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**IN THE HIGH COURT OF SOUTH AFRICA,**  
**FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 1700/2015

In the matter between:

**ADV. H. KRIEL obo I M**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

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**HEARD ON:** 05, 06, JUNE 2018 & 09 OCTOBER 2018

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**JUDGMENT BY:** MATHEBULA, J

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**DELIVERED ON:** 08 NOVEMBER 2018

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[1] The issue to be determined is the quantum for past and future loss of income which the plaintiff is claiming arising out of a motor vehicle accident. The merits have been conceded by the defendant

and an order was made in that regard. Prior to the commencement of the trial the parties attempted settlement but such talks stalled.

- [2] The plaintiff relied on the evidence and reports compiled by Dr. Herman Edeling (neurosurgeon), Me Franja Burger (Occupational Therapist), Me Andri van der Westhuizen (Industrial & Counselling Psychologist) and Gregory Whittaker (Actuary). The defendant did not call any witness(es) in rebuttal.
- [3] Dr. Edeling testified that he consulted with the plaintiff and is the author of the report that is part of the record. He concluded that the plaintiff's injuries included an abdominal injury with rupture of abdominal wall and traumatic diaphragmatic hernia, chest injury with traumatic pneumothorax, fracture of the left humerus and head injury with complicated traumatic brain injury of a severe degree. In essence he suffered from cerebral neurological deterioration and fluctuations. He concluded that the plaintiff has a permanent brain injury. This rendered him to be a vulnerable individual with neurological loss of ability. As a result his capacity to work will be severely limited.
- [4] The Occupational Therapist testified that the plaintiff complained that he cannot concentrate like before the accident. She noted that he had physical and psychological deficits. After performing numerous tests she noted that his strength in gripping has decreased, he experienced low mood, decreased internal drive and motivation as well as travel related anxiety or post-traumatic stress. His memory was below average and concentration in

inadequate. She too concluded that he was a vulnerable employee.

- [5] The evidence of the Industrial and Counselling Psychologist corroborates the other experts that the plaintiff will remain a highly vulnerable worker. His chances of securing and maintaining employment has been significantly reduced to the point of being non-existent. The plaintiff has not been in employment for a period of approximately six (6) years and that he will remain mainly unemployed for the rest of his career life.
- [6] The calculations of the Actuary were also uncontested. He stated that they were based on life tables and he had applied a discount rate of 2.5%. He calculated the total gross income as being an amount of R1 765 537.00. He went further and testified that based on his experience, a generally allowable contingency was 15%.
- [7] It is uncontradicted that the plaintiff has suffered injuries as stated by various aspects. Equally so that with the result that he had been rendered a vulnerable worker with reduced prospects in the open labour market. Undeniably he has suffered loss and must be compensated in accordance with the stipulations of the Act<sup>1</sup> and decided cases.<sup>2</sup> The courts have repeatedly held that there is no cogent reason to depart from the conventional tried and tested actuarial approach. I accept that this is the basis that the Actuary calculated the loss. I accept that applying the 15% contingency, the plaintiff suffered loss in the amount of R1 500 706.45.

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<sup>1</sup> Road Accident Fund Act 56 of 1996.

<sup>2</sup> Road Accident Fund v Sweatman 2015 (6) SA 186 (SCA).

[8] In the result I make the following order:-

1. The Defendant is liable for 100% (*One Hundred percentum*) of I M (hereinafter referred to as the “patient”) proven or agreed damages pertaining to the injuries and loss of income sustained in a motor vehicle collision on 26 October 2011.
2. The Defendant shall pay damages in respect of patient’s damages relating to loss of income to the Plaintiff’s Attorneys pending the creation of a trust to be established in accordance with paragraphs 7 and 8 of this order in an amount of **R 1 500 000,00** within 14 (fourteen) days of this order.
3. The issue regarding the Plaintiff’s claim for general damages will be determined by the Health Professions Council of South Africa after the Defendant rejected the Serious Injury Assessment Report of the Plaintiff.
4. The Defendant shall pay interest *a tempore morae* on the capital amount aforesaid at a rate of 10.25% per annum from date of this order to date of final payment;
5. Payment of the capital amount, costs, as well as any interest is to be made into the following account:-

Account Name : Edeling Van Niekerk Incorporated  
Bank : Nedbank

Branch : Business Westrand  
Account number : [...]  
Branch code : 128605

6. The Defendant shall furnish the Patient, with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, Act No 56 of 1996 for 100% of the Patient's future accommodation in a hospital or nursing home, or treatment or rendering of a service, or supplying of goods or related expenses in respect of injuries sustained by the Patient in the motor vehicle collision which occurred on the 26 November 2011;

6.1. the reasonable costs incurred in the establishment of the TRUST contemplated in paragraph 6 below;

6.2. the reasonable costs incurred by the TRUST in the administration of the Patient's estate;

6.3. the reasonable costs incurred in providing security to the satisfaction of the Master of the High Court of South Africa for the administration of the Patient's estate;

7. The attorneys for the Plaintiff, EDELING VAN NIEKERK INCORPORATED of Clearview Office Park, Block A, Unit 2, Wilhelmina Road, Constantia Kloof, Roodepoort, are ordered :

7.1. to cause a trust ("the TRUST") to be established in accordance with the Trust Property Control Act No. 57 of 1988 to administer the estate of the Patient;

- 7.2. to pay all monies held in trust by them for the benefit of the Patient, to the TRUST;
8. The trust instrument contemplated in paragraph 6 above shall make provision for the following :
    - 8.1. That the Patient at all times remain the sole beneficiary of the TRUST;
    - 8.2. That the trustee(s) are to provide security to the satisfaction of the Master;
    - 8.3. That the powers of the trustee(s) shall specifically include the power to make payment from the capital and income for the reasonable maintenance of the Patient, or for any other purpose which the trustee(s) may decide to be in the Patient's interest, and if the income is not sufficient for the aforesaid purpose, that the trustee(s) may utilise capital;
    - 8.4. That the ownership of the trust property vest in the trustee(s) of the TRUST in their capacity as trustees;
    - 8.5. Procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Honourable Court;
    - 8.6. That the trustee(s) be authorised to recover the remuneration of, and costs incurred by the trustee(s), in administering the undertaking in terms of Section 17(4)(a) of Act 56 of 1996 in accordance with the certificate of undertaking to be provided

by the Defendant in terms of the provisions in paragraphs 5 above;

- 8.7. The exclusion of any and all benefits accruing to the Patient as beneficiary of the TRUST from any community of property and/or accrual system in any marital regime in the event of the Patient's marriage;
  - 8.8. The suspension of the Patient's contingent rights in the event of cession, attachment or insolvency, prior to the distribution or payment thereof by the trustee(s) to the Patient;
  - 8.9. That the amendment of the trust instrument be subject to the leave of this Honourable Court;
  - 8.10. The termination of the TRUST upon the death of the Patient, in which event the trust assets shall pass to the estate of the Patient;
  - 8.11. That the trust property and the administration thereof be subject to an annual audit.
9. The Defendant pays the Plaintiff's taxed or agreed party and party costs on the High Court Scale inclusive of correspondent's fees which costs will include the following:
    - 9.1. The Costs of Counsel;

9.2. All costs in obtaining all medico-legal-reports and an actuarial report as well as the Plaintiff's travelling and lodging costs in attending the Plaintiff's and Defendant's Experts as well as trial on 5 June 2018. The Plaintiff filed the following expert reports:

9.2.1. Dr. D. Irslinger (General Practitioner) (RAF4);

9.2.2. Dr. H.E.T. van den Bout (Orthopaedic Surgeon);

9.2.3. Dr. T. P. Olivier (Ophthalmologist);

9.2.4. Dr. L. Fine (Psychiatrist);

9.2.5. Dr. H.J. Edeling (Neurosurgeon);

9.2.6. Ms. F. Burger (Occupational Therapist)  
(Alison Crosbie's Therapists);

9.2.7. Ms. C. Du Toit (Industrial Psychologist);

9.2.8. Mr. G.A. Whittaker (Actuary).

9.3. The costs occasioned by the appointment of the *curator ad litem*;

10. The Plaintiff's attorneys shall be entitled, subject to the approval thereof by the *curator ad litem*, to make payment of expenses incurred in respect of accounts rendered by :

10.1. Expert witnesses, namely:

10.1.1. Dr. D. Irslinger (General Practitioner) (RAF4);

10.1.2. Dr. H.E.T. van den Bout (Orthopaedic Surgeon);

10.1.3. Dr. T. P. Olivier (Ophthalmologist);

- 10.1.4. Dr. L. Fine (Psychiatrist);
- 10.1.5. Dr. H.J. Edeling (Neurosurgeon);
- 10.1.6. Ms. F. Burger (Occupational Therapist)  
(Alison Crosbie Therapists);
- 10.1.7. Ms. C. Du Toit (Industrial Psychologist);
- 10.1.8. Mr. G.A. Whittaker (Actuary);

10.2. Counsel employed on behalf of the patient; and

10.3. The *curator ad litem*;

from the aforesaid funds held by them for benefit of the Patient.

11. The Plaintiff's attorneys shall be entitled to payment, from the aforesaid funds held by them for the benefit of the Patient, of their fees in accordance with their fee agreement, such fee agreement having been approved by the *curator ad litem*;

12. The trustee(s) will ensure that the payment in terms of such agreement will be fair and reasonable and the Master of the High Court and/or the trustee(s) may insist on the taxation of an attorney-and-own-client bill of costs.

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**MATHEBULA, J**

On behalf of Plaintiff:

Adv. J. S. Rautenbach

Instructed by:

McIntyre & vd Post

Bloemfontein

On behalf of Defendant:

Adv. L Collins

Adv. C.J. Hendriks

Instructed by:

Maduba Attorneys

Bloemfontein

/roosthuizen