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**IN THE HIGH COURT OF SOUTH AFRICA  
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case no: 977/2020

Reportable: YES / **NO**

Circulate to Judges: YES / **NO**

Circulate to Regional Magistrates: YES / **NO**

Circulate to Magistrates: YES / **NO**

In the matter between:

**A[...]** **S[...]** **B[...]**

1<sup>st</sup> Plaintiff

**B[...]** **B[...]**

2<sup>nd</sup> Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

**Neutral citation:** *B[...]* and Another v The Road Accident Fund (Case no 977/2020) (11 September 2025).

**Coram:** Tyuthuza AJ

**Heard:** 28 January 2025

**Delivered:** 11 September 2025.

**Summary:** *Delict – Claim for damages against Road Accident Fund – Past hospital and medical expenses – Settled by third party – Does not necessarily absolve the Road Accident Fund from liability – Loss of future income/ earning capacity – Contingencies to be applied.*

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## **ORDER**

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1. As set out in paragraph [30] of this judgment.
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## **JUDGMENT**

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**Tyuthuza AJ**

### **INTRODUCTION**

- [1] The plaintiffs instituted an action against the defendant, the Road Accident Fund, claiming general damages; past and future hospital and medical expenses; and loss of future income/ earning capacity arising from the injuries the second plaintiff sustained as a result of a motor vehicle collision that took place on 27 July 2018.
- [2] The plaintiffs claim R1 000 000 (one million rand) for the second plaintiff's general damages, R 452 236.85 (four hundred and fifty-two thousand two hundred and thirty-six rand and eighty-five cents) for past medical and hospital expenses, and R 1 210 830.00 (one million two hundred and ten thousand eight hundred and thirty rand) for loss of future income/ earning capacity.
- [3] The issue of liability and quantum in relation to general damages was settled in that the defendant agreed to pay an amount of R1 000 000.00 (one million rand) in respect of the general damages suffered by the

second plaintiff. The defendant also gave the plaintiffs an undertaking in accordance with section 17(4)(a) of the Road Accident Fund Act<sup>1</sup> to compensate the plaintiffs for 100% of the costs associated with the second plaintiff's future hospitalisation or accommodation in a nursing home, treatment, and services or goods occasioned by the mentioned motor vehicle accident.

[4] Similarly, the defendant conceded liability for future loss of income/ earning capacity but disputed the quantum thereof. In relation to past hospital and medical expenses, however, the defendant denied liability. Accordingly, the only issues for determination were the defendant's liability in respect of the plaintiffs' claim for past medical and hospital expenses and the quantum for the second plaintiff's future loss of income/ earning capacity and the contingency deduction applicable thereto.

[5] The plaintiffs filed expert reports of the occupational therapist, industrial psychologist, neurosurgeon, clinical and neuropsychologist, psychiatrist, orthopaedic surgeon, educational psychologist and the actuary. The defendant did not object to the expertise and findings of any of these experts. The reports of these experts were admitted into evidence.

[6] The defendant did not appoint any experts or lead evidence.

## **BACKGROUND**

[7] On 27 July 2018, at approximately 23H45, at or near the N14 between Upton and Keimoes, Northern Cape, a collision occurred between two motor vehicles. One motor vehicle bearing registration number C[...] was driven by Mrs V Nel ("the first insured driver") and the other motor vehicle bearing registration number C[...] was driven by Mr MP van Rooyen ("the

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<sup>1</sup> 56 of 1996.

second insured driver"). At the time of the collision, the second plaintiff was 15 years old and a passenger in the motor vehicle driven by the first insured driver.

[8] The plaintiffs aver that the collision was caused by the sole negligence of the insured drivers, resulting in the second plaintiff sustaining severe bodily injuries. The plaintiffs further aver that as a result of the bodily injuries sustained by the second plaintiff, the first plaintiff incurred hospital and medical and related costs in the amount of R425 236.85. The plaintiffs further averred that the bodily injuries sustained by the second plaintiff consisted of diffuse traumatic brain injury; pelvic injury with a fracture of the right sacrum involving the right sacroiliac (SI) joint with a fractured pubic rami and displacement of the right hemi pelvis; left wrist injury involving a fracture of the radial styloid; lumbar spine injury involving a fracture of the L5 transverse process; and cervical spine injury involving a fracture of the C7 transverse process.

[9] The plaintiffs led the following expert evidence:

9.1. Dr Vlok, an orthopaedic surgeon who assessed the second plaintiff on 25 September 2019 and again on 25 September 2024, reported that the second plaintiff sustained a severe pelvic injury that included a fracture of the right sacrum involving the right SI joint and with fractures of the pubic rami and displacement of the right hemi pelvis. He reported that the injury was managed conservatively and that she has made a reasonable recovery from it, but still has residual complaints relating to the pelvic injury. Further that, as a result of the injuries, the second plaintiff had an 11mm shortening of the right leg and walks with a limp. The second plaintiff reported ongoing discomfort in the pelvis, particularly with physical activities. He further reported that the second plaintiff due

to the injuries she has sustained will not be able to deliver a child normally and will need her children delivered by way of a cesarean section. He opines that the second plaintiff will not be suited for physical work in the moderate to very heavy categories and that her work will be limited to sedentary and light physical work. It is anticipated that she will be able to work up until retirement age in work of a light physical nature. However, the possibility (10%) that she may still have to retire 1 or 2 years earlier than anticipated cannot be discounted. The second plaintiff's lifestyle has been disrupted following the pelvic injury for which she will require further treatment and most probably surgery to the right SL joint. The said treatment and surgery will be associated with a temporary loss of life amenities as well as further pain and suffering.

9.2. Dr Roper, a clinical and neuropsychologist, assessed the second plaintiff on 11 November 2024. He reported that she sustained a severe head injury because of the accident and that the severe head injury is expected to result in significant long-term neuropsychological difficulties and significantly disrupt her psychological functioning. He reported that the second plaintiff's involvement in the accident resulted in a decrease in all areas of her functioning, particularly her academic and occupational functioning. Dr Roper also reported that the second plaintiff's career choices and progression will be hampered, especially if compared to her expected pre-morbid level of functioning. He further reported that she is likely to find it extremely difficult to obtain and sustain employment that is not sympathetic to her condition in the long term.

9.3. Ms Jansen, an occupational therapist, assessed the second plaintiff in March 2021 and again in September 2024. She reported that the

second plaintiff's physical abilities remain suitable for sedentary work and that there is no improvement in her capacity for more physically demanding work. She reported further that the second plaintiff could not complete her initial studies in Somatology due to accident-related injuries and cognitive difficulties. The second plaintiff has since redirected her academic path towards a certificate in front office administration, suggesting an adjustment to more sedentary career options. Ms Jansen reported that the second plaintiff's move to a potentially less lucrative field of study might limit her future earning potential. The second plaintiff is an unequal competitor in the open labour market compared to her uninjured peers and, her physical limitations and cognitive challenges significantly reduce her employability, so opines Ms Jansen.

- 9.4. Dr Jacobs, an industrial psychologist, assessed the second plaintiff on 27 September 2024. Dr Jacobs reported that the second plaintiff's father is a farmer with a diploma in agricultural studies; her mother is a housewife with a grade 12 and a secretarial certificate; and her brother has a BCom degree in Marketing. Further that the second plaintiff retains work capacity, but it would be at a lower level compared to what she would have been capable of prior to the accident. Finally, that the second plaintiff might face long and regular periods of unemployment due to her physical and mental impairments.
- 9.5. Dr van Aswegen, a neurosurgeon, assessed the second plaintiff on 27 September 2024. He reported that, due to the accident, the second plaintiff suffered multiple injuries, including a moderate traumatic brain injury and a head injury. He further reported that the second plaintiff's complaints about decreased concentration,

impaired memory and irritability, fit in with the so-called post-concussive syndrome following traumatic brain injury. The long-term cognitive and emotional consequences of mild traumatic injury include somatic symptoms such as chronic headaches; cognitive symptoms such as attentional deficits; reduced working memory and impaired executive function; and psychiatric symptoms such as depressed mood, insomnia, anxiety, poor motivation, social withdrawal and interpersonal difficulties. Dr van Aswegen opines that the second plaintiff will in all likelihood never reach her full potential, even in the event that she manages to pass all her exams, she is at a high risk of developing the so-called “burn out”. Further that the second plaintiff has a lifetime risk of between 2-5% to develop epilepsy due to her head injury and, she would have to take anti-epileptic drugs. The use of anti-epileptic drugs would usually be for a lifetime in these circumstances.

- 9.6. Dr Olivier, a psychologist, who assessed the second plaintiff on 11 March 2011 and again on 1 June 2022, conducted a psycho-educational evaluation of the second plaintiff. He reports that her neuro-cognitive functions were permanently damaged as a result of the incident. He reports that her cognitive impairment will limit her capability by about 20% and that other areas of her life will be negatively influenced such as communication, social integration and physical ability. He recommends that she be adequately compensated for at least 20% of neuro-cognitive impairment suffered from the accident.
- 9.7. Dr Shavel, a psychiatrist, assessed the second plaintiff on 24 January 2022. He opines that the second plaintiff sustained significant orthopaedic injuries which are likely to further compound her post-accident level of occupational potential. He further reports

that the second plaintiff retains work capacity but at a lower level than what she had been capable of prior to the accident. He reports that given the severity of the head injury sustained she must be considered a vulnerable individual who can easily influenced by outside influences. He reports that there has been a devastating loss of amenities and that the second plaintiff's enjoyment of life has diminished.

- 9.8. The actuarial report was prepared by Munro Forensic Actuaries and is dated 11 December 2024. The report is based on the report of Dr Jacobs and information received from the plaintiffs' attorneys. This report makes provision for retirement at 65 and for the deduction of contingencies uninjured at 20% and injured at 50%. According to this report, the loss of future earnings is in the total amount of R1 210 830.00.

## **ANALYSIS**

### *Future loss of income/ Loss of earning capacity:*

- [10] The legal principle in respect of a claim for diminished earning capacity is trite in that the plaintiff must be placed in the position she would have been in had the injuries not occurred.<sup>2</sup> In our law, the capacity to earn money is considered to be part of a person's estate, and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate.<sup>3</sup> To succeed in the claim for loss or diminished earning capacity, the second plaintiff has to establish on a balance of probabilities that, as a

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<sup>2</sup> *Dippenaar v Shield Insurance CO Ltd* 1979 (2) SA 904 (A) at 917A-D.

<sup>3</sup> *Ibid.*



result of the accident, her earning capacity has been compromised, resulting in the diminution of her estate.<sup>4</sup>

[11] When making an order for future losses, it is expected from the court to make use of contingency deductions to provide for any future circumstances which may occur but cannot be predicted with precision.<sup>5</sup>

[12] Whilst it is not disputed that the second plaintiff will suffer a future loss of income/ earning capacity, the amount of contingencies to be applied was placed in dispute. The defendant submits that the same contingencies ought to be applied pre and post-accident.

[13] It is trite that the application of contingencies is at the discretion of the court. In this regard, Nicholls AJA writing for the majority in *Road Accident Fund v Kerridge*<sup>6</sup> (*Kerridge*) said:

“Contingencies are arbitrary and also highly subjective.

. . .

It is for this reason that a trial court has a wide discretion when it comes to determining contingencies.”

[14] The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%.<sup>7</sup>

[15] In *Kerridge*<sup>8</sup> the Court expressed as follows:

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<sup>4</sup> *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) para 11.

<sup>5</sup> *Sithole v Road Accident Fund* (35916/18) [2023] ZAGPPHC 355 (28 July 2023) para 30.

<sup>6</sup> [2018] ZASCA 151; [2019] 1 All SA 92 (SCA); 2019 (2) SA 233 (SCA) para 42–43.

<sup>7</sup> *AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A) 812; *De Jongh v Gunther and Another* 1975 (4) SA 78 (W) 81 at 83–84D; *Goodall v President Insurance* 1978 (1) SA 389 (W) at 393; *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114–115D.

<sup>8</sup> *Supra* fn 5 para 44.

*“Some general rules have been established in regard to contingency deductions, one being the age of a claimant. The younger the claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings they include, inter alia, a downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill health, death and the myriad of events that may occur in one’s everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in pre-morbid scenario, generally awarded higher contingencies, the younger the claimant.”* (Own emphasis.)

[16] In *N.P.S obo Z.S v Road Accident Fund*<sup>9</sup> the Court held that:

“Contingencies are risk factors which may affect an individual’s earning capacity in future. They are applied to both the pre and post-morbid calculations. If a claimant is no longer an equal competitor in the open labour market, is a vulnerable employee or is enjoying an element of sympathetic employment, the chances of job loss or loss of income are significantly higher. It is customary in these circumstances to apply a higher post-morbid contingency deduction to cater for this vulnerability”.

[17] The determination of contingencies includes factors such as the second plaintiff’s age, the extent of her injuries, the prospect of her finding employment suitable to her diminished employment capacity, her retirement age, her qualifications and her mental health.

[18] I have regard to the following material facts that would impact the determination of the appropriate contingencies:

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<sup>9</sup> (3614/2021) [2024] ZAECMKHC 87 (13 August 2024) para 16.

- 18.1. The second plaintiff suffered severe brain injury that has resulted in significant long-term changes in cognitive functioning and behaviour.
- 18.2. The second plaintiff suffered physical injuries that result in limited employment possibilities that involve sedentary work.
- 18.3. There is a possibility that the second plaintiff will not be able to work up until retirement age of 65 years.
- 18.4. The second plaintiff has to undergo further surgery on her left SI joint.
- 18.5. The second plaintiff suffers from a depressive mood, post-traumatic stress disorder (PTSD), anxiety and depression.
- 18.6. The second plaintiff will not be considered suited for manual labour occupations and is therefore limited in her choices for employment within the open labour market.
- 18.7. The bodily injuries will leave the second plaintiff in pain on a frequent basis.

[19] I have considered the submissions of both parties in respect of the contingency deductions to be applied herein. In exercising my discretion, I am satisfied that the contingency deductions as submitted by the plaintiffs and applied by the actuary (uninjured at 20% and injured at 50%), are fair in the circumstances of this matter based on the accepted reports of the plaintiffs' expert witnesses as was fully dealt with herein above.

*Past hospital and medical expenses:*

[20] As alluded to above, it was also in dispute whether the plaintiffs were entitled to payment for the past medical and hospital expenses, on the basis that these expenses were paid by the first plaintiff's medical aid scheme.

[21] The issue I had to decide is whether the defendant remains liable to compensate a claimant for medical expenses paid by a medical aid provider.

[22] In respect of this issue, the following evidence was led by the plaintiffs:

22.1. Mr S[...] B[...], the first plaintiff, testified that the second plaintiff is his daughter. He testified that he is a member of Discovery Health Medical Scheme (DHMS), and was a member of this medical aid scheme at the time of the accident. He confirmed that the second plaintiff received further medical treatment, which was paid for by DHMS. Under cross examination, he further confirmed that he is now seeking to recoup the amounts paid by DHMS for the second plaintiff's medical costs from the defendant.

22.2. Vusumuzi Shabalala, employed by DHMS as administrator-MVA (Third Party Recovery Services), testified that the payments were made by DHMS and that the payments were related to the accident.

[23] It is not in dispute that the plaintiff's past medical and hospital expenses amounted to R452 236.85 and that these expenses have been paid in full by DHMS.

[24] In *Discovery Health (Pty) Ltd v Road Accident Fund and Another*<sup>10</sup> the defendant's directive stating "[a]ll RAF offices are required to assess claims for past medical expenses and reject the medical expenses claimed if the Medical Aid has already paid for the medical expenses" was found unlawful and set aside by Mbongwe J on 27 October 2022.

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<sup>10</sup> [2022] ZAGPPHC 768; 2023 (2) SA 212 (GP).

- [25] The Court in *Van Tonder v Road Accident Fund*<sup>11</sup> re-affirmed that:  
“The RAF’s statutory duty to compensate for past medical expenses, as mandated by the Road Accident Fund Act, is not discharged by the involvement of a private insurer. The Act ensures that a claimant is indemnified for all reasonable medical costs incurred due to injuries sustained in a road accident, and the fact that a medical aid has stepped in to settle those costs does not alter the RAF’s obligation to reimburse the claimant.” (Own emphasis.)
- [26] Subsequently, the defendant published two more directives to a similar but qualified effect. On 17 December 2024, in *Discovery Health (Pty) Ltd v Road Accident Fund and Another*,<sup>12</sup> the Court found that the subsequent directives remained in effect until reviewed and set aside as they were substantially different from those set aside by Mbongwe J. On 9 April 2025, Discovery Health (Pty) Ltd was granted leave to appeal to the Supreme Court of Appeal.<sup>13</sup>
- [27] While the two subsequent directives issued by the defendant continue being in operation as the matter is pending before the Supreme Court of Appeal, more need not be said about them because they are not applicable in this case. The defendant did not supplement its papers to rely on those directives and or argue the retrospective applicability thereof *in casu*.<sup>14</sup>
- [28] It is common cause that DHMS paid the past hospital and medical expenses by virtue of a contractual arrangement between itself and the first plaintiff. By doing so, DHMS discharged its contractual obligation

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<sup>11</sup> (2023/013183) [2024] ZAGPJHC 1009 (7 October 2024). See also *Fookwe v Road Accident Fund* [2024] ZAWCHC 115; 2024 JDR 1902 (WCC).

<sup>12</sup> [2024] ZAGPPHC 1303; [2025] 2 All SA 113 (GP); 2025 (3) SA 225 (GP).

<sup>13</sup> *Discovery Health (Pty) Ltd v Road Accident Fund and Another* (Leave to Appeal) (2023-117206) [2025] ZAGPPHC 363 (9 April 2025).

<sup>14</sup> *Fookwe v Road Accident Fund* [2024] ZAWCHC 115; 2024 JDR 1902 (WCC) para 27.

towards the first plaintiff in terms of law and the private contract entered into between the parties. Such a contract is only binding between the parties to the contract, and not third parties, such as the defendant in this matter.

- [29] In conclusion, I find that the first plaintiff has proved that he is entitled to be compensated by the defendant for the past medical expenses incurred and related medical services employed as a result of the injuries the second plaintiff sustained due to the motor vehicle accident.

## **ORDER**

- [30] In the premise, the following order is made:

### **A. BY AGREEMENT BETWEEN THE PARTIES THE FOLLOWING ORDER IS MADE:**

1. Payment by the defendant to the Plaintiffs in the sum of R 1 000 000.00 (one million rand) which amount is compiled as follows:
  - 1.1. R1 000 000.00 (one million rand) in respect of general damages;
  - 1.2. The defendant is ordered to furnish the Second Plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for 100% of the costs of the future accommodation of the Second Plaintiff in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to the Second Plaintiff arising out of the injuries sustained by her in the motor vehicle accident on 27 July 2018, in terms of which undertaking the Defendant will

be obliged to compensate her in respect of the said costs after the costs have been incurred and on proof thereof.

**B. AFTER HAVING CONSIDERED THE EVIDENCE OF RECORD AND HAVING HEARD EVIDENCE AND ARGUMENTS ON BEHALF OF THE PLAINTIFFS AND THE DEFENDANT THE FOLLOWING ORDER IS MADE:**

1. Payment by the Defendant to the Plaintiffs in the sum of R1 663 066.85 (one million six hundred and sixty-three thousand and sixty-six rand and eighty-five cents), which amount is compiled as follows:
  - 1.1. R452 236.85 (four hundred and fifty-two thousand two hundred and thirty-six rand and eighty-five cents) for past hospital and medical expenses; and
  - 1.2. R1 210 830.00 (one million two hundred and ten thousand eight hundred and thirty rand) for the second plaintiff's loss of future income or earning capacity.
2. Payment of the amounts referred to in paragraphs 1 and 2 above to be made into the following bank account:  
HONEY ATTORNEYS – TRUST ACCOUNT  
NEDBANK – MAITLAND STREET BRANCH, BLOEMFONTEIN  
BRANCH CODE: 1[...]  
ACCOUNT NO: 1[...]  
REFERENCE: Y[...]
3. In the event that the Defendant does not, within 180 days (one hundred and eighty) days from the date on which this order is handed down, make payment of the capital amount the Defendant will be liable

for the payment of interest on such amounts at the rate of 11.25% (the statutory rate per annum) calculated 14 (fourteen) days from the date of this order.

4. The Defendant to pay the Plaintiffs' taxed or agreed party and party costs on the High Court scale, until the date of this order, including but not limited to the costs set out hereunder:

- 4.1. The reasonable qualifying and reservation fees and expenses (if any) of the following experts:

- 4.1.1. Dr A van Aswegen (neurosurgeon)
- 4.1.2. Dr DA Shevel (psychiatrist)
- 4.1.3. Dr L Roper (clinical and neuropsychologist)
- 4.1.4. Dr AL Vlok (orthopaedic surgeon)
- 4.1.5. Drs van Dyk and Partners (radiologists)
- 4.1.6. Ms A Jansen (occupational therapist)
- 4.1.7. Dr N Olivier (educational psychologist)
- 4.1.8. Dr EJ Jacobs (industrial psychologist)
- 4.1.9. Munro Forensic Actuaries.

- 4.2. Costs of counsel as on Scale B of the Uniform Rules of Court.

5. In the event that costs are not agreed:

- 5.1. The Plaintiffs shall serve a notice of taxation on the Defendant's attorney of record; and

- 5.2. The Plaintiffs shall allow the Defendant 180 (one hundred and eighty) days to make payment of the taxed costs.



**T TYUTHUZA**  
**ACTING JUDGE OF THE HIGH COURT**  
**NORTHERN CAPE DIVISION**

## Appearances

On behalf of the Plaintiffs:

Adv De La Ray

On the instruction of:

Honey Attorneys

On behalf of the Defendant:

Mr M Magano

On the instruction of:

Office of the State Attorney