

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)**

CASE NO.: 942/18
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
15 December 2022

In the matter between:

**NDABA SIBONGILE ANNA
O.B.O P [....] N [....] H [....]**

PLAINTIFF

And

ROAD ACCIDENT FUND DEFENDANT

Defendant

JUDGMENT

MKHAWANE (AJ):

[1] The plaintiff, Sibongile Annah Ndaba, in her representative capacity as the natural guardian and the biological mother of P [....] N [....] H [....], instituted an action against the Road Accident Fund, the defendant as a result of the motor vehicle accident which occurred on 7 December 2016. The minor child born on 13 April 2010 was a pedestrian at the time of the accident. She was six years old at the time of the accident.

[2] The defendant previously conceded liability and agreed to pay 100% of the plaintiff's proven or agreed damages. The issue of general damages was settled in an amount of R 900, 000.00. In addition, the defendant agreed to 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 future medical expenses and related expenses in accordance with the provisions of this section. The matter was allocated to me to decide the plaintiff's claim for loss of earnings or earning capacity.

[3] There was no appearance for the defendant even though a notice of set down was served on it. The plaintiff filed several medical legal reports from various experts namely, neurosurgeon, plastic and reconstructive surgeon, clinical psychologist, educational psychologist, occupational therapist, industrial psychologist and an actuary. All these reports were filed timeously the effect being that the RAF was in possession thereof.

INJURIES

[4] The minor child suffered moderate to severe head injury as evidenced by history of loss of consciousness, recorded GCS of 13/15, recorded CT brain abnormality and chronic headache, injuries to her face and right leg. She was referred to the Benoni hospital where she received treatment. She was never operated and was discharged after 11 days.

[5] The hospital records show that P [...] was diagnosed with multiple skull fractures, mild brain edema, multiple skull and facial abrasions. The RAF1 claim form indicates that her treatment included emergency treatment, a CT brain scan, intracranial haemorrhage, admission, analgesia and dressing of wounds.

VIVA VOCE EVIDENCE

[6] The plaintiff called educational psychologist, occupational therapist and an industrial psychologist. All these three experts prepared comprehensive and detailed reports.

T A Sepenyane

[7] Ms Sepenyane is an educational psychologist. She testified that she had consultations with the plaintiff and P [....] and prepared two reports. She noted that it is indeed always very difficult for any expert to comment on a minor's scholastic abilities especially in cases where an accident occurs too early in their lives.

[8] However, minor child's pre-accident school report grade 1 term for 1, 2 and 4 indicated that she mostly achieved within the adequate to outstanding achievement (4-7) and within outstanding achievement level 7 across all terms for mathematics. She was performing satisfactorily in all her subjects without challenges. The educational psychologist opined that considering the above P [....] had the potential to pass grade 12 and pursue degree studies. She further opined that P [....] would have been able to enter the open labour market and move through the usual promotional channels with ease.

[9] According to Ms Sepenyane post-accident, P [....] functions at an average level. Her verbal functioning indicates further deterioration in her performance. On reassessment she presented with deficits in all the verbal subtests. The noted neurocognitive deficits can be aligned to severe brain injury as reported by the neurosurgeon.

[10] The educational specialist opines that her intellectual functioning is low average and that results for the verbal IQ suggest that she struggles with common knowledge/judgment, mental alertness, ability to differentiate information and poor short-term memory or auditory attention span. The specialist opines that the above challenges suggest that she is likely to struggle at higher grades, especially seeing that she sustained a traumatic brain injury with a GCS of 13/15 based on hospital records.

[11] Ms Sepenyane testified that although P [....] seems to be functioning adequately at school thus far as she has not repeated a grade, when reports are analysed, they indicate that her post-accident marks are fluctuating and inconsistent which will likely have adverse consequences on academic functioning especially

when she reaches higher grades (high school) where metacognition is required from her. Each year further into school places greater demands on higher order learning skills and P [...] will need to work harder to keep up with her peers and the increased academic demands, which will likely be more challenging for her with a head injury she sustained, pain in her leg, neurocognitive challenges indicated in a questionnaire and low average non-verbal IQ. She concludes that P [...] would now after the accident find it difficult to reach her pre accident levels of functioning as a result of a head injury she sustained in the accident. Her postulated post-accident potential according to Ms Sepenyane is a higher certificate studies NQF5. She recommends that P [...] be referred to a TVET college after completing Grade 9 as she seems to be more technically inclined where she will harness the technical side.

Sagwati Sebapu

[12] Ms Sagwati Sebapu is an occupational therapist. She testified that P [...]’s scholastic performance was negatively affected by the accident sustained injuries and she is expected to experience difficulties in the long run. She is of the opinion that once she has reached full maturity, P [...] will retain the residual capacity forcing entry into all light to medium occupations should her physical condition not deteriorate. However, with pain in the right knee, she is expected to have difficulties with occupations that require prolonged standing, walking and running.

[13] Ms Sebapu further testified that due to the severity of a head injury as well as cognitive, psychological/emotional difficulties she is expected to present with difficulties to secure and maintain a job. She notes that P [...] had reported that she would like to be a doctor but considering the opinion of the educational psychologist regarding her educational potential post-accident she will not be accepted at the tertiary institutions to study medicine. Besides this, concludes Ms Sebapu, work that requires prolonged standing and walking is expected to be a difficulty due to the right knee pain. She opines that the accident has resulted in disruption of P [...]’s life. She has suffered a reduction in her functional abilities on multiple levels and that she will never achieve pre-accident potential on various levels.

[14] She will require learning support and remedial education and cognitive

stimulation in the mainstream to assist her to pass grade 11 and progress to achieve occupational certificate on NQF level 4.

Rirhandzu Lowane-Mayayise

[15] Ms Rirhandzu Lowane-Mayayise is an industrial psychologist. She testified that P [...] currently experiences headaches, forgetfulness, poor concentration, painful right leg after prolonged standing and walking, tires easily and sleeps (teachers complain that she is always sleeping) and painful leg during the cold weather.

[16] She then depending on made level of education as well as in light of the residual reported health challenges, P [...]’s choice of jobs will remain restricted. She opines that the reported neuropsychological limitations will render her an unequal competitor within the open labour market compared to her colleagues with no limitations. She further opined that work performance will always be compromised and as a such she will be prone to being perceived as a poor performer at risk of inability to progress, emotions and dismissals. P [...], according to the industrial psychologist, will no longer attain the same career ceiling as would have been the case had the accident not occurred. The drop in scholastic and educational level will ultimately translate into a lowered career and earning life and most likely that she will predominantly remain an unskilled and at best semiskilled worker with a strong reliance on supervision and a structured environment.

[17] Ms Lowani-Mayayise opines that with the neuropsychological challenges it is considered likely that any career that she will ultimately pursue will remain only at an entry level with no career advancement achieved and will remain threatened by the challenges that she would constantly lose jobs thereby building a negative career history with periods out of employment with no earning tending to be frequent and longer over time. The likelihood that she will remain within entry levels of employment in sympathetic environments is considered very high.

EVALUATION OF THE EVIDENCE

[18] I have had the opportunity to see and hear the educational psychologist, occupational therapist and the industrial psychologist. The above experts gave their evidence and have prepared detailed reports referring in a balanced way many other medical legal reports which they took into account. They were well prepared and stood their ground. I never gained any impression that they were biased in any way. I accept that P [...]’s career is severely compromised in that, *inter alia*, her choice of jobs will remain restricted, the reported neuropsychological limitations will render her an unequal competitor within the open labour market compared to her colleagues with no limitations and that she will no longer attain the same career ceiling as would have been the case in the absence of the accident. In addition, her career is likely to remain one wherein she is considered a poor performer and an incompetent employee. I also accept that periods of unemployment would also mostly likely characterise her career life as a result of the challenges and the limitations indicated. The actuarial calculation prepared on this basis can be accepted as correct save for the current contingencies to be applied. This court is clothed with the discretion to apply contingencies. I return to this aspect later.

[19] It is trite that the assessment of damages for loss of earnings is a complex matter and incapable of precision.¹ In *Anthony and Another v Cape Town Municipality* 1976 (4) SA 445 (A) Holmes JA state the following;

“When it comes to scanning the uncertain future, the court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for system general damages for future loss.”

[20] In *Southern Insurance Association Ltd v Bailey* NO² the Appellate Division stated the following;

“Any enquiry into damages for loss of earning capacity is to its nature speculate, because it involves a prediction as to the future without the

¹ *Santam versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A) it 150 A-C

² 1984 (1) SA 98 AD at 113G

benefit of crystal balls, soothsayers, augers or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of loss."

[21] In a case where the court has before it material on which an actuarial calculation can be made the actuarial computation has an advantage of an attempt to assist in defending what was lost on a logical basis.

[22] Contingencies are the hazards of life that normally beset the lives and circumstances of ordinary people (AA Mutual Ins v Van Jaarsveld reported in Corbett & Buchanan, The Quantum of Damages, Vol II 360 at 367) and should therefore, by its very nature, be a process of subjective impression estimation rather than objective calculation (Shield Ins Co Ltd v Booysen 1979 (3) SA 953 (A) at 965G-H).

[23] The actuarial calculation by Wim Loots (in a table below) as at 01 August 2022 on behalf of the P [...] based on the industrial psychologist's report considered the present value of earnings had the accident not occurred, thus R14,056,240 less a contingency of 25%; the present value of earnings having regard to the accident R2,358,715.00 and applied 40% contingency. The loss of earnings or earning capacity was taken as the difference between the above-mentioned present figures, thus R9,126,951.00. The actuarial calculation considered that this amount exceeded the cap hence the loss was limited accordingly to an amount of R9,109,733.00.

[24] Contingencies for which allowance should be made, would usually include the following:

- (a) the possibility of illness which would have occurred in any event; up to
- (b) inflation or deflation of the value of money in future; and
- (c) other risks of life such as accidents or even, which would have become a reality, sooner or later, in any event (Corbett & Buchanan, The Quantum of Damages, Vol I, p51).

[25] There are generally no fixed rules as regards to general contingencies, but

Robert Koch suggests only guidelines³ namely

“Sliding scale: Yz % a year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age.

Normal contingencies: The RAF usually agrees to deductions of 5% for past loss in 15% for future loss, the so-called normal contingencies”

[26] The above approach is only a guideline as contingencies, by its very nature is a process of subjective impression or estimation rather than objective calculation. It is trite that 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 discretion to award what he considers right”*⁴ “

[27] Mr Masina, acting on behalf of the plaintiff contended that the contingencies applied of 25% and 40% are influenced by the fact that the claimant is a minor child and obviously was not working at the time of the accident. He submits that the contingencies applied are fair and reasonable under the circumstances. I disagree.

[28] In my view the 25% contingency applied in calculating the loss of earnings had accident not occurred is far too low considering that the minor child was in grade 1 when the accident occurred. In this regard I refer to what has been noted by Ms Sepenyane that it is indeed always very difficult for any expert to comment on a minor’s scholastic abilities especially in cases where an accident occurs too early in their lives. In my view A higher contingency of 40% should be applied.

[29] The 40% contingency applied in calculating the loss having regard to the accident is too high considering the guide set by Robert Koch above. In my view a contingency of 25% should be applied. This means that the total amount of R6,664 707.75 should be awarded to the plaintiff for loss of earnings/earning capacity as set out in the table below. This amount will be reflected in the draft order which I intend to make an order of court.

³ Quantum Yearbook (by Robert Koch, 2017 Edition, p 126)

⁴ Legal Assurance Co Ltd v Boles 1963 (1) SA 608 (A) at 614F

	Future
Earnings had accident not occurred	14 056 240
Less Contingencies (40%)	5 622 496
	8 433 744
Earnings having regard to accident	2 358 715
Less Contingencies (25%)	589 679
	1 769 036
Loss of Earnings	6 664 708

ORDER

In the result I grant the following order:

The draft order attached hereto marked "X" is made an order of court.

HE MKHAWANE
ACTING JUDGE OF THE HIGH COURT,
MIDDELBURG

FOR THE PLAINTIFF: Adv S S Masina

INSTRUCTED BY: Komane & Associates

FOR THE DEFENDENT: No appearance

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date of the hand-down is deemed to be on 15

December 2022.

**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION, MIDDLEBURG (LOCAL SEAT)**

CASE NO:942/18

Before her ladyship Judge AJ: MKHAWANE

On the 24TH OF AUGUST 2022

In the matter between:

NDABA SIBONGILE ANNA

o.b.o P [....] NKULULEKO HLOPHE

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

RAF REF: 560/ 12485130/ 1043/ 1

LINK NO: 4226591

DRAFT COURT ORDER

HAVING heard Counsel(s) for the party(ies) and having read the documents filed of record and considered the matter:

IT IS ORDERED THAT:-

- 1.** Merits are previously settled **100%** in favour of the Plaintiff.
- 2.** General damages were previously settled between the parties.
- 3.** The Defendant shall pay the Plaintiff the sum of R6 664 708.00 (**Six Million Six**

Hundred and Sixty Four Thousand Seven Hundred and Eight Rand) in respect of loss of earnings.

4. The amount mentioned in paragraph three, R6 664 708.00 to be paid to the plaintiff within **180 (hundred and eighty)** days of this Court Order.

5. 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, for the costs of future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the injured after such costs have been incurred and on proof thereof, relating to the injuries sustained by the Plaintiff.

6. The Defendant is ordered to pay the Plaintiffs taxed or agreed party and party costs on High Court Scale, which costs will include, but will not be limited to the following:

6. 1 The reasonable taxed fees for consultation with the experts mentioned below, together with delivery of experts bundles including travelling and time spent travelling to deliver such bundles, preparation for trial, qualifying and reservation fees (if any and proof thereof, as well as costs of the reports, addendum reports, joint minutes and attendance fees of the following experts and subject to the discretion of the Taxing Master:

- (a) Dr. B Mosadi (Neuro Surgeon);
- (b) Dr. B Mosadi (RAF 4 Form);
- (c) Dr. K Segwapa (Plastic Surgeon);
- (d) Dr. K Sekwapa (RAF 4 Form);
- (e) Dr. Mkhabela & Induna Radiokwsts;
- (f) Mtimkulu-Nagel Clinical Psychologist;
- (g) Sepenyane Educational Psychologists;
- (h) S Sebapu Occupational Therapists;
- (i) Lowane Mayayise- Industrial Psychologist; and
- (i) Wim Loots Actuarial Consulting

6.2 The costs of transporting; time spent and accommodation of the Plaintiff with any other service provider to the medical legal examination(s) arranged by Plaintiff and Defendant.

6.3 The costs of any transportation service provider and accommodation for the Plaintiff and family member(s) to attend court on 29th of April 2019; 26th July 2021; 8th November 2021, 7th March 2022, 22nd and 24th August 2022.

6.4 The costs for the Plaintiff, Attorney travelling to and spending time travelling to pre-trial conference and attendance of pre-trial conference by the Plaintiff attorney, subject to the discretion of the Taxation Master.

6.5 The costs for preparation of Plaintiff's court bundles of documents for experts, as well as travelling costs and time spent to deliver these bundles;

6.6 The full costs of Plaintiff's Counsel for perusal, preparation, Drafting of Heads of argument and to attend Court for Trial on the 29th of April 2019; 26th July 2021; 8th November 2021, 7th March 2022, 22nd and 24th August 2022

6. 7 The costs of Plaintiff attorney to attend Court for Trial on the 29th of April 2019; 26th July 2021; 8th November 2021, 7th March 2022, 22nd and 24th August 2022

6.8 The fees for the Occupational Therapist, Industrial Psychologist and the Educational Therapist for attending Court for trial on the 24th of August 2022.

6. 9 All previously reserved costs, travelling time and all costs of the Judicial pre-trial conferences.

6.10 The costs of appointing an assessor to investigate both merits and quantum (if any);

6.11 Reservation costs for the interpreter.

7. The Defendant is ordered to pay the Plaintiffs taxed and/ or agreed party and party costs within 14 days from the date upon which the accounts are taxed by the Taxing master and/ or agreed between the parties.

8. Should payment of taxed costs not be effected timeously, Plaintiff will be entitled to recover interest at the rate of 10.25% on the taxed or agreed costs from date of allocator to date of payment.

9. It is noted that after deduction of disbursements due to Plaintiffs attorneys of record and after deduction of agreed/ attorney and client fees and after payment of **R 100 000.00 (Hundred thousand rand only)** to the plaintiff, the net proceeds of the award is to be paid to the Trust to be established with ABSA , attached Consent letter marked annexures "A" in the name of the beneficiary being **P [....] M [....] H [....] ([....])** referred to as "the minor herein.

10. The amount referred to above will be paid to the plaintiff's attorneys, Komane Attorneys trust account, details of which are the following: -

ACCOUNT HOLDER : A.M KOMANE AND ASSOCIATES INC

NAME OF ACCOUNT : FIRST NATIONAL BANK

ACCOUNT NUMBER : [...]

BRANCH NAME : CENTURION

TYPE OF ACCOUNT : TRUST ACCOUNT

**BY ORDER
THE REGISTRAR**

**REGISTRAR OF THE HIGH
COURT MIDDLEBURH**

ADVSMASINA

PLAINTIFF'S ADVOCATE

DEFENDANT'S ADVOCATE