IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2020-9960

[1]	REPORTABLE: YES/**NO**	
[2]	OF INTEREST TO OTHER JUDGES: YES/**NO**	
[3]	REVISED:	
	05 November 2024	
	……	[redacted]
	DATE	SIGNATURE

In the matter between:

NKOSI, GUGU ANGEL Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGEMENT

T LIPSHITZ AJ

INTRODUCTION

1. This matter concerns an application for default judgment arising from a delictual claim brought by the plaintiff against the defendant. The plaintiff seeks compensation for bodily injuries sustained by the plaintiff in a motor vehicle accident on 15 April 2015. The plaintiff suffered significant injuries, including soft tissue injury to the lumbar spine, left pubic ramus fracture, soft tissue injuries to both ankles and a minor head injury with loss of consciousness with resultant neurocognitive and neuropsychological *sequelae*.

2. The defendant conceded the merits of the claim, and the plaintiff accepted the offer on 18 February 2020. Consequently, the sole remaining issue for determination is the quantum of damages and, specifically, loss of earnings and future medical expenses, as the defendant has not accepted or rejected the plaintiff's serious injury assessment RAF4 form.

LITIGATION HISTORY

3. The plaintiff commenced proceedings by serving a summons and particulars of claim on the defendant on 25 March 2020. The defendant's failure to respond prompted the plaintiff to seek leave from this Honourable Court to apply for default judgment, as the applicable practice directives at the time required. The court granted this application on 24 October 2022.

4. Subsequently, the plaintiff underwent various medico-legal evaluations by experts who produced their reports. In light of the evidence contained in these

reports, the plaintiff served a notice of intention to amend her claim from R 1 370 000. 00 to R 6 343 147. 00. This amendment appeared to have spurred the defendant into action, and the defendant filed a notice of intention to defend on 27 October 2023, approximately 3.5 years post-service of the summons.

5. Despite filing this notice, the defendant neglected to submit a plea within the prescribed period as set out in Rule 22(1) of the Uniform Rules of Court ("URC").

6. On 27 November 2023, the plaintiff issued a notice in terms of Rule 26, requiring the defendant to file its plea within five days, by 04 December 2023.

7. The defendant eventually filed its plea late, on 07 December 2023, after it had been *ipso facto* barred.

8. Subsequently, on 08 December 2023, the plaintiff filed a Rule 30 notice, asserting that the late filing of the plea constituted an irregular step, given that the defendant was *ipso facto* barred. The defendant was given an opportunity to rectify the irregularity, failing which the plaintiff would apply to have the plea set aside.

9. The defendant did not heed the notice and did not remove the cause of complaint. Thus, on 26 January 2024, the plaintiff filed an application to set the defendant's plea aside as an irregular step.

10. Having complied with all procedural formalities, the plaintiff sought default judgment under Rule 31(5) of the URC. A hearing was set for 30 April 2024, with the plaintiff serving a notice of set-down on 21 February 2024. Given that the defendant was *ipso facto* barred, the plaintiff was aptly positioned to apply for

default judgment. It is worth noting that, as Rule 30 is not etched in peremptory terms, the plaintiff was entitled to pursue default judgment without necessarily invoking the Rule 30 remedy.

11. On 29 April 2024, at the proverbial 11th hour, the defendant filed a notice of opposition to the Rule 30 application. Upon the matter being called, counsel for the defendant argued that the case should be removed from the roll, asserting that the matter was not ripe for default judgment due to the pending interlocutory application on the plea's irregularity. In response, the court proposed a consolidated hearing to resolve both the irregular step and default judgment applications together and invited the defendant to articulate any prejudice that might result from this approach. The defendant's counsel was unable to demonstrate any substantial prejudice.

12. Accordingly, the court proceeded on the basis of the consolidated hearing to promote judicial efficiency and stood the matter down until later in the week to allow the parties to file their respective affidavits in the Rule 30 application.

13. On 02 May 2024, the defendant filed an answering affidavit to the Rule 30 application, and the plaintiff submitted a reply. Additionally, the defendant applied under Rule 27 of the URC, seeking the upliftment of the bar, to which the plaintiff had already responded. To permit the defendant to file a replying affidavit in the condonation application, the matter was postponed to 15 May 2024 for determination of (1) the condonation application, (2) the Rule 30 application, and (3) the default judgment application. It naturally follows that should the

condonation application succeed or the Rule 30 application be dismissed, the matter would not be ripe for default judgment.

ISSUES BEFORE THE COURT

14. In the course of these proceedings, the court was required to address the following issues:

    14.1. Whether the filing of the plea was an irregular step and should be set aside;

    14.2. Whether the defendant had set out good cause for the upliftment of the bar;

    14.3. If the plea is set aside and the bar is not uplifted, then the quantum of damages will be awarded, specifically loss of earnings and future medical expenses.

15. These matters will be addressed in detail in the sections that follow.

RULE 30 APPLICATION

16. Rule 30 of the Uniform Rules of Court provides recourse for the aggrieved party to apply for the irregular step to be set aside. An “irregular step” within the meaning of Rule 30 includes any action that moves proceedings closer to

resolution. By any measure, the filing of a plea undoubtedly advances the litigation one significant step toward completion.

17. The plaintiff's basis for seeking to set aside the defendant's plea is grounded in the contention that the defendant had been duly served with a notice of bar in terms of Rule 26, granting the defendant five days to submit its plea. The notice of bar explicitly warned that failure to comply within this timeframe would result in the defendant's automatic exclusion from further participation in the proceedings. Yet, in the absence of an order lifting the bar, the defendant proceeded to file its plea. In the plaintiff's view, this act constitutes an irregular step, given that the bar was firmly in place, effectively preventing the defendant from proceeding as if no procedural impediment existed. The resulting prejudice is explicit, as Rule 26 is designed to guard against procedural delays, ensuring timely progress in litigation and preventing any party from assuming a supine posture that might unjustifiably prolong the finalisation of the matter.

18. In opposition, the defendant challenges the propriety of the notice of bar's service, asserting that it was physically served on the State Attorney rather than through email, as allegedly required under Rule 4(1)(a) of the Uniform Rules of Court. The defendant contends that the acceptance of its notice of intention to defend via service by e-mail — created an implied agreement between the parties that notices and pleadings would be served exclusively via email. In light of this agreement, the defendant argues that the plaintiff's service of the notice of bar by physical delivery was improper and ineffective, leaving the defendant unaffected by the purported bar and entitled to file a plea without procedural irregularity.

19. The defendant's purported defence lacks credibility, as evidenced by its application to uplift the bar—a move entirely at odds with any genuine belief that it had not been barred due to alleged improper service of the notice of bar. This contradictory action strongly suggests an acknowledgement of the bar's validity, undermining the defendant's contention of defective service and casting doubt on the authenticity of its defence.

20. In any event, the central question before the court is whether the plaintiff's service of the notice of bar deviated from an established mode of service to such an extent that it constitutes a procedural misstep, thereby rendering the defendant's filing of the plea procedurally sound or irregular.

21. Rule 19 of the URC 9 imposes specific obligations on a defendant upon delivering a notice of intention to defend, requiring the defendant to provide their full residential or business address, postal address, and, if available, a facsimile address. The rule mandates the appointment of an address within 25 kilometres of the Registrar's office, excluding a post office box or poste restante, and, where available, an email address for valid service of documents unless personal service is specifically required by court order or practice. Additionally, the defendant may specify a preferred alternative method of service for subsequent documents in the notice of intention to defend and may request written consent from the plaintiff to exchange documents via facsimile or email. Should the plaintiff refuse such consent, the defendant is entitled to seek court approval for electronic service on terms deemed just and appropriate, ensuring clear and

effective communication between parties in accordance with procedural requirements.

22. Rule 4(A) permits service of documents and notices not falling under Rule 4(1) by hand at the physical address provided, registered post to the post address provided, or facsimile or electronic mail to the respective addresses provided.

23. The defendant's notice of intention to defend expressly indicated acceptance of service for all processes at a designated physical address, omitting any provision of an email address for this purpose. Furthermore, the defendant has not produced any written correspondence or confirmation evidencing an express agreement stipulating that service should occur exclusively via email.

24. In light of this, it is clear that no such agreement existed, and the defendant's own notice of intention to defend unequivocally established physical service as the accepted mode. The plaintiff complied with this designated method of service as stipulated by the defendant.

25. The defendant's subsequent complaint that the notice of bar did not come to its attention, allegedly due to internal disarray and a failure of documents to reach the intended recipient at its physical offices, is without merit. The defendant knowingly elected physical service despite being fully aware of the inefficiencies within its office operations. The defendant's choice to rely on a mode of service it acknowledges as unreliable is a self-imposed constraint, which it cannot now invoke as a basis for non-compliance. Accordingly, the defendant's argument lacks substance, and the notice of bar is deemed validly served in accordance with the agreed mode.

26. In light of the foregoing, I conclude that the notice of bar was served in strict compliance with the provisions of the URC, rendering the defendant *ipso facto* barred when it filed its plea. It would be appropriate, therefore, to first consider the application to uplift the bar before deciding whether to set aside the plea as an irregular step or to condone its late filing.

Rule 27 Application to Uplift the Bar

Legal Principles Relating to the Upliftment of the Bar.

27. The defendant bears the onus of demonstrating "good cause" for the upliftment of the bar, as set out in *Du Plooy v Anwes Motors (Edms) BPK* 1983 (4) SA 212 (O), where it was held that the court enjoys broad discretion in such matters, which must be exercised with regard to the merits of the case viewed holistically. The concept of "good cause" generally requires a reasonable and acceptable explanation for default, a demonstration of *bona fides,* and a prima facie defence with some prospect of success, as reaffirmed in *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* [2021] ZASCA 69 at para 21: "*Good cause requires a full explanation of the default so that the court may assess the explanation."*

28. Our courts have consistently held that, in assessing "good cause," three principles prevail: (i) if the delay is extensive and lacks a reasonable explanation, the court may dismiss the application without considering prospects of success,

as this alone justifies refusal; (ii) if the delay is brief and adequately explained, with reasonable prospects of success, condonation may be granted; and (iii) even where prospects of success are strong, condonation may be refused if the delay is excessive and unexplained, or if it would prejudice the other party (*Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] All SA 251 (SCA)).

29. The *Smith NO v Brummer NO* judgment further underscores the requirements for the removal of a bar, stipulating that the applicant must furnish a reasonable explanation for the delay, act in good faith without intent to delay the opposing party's claim, avoid reckless disregard for court rules, and show that any prejudice caused to the opposing party can be mitigated by an appropriate costs order.

30. Additionally, in *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC), the Constitutional Court emphasised the necessity of a comprehensive and uninterrupted explanation covering the entire period of delay. This requirement was echoed in *Dengetenge Holdings*, where it was noted that any condonation request must include "*a full, detailed and accurate account of the causes of the delay and their effects"* to allow the court to assess the reasons and assign responsibility clearly.

31. Lastly, *Ingosstrakh v Global Aviation Investments* highlighted the importance of explaining not only the initial default period but also the delay following the issuance of the notice of bar. Makgoka JA observed in para 22: *"There are two periods of default which [the applicant] must explain for its failure to deliver a plea. The first is before the notice of bar was served on it, and the second relates*

to the period after it was served. This is because the notice of bar was served as a consequence of [the applicant's] failure to plea."

32. In addition, the applicant must demonstrate a *bona fide* defence, which in this context means that the minimum that the defendant must show is that her defence is not patently unfounded and that it is based upon facts (which must be set out in outline), which, if proved, would constitute a defence or put differently, a *prima facie* defence which *prima facie* has some prospect of success[1].

33. In summary, to succeed in lifting the bar, the defendant must present a *bona fide* explanation covering the entire delay, demonstrate genuine intent, provide a *bona fide* defence to the action and prove that any resultant prejudice to the plaintiff can be adequately addressed. Failure to satisfy these criteria would render the application for condonation untenable.

Degree of Lateness

34. The defendant took 3.5 years after the summons to serve a notice of intention to defend.

35. The defendant did not file its plea timeously, and within the 20 days afforded to it under the URC.

36. The defendant filed its plea 3 days after it was *ipso facto* barred.

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[1] Mukhinindi v Cedar Creek Estate Home Owners Association (unreported, GP case no 81830/2018 dated 10 May 2021) at paragraphs [31]–[33]; Ingosstrakh v Global Aviation Investments (Pty) Ltd 2021 (6) SA 352 (SCA) at paragraph [21]; Legodi v Capricorn District Municipality (unreported, LP case no 2974/2018 dated 9 October 2023) at paragraph [16].

37. While the delay in filing its plea after it was *ipso facto* barred is insignificant, considering the defendant's cumulative delaying conduct, one would expect a full explanation of its default.

Explanation for the Delay

38. The high watermark of the defendant's explanation for its default is that the notice of bar did not come to its attention as it was physically served juxtaposed to directly via e-mail on the attorney dealing with the matter.

39. This explanation does not pass the muster of a *full explanation* and manifests an explanation merely paying "*lip-service*" to this element of good cause. This is so because:-

    39.1. As already dealt with above, the defendant did not request that service be effected via e-mail in its notice of intention to defend. It elected to have service via physical delivery. It cannot now cry about it not coming to its attention when this occurred because of its own actions.

    39.2. There is no explanation for the "*first period,"* as alluded to in *Ingosstrakh v Global Aviation Investments*, being the period after the notice of intention to defend and when the notice of bar was served.

    39.3. Given the extraordinary delay the defendant took to enter a notice of intention to defend (3.5 years), one would expect that litigant to join the litigation fray, acting with the necessary alacrity and to file a plea before being served with a notice of bar. I pause to point out that the

defendant's late service of the notice of intention to defend may very well constitute an abuse of court process as contemplated in the decision of *Delport v Road Accident Fund (GJ).*[2]

39.4. The defendant's conduct as a whole is indicative of a litigant acting with the intent to delay the finalisation of the matter, in flagrant disregard for court rules, and to the extreme prejudice of the plaintiff, who would then have to wait an indeterminate period for a trial date, further prolonging the resolution of the claim and deferring compensation for years to come and the lack of prejudice to the defendant who for reasons as will be advanced below does not appear will be in a more favourable position in the future.

39.5. During the argument, the defendant's counsel sought to convince the court that judicial notice should be taken of the high volumes of litigation which the State Attorney has to deal with. I am not persuaded that the RAF is a special litigant who is not subject to the time frames contained in the URC. While I am sympathetic to each state attorney's specific workload, the State Attorney's office should employ enough resources to ensure litigation is conducted effectively and efficiently. The court and litigants should not be expected to have to wait for the finalisation of a matter to accommodate the workloads of the State Attorney. I am not convinced this is a reason to give the RAF a free pass to disregard time frames and treat litigation as a game.

[2] Unreported case no 10928/2020 (8 December 2023) at [18]

40. I am, accordingly, not persuaded that the defendant has provided a reasonable explanation for its default.

***Bona Fide* Defence**

41. In assessing the defendant's application to uplift the bar, it is conspicuous that the defendant has neglected to address the essential element of a *bona fide* defence to the action. This omission is of significant consequence, as it renders the application intrinsically defective. Even assuming, *arguendo*, that the defendant had provided an adequate explanation for the default, established authorities unequivocally require that the court be persuaded of the existence of a *bona fide* defence, as this forms a cornerstone of any application for condonation or upliftment of a bar.

42. To afford the defendant the benefit of the doubt, I was inclined to examine the plea to ascertain whether any *bona fide* defence had been disclosed. This review was undertaken with the view that, despite procedural lapses, the defendant might yet demonstrate a defence which, *prima facie*, holds some prospect of success. However, the failure to address this fundamental element within the application remains a considerable shortcoming, underscoring the necessity for litigants to present both procedural compliance and substantive justification when seeking indulgence from the court.

43. In the plea, the defendant curiously denies both the occurrence of the accident and any negligence on the part of its insured driver. This position stands in stark contrast to the defendant's prior actions, wherein it made an offer of settlement

and conceded liability. Such inconsistency not only highlights the disingenuous nature of the plea but suggests that it was crafted either to delay the proceedings or without due regard for issues that had already been resolved between the parties.

44. Beyond this incongruent denial of liability, the plea amounts to a series of broad and unsubstantiated denials of the allegations laid out in the particulars of claim. The defendant further contests the severity of the plaintiff's injuries and the claim for general damages, an issue which is, notably, not presently before the court, as the plaintiff seeks either a postponement of this aspect, given that the defendant has not formally accepted or rejected the plaintiff's RAF4 serious injury form.

45. During the argument, I pressed the defendant's counsel to elucidate what, if anything, would be challenged at trial. Despite his efforts, the counsel failed to convincingly demonstrate any viable basis for defence. The filing of this plea appears to be a calculated attempt to prolong the litigation rather than a response grounded in any genuine or *bona fide* defence. Alternatively, the defendant may still wish to conduct investigations to ascertain whether it may have a future defence. This does not pass the muster of a *bona fide* defence. At present, however, the plea lacks any substantive foundation, reinforcing the conclusion that it serves merely as a delaying tactic, rather than a legitimate entry into the litigation.

46. Accordingly, I am unpersuaded that the defendant has established a *bona fide* defence, and thus, the application to uplift the bar is dismissed with costs. I now proceed to consider the plaintiff's claim for default judgment.

Plaintiff's Claim for Default Judgment

Summary of the Plaintiff's Evidence

47. The plaintiff appointed several experts to assess the nature and impact of her injuries and provide insight into her current limitations. She applied under Rule 38(2) of the Uniform Rules of Court and Section 3(1) of the Law of Evidence Amendment Act 45 of 1988 for the reports of these experts to be admitted, each of which was supported by confirmatory affidavits and corroborated by the plaintiff's own affidavit. The court grants this application, allowing the following expert reports to form part of the evidence:

    47.1. **Dr. H.B. Enslin**, Orthopaedic Surgeon;

    47.2. **Dr Kruger,** Neurosurgeon;

    47.3. **Dr. M. Joubert**, Psychiatrist;

    47.4. **V Gaydon,** Clinical Neuropsychologist;

    47.5. **Dr. S. Van Den Heever**, Educational Psychologist;

    47.6. **Dr. J. Morland**, Occupational Therapist;

    47.7. **Dr. L. Theron**, Industrial Psychologist; and

    47.8. **Algorithm**, Actuarial Expert

48. The plaintiff was 15 years old at the time of the accident and in Grade 10. She harboured aspirations of a career in Correctional Services or Traffic

Enforcement—fields she viewed as offering stability, advancement, and the promise of financial independence. Tragically, the accident altered the course of her life, impeding her ability to pursue these career goals and significantly diminishing her quality of life.

49. The plaintiff comes from a modest family background. Her mother, who attained a Grade 8 level of education, was employed as a department supervisor, while her father worked at a steel factory. The plaintiff's elder sister completed her Grade 12 and is self-employed, owning a hair salon.

50. Before the accident, the plaintiff's academic records reveal varying marks ranging from 37% to 66%, with an overall average of 45% in the year preceding the accident. Despite her academic struggles, she was advanced to Grade 10 following adjustments made to her marks.

51. On 15 April 2015, the plaintiff was a passenger in a taxi travelling along the R554. The taxi collided with a vehicle driven by Mr TJ Motloung at the intersection with Keurboom Street in Van Dyk Park, Boksburg. The collision was severe, and the plaintiff lost consciousness at the scene. Upon regaining consciousness, she found herself lying on the ground, where paramedics attended to her before transporting her by ambulance to Sunshine Hospital for emergency treatment.

52. At Sunshine Hospital, the plaintiff underwent radiological imaging, including x-rays, which revealed a fracture of the left inferior pubic ramus. She also sustained soft tissue injuries to her lumbar spine and both ankles, along with a minor head injury. Her treatment was conservative, and she was admitted for three days. Upon discharge, she was prescribed strict bed rest for four weeks, followed by a

week of mobilisation with crutches, marking the beginning of a prolonged recovery period.

53. In the wake of the accident, the plaintiff was absent from school for two months and failed her academic year in 2015. Her school advised a subject change for Grade 11, and she ultimately achieved her National Senior Certificate in 2018, with an admission to diploma-level studies.

54. Post-matriculation, the plaintiff was employed as a cashier at Spar starting in October 2019. However, she was dismissed in July 2020 after receiving several warnings related to missing funds. Following this dismissal, she assisted her mother in her business until she secured a permanent position as an educational assistant at a secondary school, where she currently earns approximately R 4 070.63 per month.

Expert Assessments

Dr H.B. Enslin: Orthopaedic Surgeon

55. In his detailed examination of the plaintiff, Dr. H.B. Enslin documented the enduring physical impairments and clinical manifestations arising from her injuries. He observed that the plaintiff continues to experience persistent pain in her pelvis, lumbar spine, and both ankles, with notable tenderness over the Achilles tendons. He noted that her gait is visibly affected by a discernible limp during episodes of pain. Functionally, the plaintiff faces limitations, struggling to stand for prolonged periods, walk, or run without exacerbating her pain, which also disrupts her sleep.

56. Dr. Enslin's clinical examination recorded tenderness in both the lumbar spine and right sacroiliac joint, alongside further tenderness at the insertion points of the Achilles tendons. While both ankles demonstrated full movement, the plaintiff reported pain upon dorsiflexion and plantarflexion. Additional findings of synovial thickening over the Achilles tendon were found in the left ankle. Significant tenderness was observed in her pelvis over the right hip and sacroiliac joint, with a positive compression test at the right sacroiliac joint.

57. Radiological assessments corroborated early degenerative changes in the facet joints at lumbar levels L3/L4, L4/L5, and L5/S1 and identified a flat foot deformity characterised by a calcaneal inclination angle of three degrees. Dr Enslin attributed the plaintiff's lumbar pain to mechanical issues, diagnosed a healed left inferior pubic ramus fracture in the pelvis, and confirmed tendonitis in both Achilles' tendons.

58. Dr Enslin opined that spontaneous improvement in these conditions is unlikely, as her chronic pain in the lumbar spine, pelvis, and ankles requires ongoing medication. He recommended conservative management supplemented by potential surgical interventions, specifically stabilisation surgeries for both the lumbar spine and right sacroiliac joint. Nevertheless, Dr. Enslin concluded that her musculoskeletal injuries, while impactful, should not detrimentally affect her earning capacity or necessitate early retirement.

Dr Kruger: Neurosurgeon

59. Dr Kruger opined that the plaintiff sustained a mild traumatic brain injury, which was managed conservatively. His assessment is based on the plaintiff's self-

reported symptoms, including her loss of consciousness, episodes of post-traumatic amnesia, and subsequent cognitive difficulties. The plaintiff has since reported challenges with short-term memory and concentration, although Dr Kruger noted no significant impairments in executive functioning or personality changes. While clinical records document cognitive difficulties post-accident, the precise extent of these impairments remains uncertain.

60. The plaintiff additionally reports persistent physical and psychological symptoms, including weekly muscle tension headaches and chronic lumbar back pain, which intensifies with prolonged sitting. She also endures chronic pain in her right hip, knee, and upper leg, which is exacerbated during physical activity or adverse weather conditions. Dr Kruger recommended conservative treatment for her lumbar pain, involving anti-inflammatory medication and physiotherapy, and estimated a 5% likelihood that future lumbar spine surgery may be necessary. He further noted that her injuries would likely reduce her expected retirement age by approximately 18 months, though her overall life expectancy remains unaffected.

61. Dr Kruger highlighted the adverse impact of the plaintiff's injuries on her social life, particularly her inability to engage in former physical activities such as aerobic exercise, which has reportedly diminished her quality of life. These lasting physical, psychological, and cognitive challenges have collectively contributed to a reduced capacity for life enjoyment and long-term functional independence.

62. In terms of future health risks, Dr Kruger estimated a 2% likelihood of the plaintiff developing epilepsy as a consequence of her injury.

63. He assessed her whole-person impairment (WPI) at 9% and concluded that she qualifies for general damages under the narrative test.

Dr. M. Joubert: Pyschiatrist

64. Dr Joubert assessed the plaintiff, diagnosing her with symptoms of depression and post-traumatic stress disorder in the aftermath of the accident. Although there has been some improvement, Dr Joubert concluded that the plaintiff remains symptomatic. Following a battery of neuropsychological tests and comprehensive interviews, Dr Joubert identified that the plaintiff had sustained a mild traumatic brain injury, manifested in measurable deficits across multiple cognitive domains, including complex attention, executive function, learning and memory, language, perceptual-motor abilities, and social cognition. These findings were corroborated by the plaintiff's self-reports and neuropsychological testing results.

65. In light of this evidence, Dr Joubert diagnosed the plaintiff with a mild neurocognitive disorder arising from the traumatic brain injury, accompanied by behavioural disturbances and an unspecified trauma and stress-related disorder. Dr Joubert observed that the plaintiff functions at a markedly diminished level relative to her pre-accident baseline and is experiencing substantial emotional distress, which significantly impacts her quality of life. The prognosis, as opined by Dr Joubert, is that these cognitive impairments are likely to be permanent,

and, therefore, recommended ongoing psychiatric intervention to manage the plaintiff's symptoms and support her overall mental health.

V Gaydon: Clinical Neuropsychologist

66. Ms Gaydon conducted neuropsychological screenings that revealed distinct neurocognitive deficits in the plaintiff, particularly in the areas of verbal fluency, verbal learning, and retention. Ms Gaydon observed that the plaintiff experiences difficulty with auditory retention when exposed to interference, significant challenges in memory and recognition of previously acquired information, and a diminished capacity in working memory. Based on these findings, Ms Gaydon concluded that the plaintiff had sustained, at most, a mild traumatic brain injury.

67. Ms Gaydon noted that although the plaintiff's cognitive functioning has shown some improvement over time, she continues to exhibit subtle yet pervasive neurocognitive sequelae. These include enduring difficulties with verbal fluency, verbal learning, and auditory retention—deficits likely to impair her capacity to compete effectively within the open labour market or to pursue further tertiary education. Ms Gaydon highlighted the plaintiff's dismissal from her employment at Spar, reportedly due to missing funds, suggesting possible issues with impulse control, indicative of executive dysfunction. Furthermore, the plaintiff suffers from accident-related anxiety and unresolved symptoms of post-traumatic stress disorder, including persistent anxiety and lowered mood, both of which, Ms Gaydon explained, could further impact her neurocognitive functioning.

Dr. S. Van Den Heever: Educational Psychologist

68. Ms Van der Heever conducted a comprehensive assessment of the plaintiff, incorporating an interview, neurocognitive testing, and a review of her academic records and employment history. She reported that the plaintiff had a typical birth and developmental history with no prior physical conditions or discomfort. Evaluating her pre-morbid cognitive and academic abilities, Ms Van der Heever concluded that the plaintiff possessed the capacity to complete her Grade 12 (NQF4) and potentially a higher certificate (NQF5) in a practically oriented field of interest.

69. Ms Van der Heever noted that the plaintiff aspired to a career as a traffic officer, a role requiring a Grade 12 certificate or equivalent NQF4 qualification, physical and mental fitness, and a clean criminal record. She opined that, given the plaintiff's cognitive potential, she would likely have met the requirements to undertake and complete the one-year training course to qualify as a traffic officer.

70. However, Ms Van der Heever observed significant attention and concentration difficulties in the plaintiff, negatively affecting her memory and learning capacity. She attributed a reduction in the plaintiff's cognitive efficiency to the emotional distress resulting from the accident, specifically impairing her verbal reasoning, working memory, and executive functioning. In addition, symptoms of anxiety and depression have hindered the plaintiff's daily functioning, leaving her frequently overwhelmed and straining her relationships. Her diminished self-confidence has led to social isolation and withdrawal, further impairing her workplace productivity and stifling potential career advancement.

71. The plaintiff also experiences chronic physical pain, further affecting her mood, energy, and motivation. Her aspirations to pursue a career as a traffic officer have been derailed, leaving her with low self-esteem and diminished self-confidence, which have compounded her challenges in securing stable employment. Ms Van der Heever concluded that, as a consequence of the accident, the plaintiff's functioning had been comprehensively compromised, disrupting her physical, emotional, social, interpersonal, and occupational stability. She determined that the plaintiff would not pursue further qualifications, leaving her educational attainment at the NQF4 level.

72. Ms Van der Heever recommended ongoing psychotherapy to provide emotional support for the plaintiff's mental health needs. In an addendum report compiled in March 2024, Ms Van der Heever reviewed updated medico-legal reports and the plaintiff's recent employment as an assistant teacher, affirming that her initial findings and recommendations remain unchanged.

J Morland: Occupational Therapist

73. Ms Morland conducted a comprehensive assessment of the plaintiff, administering a series of functional and cognitive evaluations. She concluded that the plaintiff is suited for employment within the medium work category. Ms Morland noted that the plaintiff's current role as an assistant teacher falls within the light work category, a position which she generally manages. However, the plaintiff reports experiencing discomfort in her back and left hip when required to stand for extended periods.

74. During a telephonic conversation on 23 August 2023, the plaintiff indicated a desire to pursue a career in social work, classified as sedentary work. Ms Morland opined that, from a purely physical perspective, the plaintiff could meet the demands of such work. However, she deferred to an educational psychologist to determine whether the plaintiff's cognitive abilities would suffice for this career path, given her reported memory and cognitive challenges since the accident. Ms Morland noted that these cognitive impairments could potentially impact the plaintiff's productivity and dependability in a professional environment.

75. Ms Morland further opined that the plaintiff's orthopaedic injuries, in combination with her psychological difficulties, render her less competitive and less productive in the open labour market. This confluence of physical and neurocognitive limitations diminishes her employability, making sustained, stable employment increasingly challenging and hindering her prospects for advancement.

L. Theron: Industrial Psychologist

Pre-Morbid Postulations

76. According to the evidence contained in Ms Theron's report, the plaintiff's likely career trajectory, had the accident not occurred, would have followed a substantially different path. Ms Theron opined that, in the absence of the accident, the plaintiff would likely have completed her matriculation a year earlier, in 2017, and pursued an NQF Level 5 higher certificate or, alternatively, the necessary training to qualify as a traffic officer or correctional services officer,

each of which requires a Grade 12 qualification. Given the variable progression within these roles, Ms Theron refrained from postulating a precise earnings projection, recommending instead a broad-brush approach to account for the age at which the accident intervened.

77. Ms Theron posits that with an NQF Level 5 qualification, the plaintiff would initially have engaged in temporary or contract employment, taking one to two years to complete her studies, followed by two to three years of employment at the Paterson A1 level. With additional experience and on-the-job training, Ms. Theron projected that the plaintiff could have reached the Paterson B3 level and, by age 45, advanced to the Paterson C1 or C2 level. Thereafter, her earnings would have increased in line with inflation, with her career culminating at the retirement age of 65**.**

Post Morbid Postulations

78. In considering the plaintiff's post-accident circumstances, Ms Theron noted that the accident has significantly compromised her educational and career potential. The plaintiff has already experienced a loss of earnings due to delayed entry into the labour market, having repeated Grade 10, and her highest educational attainment remains at Grade 12 (NQF Level 4). This limitation places her in direct competition with able-bodied matriculants. At the same time, her impairments, including mild traumatic brain injury, and physical, neurocognitive, and neuropsychological difficulties, render her a vulnerable and less competitive candidate in the open labour market.

79. Ms. Theron observed that, following matriculation, the plaintiff initially secured employment as a cashier at SPAR but was dismissed after eight months due to challenges associated with her injuries—a pattern likely to recur in similar roles. After approximately two and a half years, she obtained a contract position as an educator assistant through the Presidential Youth Employment Initiative, a role set to conclude in December 2023. The plaintiff reportedly endures physical discomfort in this position, particularly when standing for extended periods.

80. Ms Theron concluded that, for quantification purposes, the plaintiff has likely reached her career ceiling and income potential at the Paterson A1 level, given her limited capacity for job complexity, accountability, and responsibility within the formal labour market. Ms. Theron further noted that even if the plaintiff secures employment suited to her educational and physical constraints, her combined impairments will likely affect her productivity, motivation, and workplace relationships, resulting in extended periods of unemployment. Over time, these challenges may impair her employment record, rendering her unemployable in the open market.

81. Consequently, Ms Theron recommended a higher-than-standard post-morbid contingency deduction to account justly for the plaintiff's reduced earning potential and the increased likelihood of premature unemployability.

82. In a supplementary report, Ms Theron reviewed additional information pertaining to the plaintiff's employment history and newly provided medico-legal reports from Dr. Kruger and Ms. Van der Heever. Taking these updated insights into account, Ms Theron adjusted her recommendations, specifically in response to Dr Kruger's prognosis that the plaintiff's neurosurgical challenges will likely

reduce her retirement age by approximately 18 months. Given this estimation, Ms Theron opined that the plaintiff will likely be unable to remain in employment beyond the age of 63.5, thus necessitating early retirement.

83. Ms Theron further observed that the plaintiff's ongoing issues, including tension headaches, cognitive impairments, psychological and psychiatric symptoms, and anxiety, are likely to impact her employability adversely. Additionally, Ms Theron emphasised the potential for future complications, notably an increased risk of epilepsy and the probable need for lumbar spine surgery. She recommended that these factors be reflected in a higher-than-standard post-morbid contingency deduction, given the plaintiff's increased vulnerability in the labour market and her diminished capacity to achieve long-term career stability.

Loss of Earnings

84. Given the plaintiff's tender age at the time of the collision, I am persuaded that a broad-brush approach is the most appropriate method to determine her pre- and post-accident potential. Considering her familial background and the general progression that children often exceed their parents' educational and occupational attainments, I am satisfied that, absent the accident, the plaintiff would have likely completed her matriculation in 2017, with an entry-level qualification suited to pursuing an NQF Level 5 programme. Furthermore, it is reasonable to infer that she would have embarked on further studies towards a higher certificate, positioning herself for career advancement and professional development consistent with her aspirations and potential.

85. I am mindful that the plaintiff faced academic challenges prior to the accident, as evidenced by her struggles in school. However, it is evident from her cognitive decline, as revealed by the cognitive testing of the experts, that the accident exacerbated these difficulties, further diminishing her academic performance. Notwithstanding her pre-existing challenges, absent the accident, the most readily apparent inference is to conclude that she would have passed her matriculation with a higher-level entry than she ultimately achieved. This outcome would have afforded her more excellent post-secondary education and career advancement opportunities. The finding of *Goliath v MEC for Health ZASCA 2015 (2) SA 97 (SCA) para. [11]* is apposite where the court held that it is important to bear in mind that in a civil case, it is not necessary for a plaintiff to prove that the inference that she asked the court to draw is the only reasonable inference. It suffices for the plaintiff to convince the court that the inference he advocates is the most readily apparent and acceptable inference from several possible inferences. The plaintiff's pre-accident educational challenges will, however, need to be factored in when considering contingencies.

86. Considering that this matter is being heard approximately nine years after the collision and that the plaintiff has now been out of school for five years, it is evident that her cognitive challenges have significantly constrained her employment prospects. I am therefore inclined to accept the post-accident projections provided by the Industrial Psychologist, which conclude that the plaintiff has reached her career ceiling. This limitation is consistent with the severe impact of her cognitive impairments on her employability and her capacity for progression within the labour market.

87. Mr Whittaker calculated the plaintiff's loss of earnings based on assumptions provided by Ms Theron regarding the plaintiff's career trajectory before and after the accident. The pre-accident and post-accident earning capacities were carefully considered, incorporating inflation adjustments and future earning potential.

88. Mr. Whittaker provided two approaches to calculate the plaintiff's post-morbid loss of earnings, specifically, a basis for calculating her post-morbid earnings. The first basis involves her current earnings of R4 420.15, with adjustments in line with inflation to project future earnings in her current role. The second, more generic approach considers the lower quartile basic salary of the Paterson A1 level, adjusted for inflation, and projects this figure until her retirement age of 63.5.

89. The second basis is more appropriate. As the plaintiff is at an early stage in her career, she will probably transition between roles rather than remain in a single position long-term. The more generic approach aligns more closely with her likely career path and provides a balanced projection of her anticipated earnings trajectory.

Contingencies

90. Contingency deductions play a critical role in calculating damages, particularly in claims for future loss of earnings and loss of earning capacity. The purpose of these deductions is to account for the uncertainties and vicissitudes of life that may affect a claimant's future financial situation. These deductions ensure that the award reflects not only the known losses but also the potential risks and

benefits that may arise in the future. The relevant case law establishes that contingencies allow for both adverse and favourable possibilities that may affect the claimant's life.

91. In *Mngomezulu v Road Accident Fund (04643/2010) [2011] ZAGPJHC 107 (8 September 2011)*, the court held that "*Contingency deductions allow for the possibility that the Plaintiff may have less than normal expectations of life and that he may experience periods of unemployment by reason of incapacity due to illness, accident, or labour unrest, or even general economic conditions."* The rationale behind contingencies is that they account for the general hazards of life, such as temporary unemployment, illness, or retrenchment, as well as factors like savings on travel costs if the claimant is no longer able to work.

92. Contingencies, as recognised by the courts, encompass positive and negative possibilities. In *Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A)*, Nicholas JA remarked that not all contingencies are adverse. He noted: *"All 'contingencies' are not adverse, and all 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the buffets and ignore the rewards of fortune?"*

93. The assessment of contingencies is discretionary and varies with the facts of each case. As noted in *Bailey*, while actuarial calculations provide a valuable basis for determining future loss, they are not binding. The trial judge has broad discretion to adjust these calculations by applying contingencies that reflect the uncertainties of life. The amount deducted as a contingency may vary depending

on the circumstances, and, as Nicholas JA stated in *Bailey*, the assessment of contingencies is largely arbitrary, depending on the judge's impression of the case.

94. In applying contingencies, the courts often employ what is known as a "sliding scale," which varies depending on the age of the claimant. This approach was highlighted in *Goodall v President Insurance 1978 (1) SA 389 (W)*, where the court applied a scale of deductions, suggesting a 25% deduction for a child, 20% for youth, and 10% for middle-aged claimants. In practice, it is common for the Road Accident Fund to agree to standard deductions, typically 5% for past loss and 15% for future loss, reflecting the "normal contingencies."

95. The plaintiff has submitted that with respect to the pre-accident scenario, there is no basis to deviate from the "normal contingencies" as established in *Goodall v President Insurance Co Ltd 1978 (1) SA 389 (W)*. Given the plaintiff's age, it has been argued that contingencies of 5% for past losses and 20.5% for future losses would be appropriate.

96. I am of the view that the contingency deductions proposed by the plaintiff for the uninjured loss scenario are overly conservative. Given the substantial uncertainties associated with the plaintiff's career trajectory, given that she was only 15 years old at the time of the collision, I find it appropriate to apply a consistent contingency deduction to both past and future uninjured losses. At such a tender age, the plaintiff's potential career path remained highly uncertain, with numerous factors potentially influencing her progress. Additionally, her academic challenges, which existed prior to the accident, further introduce unpredictability into her uninjured career potential. For these reasons, I consider

a 30% contingency deduction for both past and future uninjured losses to be appropriate.

97. For the injured loss, I accept the suggested contingency deduction of 35.5%. This deduction accounts for the realities of the plaintiff's situation, including the potential for employment interruptions due to her injuries, the possibility of periods between jobs, and the likelihood of time off required for future treatment and related challenges arising from her injuries.

98. Accordingly, I award the plaintiff an amount of **R 4 818 176.90** with respect to loss of earnings.

Conclusion

99. In the result, I grant the following order:-

99.1. The defendant's application for the upliftment of the bar is dismissed with costs on an attorney and client scale (scale C), such costs to include the costs incurred in respect of the application in terms of rule 30, drafting heads of argument and preparation.

99.2. That default judgment is granted in favour of the plaintiff against the defendant in the following terms:-

99.2.1. The defendant shall pay the amount of **R 4 818 176.90** to the plaintiff's attorneys, Erasmus de Klerk Inc., in settlement of the plaintiff's loss of

income claim, which amount shall be payable by direct transfer into their trust account, details of which are as follows:

ERASMUS DE KLERK INC

ABSA Bank

Account number: 406 383 9468

Branch number: 632 005 Rosebank

Ref.: J Erasmus/NKOSI GA

99.2.2. The capital amount referred to in ad paragraph 99.2:-

99.2.2.1. will be payable within 180 days from the date hereof;

99.2.2.2. will bear interest at the then prevailing interest rate, calculated from 181 days after this order until the date of payment.

99.2.3. The defendant shall provide the plaintiff with an Undertaking as envisaged in Section 17 (4) (a) of Act 56 of 1996 for 100% of the costs of the future accommodation of the plaintiff in a hospital or nursing home and such treatment, services or goods as the plaintiff may

require as a result of the injuries that the plaintiff sustained as a result of the accident which occurred on 15 April 2015, as set out in the medico-legal reports obtained on behalf of the plaintiff, after such costs have been incurred and upon proof thereof.

99.2.4. Subject to the discretion of the Taxing Master, the defendant must make payment of the plaintiff's taxed or agreed party and party costs on the High Court scale, which costs include (but not limited to):

99.2.4.1. The costs of counsel and the attorney on scale C (including, *inter alia*, preparation, perusal, and counsel's fees for 30 April 2024, 2 May 2024 and 15 May 2024).

99.2.4.2. All the costs in obtaining all medico-legal/expert and actuarial reports of the following Doctors or Experts:

99.2.4.3. Dr Irsigler (RAF 4);

99.2.4.4. Dr Enslin (Orthopaedic Surgeon);

99.2.4.5. Dr Marinda Joubert (Psychiatrist);

99.2.4.6. Vanesa Gaydon (Clinical Neuropsychologist);

99.2.4.7. Sunette van den Heever (Educational Psychologist;

99.2.4.8. Dr JH Kruger (Neurosurgeon);

99.2.4.9. Involved Practitioners – Jeanne Morland (Occupational Therapist);

99.2.4.10. Lorette Theron (Industrial Psychologist); and

99.2.4.11. G.A. Whittaker (Actuary).

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

99.2.6. The following provisions will apply with regard to the determination of the aforementioned taxed or agreed costs:-

99.2.6.1. The plaintiff shall serve the notice of taxation on the defendant.

99.2.6.2. The taxed or agreed costs will:

99.2.6.2.1. be payable within 180 days from the date of taxation;

99.2.6.2.2. bear interest at the then prevailing interest rate, calculated from and including the 181st calendar day after the date of taxation to and including the date of payment thereof.

99.2.7. The plaintiff's claim for general damages is postponed *sine die*.

The matter was heard on 30 April 2024, 02 May 2024 and 15 May 2024

Judgment Delivered on 05 November 2024

_ [redacted] _____

T Lipshitz AJ

Acting Judge: Gauteng Division

Johannesburg

(electronic signature appended)

05 November 2024

Attorneys for the Plaintiff

Erasmus De Klerk Inc

Counsel for the Plaintiff

D Combrink

Attorneys for the Defendant

State Attorney

Counsel for the Plaintiff

L Klaas