

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: **10925/2017**

In the matter between:

Z[...] W[...] Z[...] o/b/o S[...] L[...] N[...]

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Delivered on: 26 May 2023

Balton J

[1] The plaintiff, in her personal and representative capacity as mother and natural guardian of her minor child, S[...] L[...] N[...] ('S[...]'), a boy born on 14 November 2008, instituted action against the defendant for injuries S[...] sustained in a motor vehicle collision on 2 June 2014.

[2] Mr *McIntosh* SC appeared on behalf of the plaintiff and Mr *Zayed-Omar* on behalf of the defendant.

[3] The defendant conceded 100% liability of the plaintiff's proven or agreed damages, and general damages were settled in an amount of R600 000. The matter was set down for trial solely on the issue of loss of earnings, in particular whether the

loss of earnings should be calculated on the Corporate Survey Earnings as per R Koch *Quantum Yearbook 2022* ('Koch 2022'), alternatively according to Statistics South Africa earnings by level of education ('STATSSA') and the contingencies to be applied.

[4] The following joint minutes were compiled by the experts:

(a) The neuropsychologists Professor Lazarus and Dr Nene, dated 12 August 2019.¹

(b) The industrial psychologists, Mrs B Pepu and Mr T Kalanko, dated 13 February 2020.² A supplementary joint minute was also filed, dated 7 June 2022.³

(c) The educational psychologists, Mr Z Gumede and Mr M Mantsena dated 7 February 2023.⁴

[5] Dr du Trevou, a neurosurgeon, confirmed in his medico-legal report dated 20 June 2016⁵ that S[...] was involved in an accident on 2 June 2014. Initially it appeared as if S[...] had suffered a minor head injury and he was discharged from hospital on 6 June 2014, but returned one week later because he suffered two epileptic seizures per day. Dr du Trevou records that because S[...] developed epilepsy as a consequence of the accident, this suggests that he suffered a cortical contusion which classifies the brain injury as moderately severe.⁶

[6] Professor Lazarus and Dr Nene agreed in their joint minute⁷ that S[...]’s ‘educability and future trainability and employability’⁸ has been compromised as a result of the injuries which he suffered and behaviours he exhibited, which they noted to be:

(a) A head injury with a degloving injury over the occipital region and a laceration

¹ Pages 3 – 4 of the expert’s joint minute bundle.

² Pages 7 – 10 of the expert’s joint minute bundle.

³ Pages 11 – 15 of the expert’s joint minute bundle.

⁴ Pages 16 – 20 of the expert’s joint minute bundle.

⁵ Pages 10 – 22 of the plaintiff’s expert bundle.

⁶ Page 21 of the plaintiff’s expert bundle.

⁷ Para 1, page 3 of the expert’s joint minute bundle.

⁸ Para 2.02, page 3 of the expert’s joint minute bundle.

and abrasion over the forehead;

- (b) A frontotemporal and axonal brain injury;
- (c) Post-traumatic seizures and he displayed significant behavioural observations in hospital;
- (d) Various cognitive deficits, mood regulation, physical complaints and persisting post-traumatic seizures.

[7] In the initial joint minute,⁹ the industrial psychologist, Mrs Pepu stated that:

- (a) S[...] would pre-morbidly have managed to function at further up within the above range of intelligence.
- (b) In terms of his intellectual ability and from an educational perspective, S[...]’s pre-morbid estimate of above average intelligence ability is consistent with functioning at a level where he could have progressed through the mainstream school system, matriculated and proceeded to obtain a tertiary qualification, a university degree.
- (c) He could also have pursued a qualification through distance or correspondence learning programmes while employed or obtained funding from an institution while attending as a full-time student.
- (d) He would then have been employable in the open labour market as a skilled or professional person.¹⁰

[8] Mr Kalanko, who was not in possession of the educational psychologist’s report at the time, noted the clinical psychologist, Ms Nene’s opinion that intellectually, S[...] currently functions within the high average range of intellectual functioning and is likely to have functioned within the superior range before the head injury.

⁹ Pages 7 - 10 of the expert’s joint minute bundle.

¹⁰ Page 8 of the expert’s joint minute bundle.

[9] The industrial psychologists agree in their initial joint minutes that if the accident had not occurred on 2 June 2014, S[...] would have:

- (a) Completed Grade 12 in 2025.
- (b) Enrolled for a three-year diploma/degree in 2026, completing it in 2028.
- (c) Secured a position on a one-year internship learning at Paterson level B4 (25 percentile) in 2029.
- (d) Taken advantage of on-the-job training opportunities and would have progressed to earning at Paterson level D1 (50th percentile) at the age of 45.
- (e) Remained employed until reaching normal retirement age of 65 years depending on his employer's retirement age policy and/or the state of his health.
- (f) That the most likely scenario now is that S[...] will secure sheltered employment.
- (g) The loss of earnings should be calculated according to Koch 2022.

[10] The industrial psychologists were requested to complete a supplementary joint minute and agreed that the purpose of the supplementary report was to allow the parties to settle the matter using the average between Koch 2022 and STATSSA for settlement purposes. They state as follows:¹¹

'4. We suggest the integration of the earnings as per our respective opinion and agree that there are different earnings trajectory applicable to each qualification level of either degree or diploma and we propose that:

- a) **With a Diploma** S[...] would have secured a position earning at the lower quartile between R96 000 and R244 000 p.a of Paterson level

¹¹ Page 12 of the expert's joint minute bundle.

B3, 25th percentile in 2029 as earnings applicable to early career stage for a Diploma.

- b) **With a Degree** S[...] would have secured a position earning between STATSSA Lower quartile R145 000 and Paterson level B4, 25th percentile R282 000 per annum of early career stage for a Bachelors Degree, in 2029.
 - c) **With a Diploma** – S[...] would have taken advantage of on-the-job training opportunities and would have progressed on a straight line increases to earning between R524 000 and Paterson level C4, 50th percentile R710 000 per annum of late career stage for a Diploma.
 - d) **With a Degree** – S[...] would have taken advantage of on-the-job training opportunities and would have progressed on a straight line increases to earning between R887 000 and R100600 per annum of Paterson level D1, 50th percentile for Bachelors Degree at the age of 45 years.
 - e) **The average between earnings by career stage and Paterson levels above can be used for quantification purposes.**
 - f) **Thereafter he would earn inflationary increases until retirement.**
2. S[...] would have remained employed until reaching the normal retirement age of 65 years of age depending on employer retirement age policy and/or the state of his health.
3. **Normal contingencies Is recommended.'**

[11] The plaintiff obtained an actuarial report prepared by Arch Actuarial Consulting dated 21 July 2021¹² based on the report of Mrs Pepu dated 23 April 2019 and the first joint minute of the industrial psychologists dated 13 February

¹² Pages 133 - 138 of plaintiff's expert bundle.

2020. The actuaries used Koch 2022 and concluded that S[...]’s loss amounted to R10 508 497 without applying any contingencies.

[12] As a consequence of the supplementary joint minute by the industrial psychologists, a further calculation was done by Arch Actuarial Consulting on 28 September 2022¹³ using:

(a) The industrial psychologists’ recommendation that the average of career stage earnings per level of education and Paterson levels be used to quantify S[...]’s loss of earnings as set out in the supplementary joint minute. The figures were drawn from STATSSA earnings by level of education and Corporate Survey Earnings in Koch 2022.

(b) A sheltered employment earning of R4 000 per month to calculate S[...]’s post-accident earnings.

(c) A contingency of 25% for pre-morbid and 35% for post-morbid earnings.

[13] The said actuaries calculated S[...]’s average loss of earnings between the diploma and the degree to be an amount of R5 624 821 as follows:¹⁴

SCENARIO 1 – DIPLOMA LEVEL OF EDUCATION PRE-MORBID

PRESENT VALUE OF	Pre-morbid	Post-morbid	LOSS AFTER CONTINGENCIES
FUTURE EARNING	R	R 1,005,855	R 5,996,740
LESS:	7,002,595		
CONTINGENCIES	25% (R	35% (R	(R 1,398,600)
NETT FUTURE EARNINGS	1,750,649)	352,049)	
	R	R	R
	5,251,946	653,806	4,598,140

SCENARIO 2 – DEGREE LEVEL OF EDUCATION PRE-MORBID

¹³ Pages 141 – 147 of the plaintiff’s expert bundle (the second actuarial calculation).

¹⁴ Page 146 of the plaintiff’s expert bundle.

PRESENT VALUE OF	Pre-morbid	Post-morbid	LOSS AFTER CONTINGENCIES
FUTURE EARNING	R	R 1,005,855	R 8,734,555
LESS:	9,740,410		
CONTINGENCIES	<u>25%</u> (R	<u>35%</u> (R	(R 2,083,054)
NETT FUTURE EARNINGS	2,435,103)	352,049)	
	R	R	R
	7,305,307	653,806	6,651,501

AVERAGE OF SCENARIO 1 (DIPLOMA) AND SCENARIO 2 (DEGREE)

PRESENT VALUE OF	Pre-morbid	Post-morbid	LOSS AFTER CONTINGENCIES
AVERAGE RESULTS			
FUTURE EARNING	R	R 1,005,855	R 7,365.648
LESS:	8,371,503		
CONTINGENCIES	<u>25%</u> (R	<u>35%</u> (R	(R 1,740,827)
NETT FUTURE EARNINGS	2,092,876)	352,049)	
	R	R	R
	6,278,627	653,806	5,624,821

[14] Mr *McIntosh* submitted that the plaintiff's approach is conservative in that:¹⁵

(a) The plaintiff agrees with the experts that for the purpose of settlement the average earning of a diploma and a degree be utilised with a contingency of 25% pre-morbid and 35% post-morbid.

(b) If the calculation set out by Koch 2022 is used, the Plaintiff could ask for a 20% contingency pre-accident.

(c) The parties have agreed that S[...] would earn R4 000 per month in sheltered employment for the rest of his life. It is reasonable to apply a 35% contingency to that calculation.

(d) The defendant's proposed pre-accident contingency of 35% has no basis in

¹⁵ Para 42, pages 9 – 10 of the indexed bundle.

law or fact. The experts agreed that the normal contingencies should be applied.

(e) The defendant's submission that a post-accident 15% contingency should be applied to S[...]’s earnings is inequitable to S[...].

[15] Mr *Sayed-Omar* submitted that:

(a) The defendant is not precluded from not relying on the report of the experts.

(b) The best-case scenario for S[...] would be a diploma and the contingencies that apply.

(c) The defendant’s actuary, Grant Pretorius¹⁶ recommended contingencies at 35% for pre-accident and 15% for post-accident.

(d) If the diploma is accepted, then a contingency of 25% pre-morbid and 35% post-morbid should apply.

(e) If the degree scenario is used, a contingency of 30% pre-morbid and 25% post-morbid should apply.

[16] The educational psychologists state in their joint minutes that:

‘2. **PRE-ACCIDENT SCHOOL POTENTIAL**

We agree that the claimant’s mother had no complications during her pregnancy, and she delivered S[...] naturally at term. No obvious abnormalities were reported immediately after his birth. He reached his developmental milestones within normal parameters comparable with his peers.

Z.G: intellectually, S[...] would have managed to function within the above average range pre-morbidly.

¹⁶ Pages seven 77-80 of the defendant’s expert bundle.

Educationally, he would have managed to pass grade 12 with a Bachelor Pass and proceeded to obtain a tertiary qualification, a university degree

M.M: Intellectually; Based on his development and family history, intellectual functioning, and socio-economic circumstances **MM notes that** pre-accident S[...] would have progressed through the mainstream scholastic grades and obtained a National Senior Certificate. Considering his premorbid birth and developmental background and circumstances, S[...] was likely to have qualified at NQF level 6. His cognitive potential does not rule out the possibility that he may even have progressed to NQF level 7.¹⁷

[17] The court notes that the defendant's educational psychologist, Mr Mantsena, concluded in the joint minute that he does not rule out the possibility that S[...] may have progressed in his education to NQF level 7. However, the defendant's actuary, Mr Pretorius, dismissed Mr Mantsena's finding in the actuarial report by commenting as follows:¹⁸

'We note that a very small percentage of South African children ultimately completes NQF7 (degree) or higher qualification. The prediction of the Educational Psychologist seems to be very optimistic considering that Mr N[...] was only 5 years old at the time of the accident (without any pre-accident academic records available) and none of his older siblings has managed to pass Grade 12 (as at 2018). **We strongly recommend that a second opinion on Mr N[...]’s likely highest qualification be obtained by the RAF. The risk for over settlement in this case is substantially high.**'

[18] Mr Pretorius is not qualified to comment on S[...]’s education as he has not conducted the necessary tests to reach such a conclusion. The educational psychologists are best qualified to comment on what S[...]’s future educational prospects would have been.

¹⁷ Page 17 of the expert's joint minute bundle.

¹⁸ Page 69 of the defendant's expert bundle.

[19] This court is guided by the experts, in particular, the industrial and educational psychologists who investigated the best available options and case scenarios in the circumstances and made recommendations.

[20] Mr *McIntosh* submitted that in terms of general contingencies, R Koch *The Quantum Yearbook 2023* refers to a sliding scale of 0.5% per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in middle-age.¹⁹ Further, the Road Accident Fund usually agrees to normal contingencies, being deductions of 5% for past loss and 15% for future loss. These are the so-called 'normal contingencies.'²⁰

[21] I am satisfied that the recommendation by the industrial psychologists that the best-case scenario of a midline between a degree and a diploma is appropriate in the circumstances of this case. Further, a contingency of 25% for pre-morbid and 35% for post-morbid earnings is fair and reasonable and has been correctly applied in the actuarial calculations.²¹

[22] It is ordered that:

(a) The defendant is directed to pay the plaintiff's claim for loss of earnings in the sum of R5 624 821.

(b) The defendant is directed to furnish to the plaintiff an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 for 100% of the costs of all future accommodation of S[...] L[...] N[...] (hereinafter 'the minor child') in a hospital or nursing home and all medical treatment or the rendering of a service, or the supplying of goods to the minor child, arising out of the injuries he sustained in the motor vehicle collision that occurred on the 2nd June 2014 and to compensate him therefore after they have been incurred.

(c) Payment of the amount in paragraph 1 above is to be effected within 180 (one hundred and eighty) calendar days from the date of this order.

¹⁹ R Koch *The Quantum Yearbook 2023* at 123. See *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W) and *Southern Insurance Association Ltd v Bailey* 1984 (1) SA 98 (A).

²⁰ R Koch *The Quantum Yearbook 2023* at 123.

²¹ Page 13 of the joint minute bundle.

(d) The defendant is directed to pay interest on the amounts referred to in paragraph 1 at the rate of 10.75 per cent per annum calculated from 181 (one hundred and eighty-one) calendar days from the granting of this order to the date of payment.

(e) The defendant is directed to make payment of the plaintiff's taxed or agreed party and party costs on the High Court scale to date. These costs should include but not be limited to:

- (i) The reasonable and necessary costs of senior counsel, including senior counsel's reasonable costs for his preparation for trial, such costs to include preparation of written submissions (if any) as well as the reasonable costs of counsel and the attorney for attending upon any necessary consultations with the under-mentioned expert witnesses and the plaintiff;
- (ii) the fees and expenses reasonably incurred by the under-mentioned witnesses for, inter alia the preparation of their reports and supplementary reports, deposing to affidavits, joint minutes and RAF4 forms as well as the experts' reasonable qualifying fees, their reasonable reservation fees, and their reasonable fees for attending upon any necessary consultations with the plaintiff's counsel and attorney to testify at the trial (with the quantum of their fees to be determined by the Taxing Master), namely: Dr du Trevou – Neurosurgeon; Professor Lazarus – Neuropsychologist; Andiswa Gowa - Occupational Therapist; Zethu Gumede - Educational Psychologist; Hlunga Group - Industrial Psychologist; Arch Actuarial - Actuary (reports only).

(f) The plaintiff is directed, in the event of the aforementioned costs not being agreed to:

- (i) serve a Notice of Taxation on the defendant's attorneys of record; and

(ii) allow the defendant 180 (one hundred and eighty) calendar days to make payment of the taxed costs.

(g) For the purposes of this Court Order, it is recorded that the defendant's link number is 3[...].

(h) The defendant is directed to make payment referred to in paragraph 1 above directly to the Trust account of the plaintiff's attorneys whose details are as follows:

Account name: Moses Naidoo & Associates

Branch: 1[...] Nedbank SA

Type of account: CQ cheque account

Account no.: 1[...]

BALTON J

Date of Hearing: 16 March 2022

Date of Judgment: 26 May 2023

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