONE AND SIGNED at Pretoria this 12th day of October 2017.

AS WITNESSES:

1.

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2.

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IN THE NORTH GAUTENG HIGH COURT, PRETORIA,

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 77208/2014

IN THE MATIER BETWEEN:

GABATSHEPE JOSEPH MAKHUBELE PLAINTIFF

AND

ROAD ACCIDENT FUND DEFENDANT

CONSENT OF THE NOMINATED TRUSTEE

I, the undersigned,

CONSTANT WILSNACH

hereby state the following:

1.

I am practising as an attorney and partner in a firm called Pretorius & Wilsnach Attorneys at 386 Orient Street, Arcadia, Pretoria.

2.

I specialise in trusts and work as a trustee or curator bonis. I have often been instructed to act as a trustee or curator bonis in various other Road Accident Fund matters.

3.

I declare that I am willing to act as a Trustee for GABATSHEPE JOSEPH MAKHUBELE if it pleases the Honourable Court to appoint me as such.

DATED AT PRETORIA ON THIS THE 12 TH DAY OF OCTOBER 2017.

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Prepared on 23 October 2026 · Esheria