

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 07/8693

DATE:08/12/2011

REPORTABLE

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

KUNENE, ALFRED MWELASE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] The plaintiff, Mr Alfred M Kunene, also using the surname Mthimkhulu, has instituted action against the defendant for compensation arising from injuries he sustained when a motor vehicle collided with him. The collision occurred in Senaoane, Soweto, whilst plaintiff was a pedestrian on 26 July 2003. At the time of the collision, the plaintiff was 15 years of age. He will become 24 in December 2011.

ISSUES AGREED UPON BY PARTIES

[2] Prior to the trial, the issue of liability was settled between the parties on the basis that the plaintiff is entitled to 70% of such damages that he is able to prove. Consequently, only the issue of quantum of damages requires determination in this trial. At the commencement of the trial the parties agreed that the award to be made to the plaintiff in respect of general damages is the amount of R450 000,00. The defendant has also tendered to the plaintiff the statutory undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supplying of goods to him, arising out of the injuries sustained in the collision, and the *sequelae* thereof, after such costs have been incurred, and upon proof thereof, limited to 70%. As a result, the only remaining head of damages for determination is the plaintiff's loss of earnings and future loss of earning capacity.

COMMON CAUSE ISSUES

[3] From the evidence led as well as the various expert reports and opinions, there is very little in dispute. The following are common cause facts. The plaintiff was born on 16 December 1987. At the time of the collision in 2003 the plaintiff was 15 years of age and in Grade 9. He failed Grade 10 in the year following the collision, namely in 2004. At the end of 2007 the plaintiff achieved a Senior Certificate, without exemption. There are no pre-accident school reports available from the schools attended by the plaintiff since his mother had not kept such reports. The medical reports, discussed below, almost largely unchallenged, show that the plaintiff continues to suffer from headaches, epistaxis (bleeding from the nose), memory problems, and non-convulsive fits which ceased in 2007.

THE EVIDENCE OF PLAINTIFF'S WITNESSES

[4] Three witnesses testified for the plaintiff. They are Professor M S Mokgokong, a neurosurgeon; Ms P Ngoako, an industrial psychologist; and Mrs M A Gibson, a psychologist (Educational) with special interests in neuropsychological and educational assessment of adults and children. On the other hand, the defendant led the evidence of one witness only, namely, Ms Sandra Moses, an industrial psychologist. The evidence showed that the

plaintiff was actually assessed by a number of experts at the instance of both the plaintiff and the defendant.

[5] I must at the outset observe that the manner in which the defendant, through its legal representatives, handled this trial, leaves much to be desired to say the least. The plaintiff was compelled to prove his case right to the end, even though most of his evidence was unchallenged by counter-expert evidence or in cross-examination. I deal in greater detail with this aspect later herein when considering the costs issue.

[6] In his evidence, Prof Mokgokong, who carefully traversed the relevant hospital records, was hugely impressive. He assessed the plaintiff on 12 March 2011. In brief, the records show that immediately after the collision, the plaintiff and his mother were conveyed by the insured driver to a clinic, Koos Beukes, near Chris Hani Baragwanath Hospital. The plaintiff was ultimately admitted to Chris Hani Baragwanath Hospital where he was checked, X-rayed and discharged. The plaintiff was re-admitted after a week for a left leg POP (Plaster of Paris), which he kept on for about three months. A CT brain scan was performed and found to be normal. The plaintiff was injured on his head, face, left ankle and back. At the time of the assessment by Prof Mokgokong, the plaintiff complained of left ankle pain, headaches and epistaxis, which all started after the collision, and became worse in cold weather. The plaintiff also reported fainting twice after the accident.

[7] In Prof Mokgokong's opinion, the plaintiff sustained a mild head injury resulting in complaints of headaches and epistaxis as well as two attacks of non-convulsive fits. The plaintiff's prospect of developing post-traumatic epilepsy was assessed as high as 25%. Prof Mokgokong gave an explanation for the difference between a focal brain injury and a diffuse head injury. The mere fact that the CT brain scan performed on the plaintiff at the Chris Hani Baragwanath Hospital proved normal, did not necessarily mean that the brain was in fact normal. The CT brain scan would only detect gross abnormalities. Prof Mokgokong recommended a thorough psychological evaluation and expressed the view that given the time span between the injuries sustained and the date of his assessment, it would be unrealistic to expect further spontaneous recovery, the period of spontaneous recovery being two years. He was of the view that such deficits that are present will remain with the plaintiff for the rest of his lifespan. From the hospital records, Prof Mokgokong confirmed the plaintiff's complaints of persistent headaches and epistaxis. The cross-examination of Prof Mokgokong was uneventful, confirmatory of his evidence, and not countered by any expert opinions.

[8] Ms Gibson, both a neuropsychologist and educational psychologist, testified on the outcome of the assessment she made of the plaintiff on 15 March 2011. In view of the fact that Ms Gibson's evidence was not seriously challenged in cross-examination, it is unnecessary to detail all her testimony.

[9] Ms Gibson's testing revealed that the plaintiff was functioning well below expectation in verbal fluency, psychomotor speed, perceptual speed,

numerical reasoning, analogical reasoning, forward planning, visual memory, learning, retention and recall, complex attention, ability to sustain attention, ability to sustain engagement, working memory or complex attention, planning and aspects of problem-solving. In addition, she highlighted the severe deficit found to exist in the plaintiff with regard to numeracy. All of the deficits so found were consistent with the plaintiff having sustained a brain injury. The two year period for spontaneous recovery having elapsed it was unlikely that there would be any improvement in the plaintiff's functioning.

[10] With regard to the plaintiff's pre-accident functioning/potential she expressed the view that the plaintiff's aspiration was to complete matric and progressed to tertiary education, preferably at university level. Although no pre-accident school reports were available on the basis of the plaintiff's own report as well as indications from the tests results this would seem likely to have occurred as he was, despite the trauma of the accident under review, able to complete a reasonable matric in some subjects. Ms Gibson concluded that the plaintiff had experienced a head injury and presented in consequence of such injury with the deficits outlined above. In addition, she found him to be moderately anxious and depressed. Variability in functioning was also identified which is a difficulty common in people with brain injury. Ms Gibson further commented on the report of Dr G M Prag, more particularly, on the IQ scores obtained by the latter. Again there was variability in the results indicative of brain injury. Secondly, the difference between the verbal IQ and the non-verbal IQ was 38 points whereas the accepted difference would be no more than 10 points. The difference in her opinion is glaring and indicative of

brain injury. Finally, the plaintiff's score on the digits combined test of 13,5 was a good indicator of his intelligence pre-accident which would have been of high average.

[11] Ms Gibson, as did Prof Mokgokong, traversed the hospital records and confirmed the plaintiff's complaints of persistent headaches and epistaxis, the hospital's concern of a head injury requiring investigation in the form of a CT brain scan and a referral to the ENT Department for epistaxis. Ms Gibson's findings were corroborative of the findings of Prof Mokgokong.

[12] In a nutshell, Ms Gibson was of the view that the plaintiff had the potential pre-accident to achieve a university degree. Post-accident, he was limited and was unlikely to further his career in any meaningful manner and was suited to work where he would be under supervision. The plaintiff would struggle if he lost his present employment in any informal ventures and may be able to work as a hawker.

[13] Ms P Ngoako, an industrial psychologist, was the third witness for the plaintiff. She testified on the assessment she made to determine the extent and impact of the accident-related injuries on the plaintiff's physical and cognitive functioning. The assessment also aimed at predicting the plaintiff's future work prospects and earning potential. Ms Ngoako also compiled a joint minute with the defendant's industrial psychologist, Ms Sandra Moses. As in the case of the plaintiff's first two previous witnesses, Ms Ngoako's evidence was not seriously challenged. She agreed with Ms Moses that, but for the

accident, the plaintiff would have entered the open labour market with a matric and vocational training in the field of his choice probably on a Patterson B2/3 level and progressed to reach his ceiling on a Patterson C3/4 level.

[14] Ms Ngoako testified that the approach adopted above was conservative given the findings of Ms Gibson. In this regard Ms Moses testified that a lawyer to which reference was made by Ms Gibson as being a profession to which the plaintiff was suited given his verbal skills would ceiling at D2/3 Patterson level. Having regard to the collision and the injuries and their *sequelae*, Ms Ngoako was of the opinion that the plaintiff could progress from his present position to reach his ceiling at a B3/4 Patterson level. Given the plaintiff's reported problems of headaches and memory, she was of the view that these problems would likely have a negative effect on his performance and impact on his prospects of promotion. Whilst there were no reported problems in his present occupation, these may well surface if he is required to do work which requires more cognitive demands.

[15] Insofar as the risk of epilepsy is concerned, this, if it occurs, would have a negative effect on the plaintiff's employment and if severe enough, could render him unemployable.

[16] Ms Moses, an industrial psychologist, testified as the only witness for the defendant. The evidence of Ms Moses, regrettably, proved difficult to appreciate, and contradictory in several respects. It made the Court's task easier to accept as impressive, more probable, and persuasive the evidence

of Ms Ngoako. In the first place, in the joint minute with Ms Ngoako, Ms Moses agreed that the plaintiff would probably have entered the open labour market with Grade 12 and vocational training in the field of his choice, probably on Patterson B2/B3 level, and progressed to reach his ceiling on Patterson C3/C4. The industrial psychologist further agreed that the plaintiff would probably have worked and retired at the normal retirement age of 65. All the above predictions are pre-accident. However, post-accident, and contrary to the opinion of Ms Ngoako, Ms Moses expressed the view that the plaintiff suffered no loss of earnings since he started working in 2010, and entered the labour market one year late, and three years had already passed before he secured employment. More strangely, Ms Moses expressed the opinion that the plaintiff will suffer no loss of future earnings as he was currently employed. This opinion, once more, differs sharply with the more credible view of Ms Ngoako. However, the cross-examination of Ms Moses was significantly dramatic and revealing. Soon after cross-examination commenced, Ms Moses conceded unequivocally that the plaintiff had in fact suffered a past loss of earnings by entering the open labour market one year later than he would have, but for the collision, and that he will suffer loss of earnings in the future. There was no explanation at all why both these concessions were not made in either her report or the joint minute with Ms Ngoako.

- 16.1 In addition, although Ms Moses made the above concessions, it became abundantly clear that the report that she allegedly wrote, on which her evidence was based, was not in

consequence of an assessment made by her. It appeared that the assessment on which the report is based, was done by a colleague. To make matters worse, Ms Moses gave evidence that the colleague concerned had invited the Court to call upon her to testify, if so required. This should really be the last word on the evidence of Ms Moses. I am therefore fortified in my view that the evidence of Ms Ngoako is by far more probable and acceptable to that of Ms Moses insofar as there were any differences in the opinions. Counsel for the plaintiff went as far as describing the evidence of Ms Moses as simply ludicrous. The submission is not without merit.

BRIEF LIFE HISTORY OF PLAINTIFF

[17] The life history of the plaintiff is captured comprehensively in the various expert reports, notably that of Ms Gibson, Ms Ngoako and Ms C Motake, an occupational therapist. In short, the plaintiff lives with his parents and two siblings in Chiawelo, Soweto. He is single. His father has no formal education, and is unemployed. His mother matriculated, has nursing qualifications, and is employed as a nurse. His siblings have all matriculated. His one brother is employed as a chef. The plaintiff was in Grade 9 at Senaoane Secondary School at the time of the accident in July 2003. He passed Grade 9 but failed Grade 10 the following year. He, however, passed Grade 10 on repeating and eventually matriculated at the end of 2007. He commenced working as a sales assistant at Markhams, Johannesburg, in

June 2010 at a salary of R2 500,00 per month. His initial duties involved being a till operator. He obtained training at work in December 2010 to become a CP Administration Controller, to date. He works on the shop floor dealing with customers. He works four days a week. He experiences headaches at work and becomes tired. His employers are aware of his medical condition and give him time to rest during tea-breaks and lunch-time. He regularly takes pain killers.

[18] In the opinion of Ms Gibson, the plaintiff would probably have completed matric successfully, and progressed to tertiary education pre-accident. This was his aspiration and also based on current test results. The plaintiff would probably have obtained either a degree or diploma. He would have progressed to senior levels as a professional in the field of his choice. Ms Ngoako concluded that post-accident, the medical problems of the plaintiff will affect his work productivity as well as his ability to study further. He is now limited to sedentary work. She was of the view, finally, that the plaintiff will probably not reach his pre-accident employment potential and will suffer loss of earnings as a result of the accident. There is also a joint minute prepared by Ms Gibson and Dr Geeta M Prag, defendant's Remedial Therapist and Psychologist. The latter did not testify. No reasons for this were given. The joint minute shows a divergence of views on several aspects. The version of Ms Gibson is preferred and more probable.

[19] The overall picture of the Court's view is that all of the plaintiff's expert witnesses who testified were impressive. Their opinions were based on

common sense and logic. The cross-examination rather than to denude the opinions, served instead to bolster the opinions expressed, and, as submitted by counsel for the plaintiff, in fact exposed the plaintiff's case as being conservative. It is rather surprising that although the defendant filed a notice in terms of Rule 36(9)(a) of the Uniform Rules to call Dr Percy Miller, a neurosurgeon, to testify, this did not occur. It boggles the mind why Prof Mokgokong was compelled to testify when he had no counterpart.

THE AWARD FOR LOSS OF FUTURE EARNINGS – PAST AND FUTURE

[20] I deal first with some legal principles based on the above evidence. It is trite that the plaintiff bears the *onus* to establish his claim on a balance of probabilities. In the matter of *Bridgman NO v Road Accident Fund*, (Cape of Good Hope Provincial Division, Case No. 5622/98), reported in Corbett and Honey, Vol V, B4-1 at B4-6, Van Heerden J stated the applicable principle as follows:

“It is apparent from the South African case law that, in the majority of cases, the correct approach in assessing damages for loss of earning capacity involves a comparison between the present value of the future income which the plaintiff would have earned in an uninjured state, on the one hand, with the present value of the plaintiff's estimated future income (if any) in his or her injured state, on the other hand.”

In addition, the plaintiff, in the context of the present matter, must allege and prove that he has suffered or will probably suffer financial loss or diminution of his income. It is indeed not an easy task. In *Sandler v Wholesale Coal Suppliers Ltd* 1941 (A) 194, it was stated that:

“It is no doubt, exceedingly difficult to value the damage in terms of money, but that does not relieve the Court of the duty of doing so upon the evidence placed before it. This is a principle which has been acted on in several cases in South African Courts.”

In *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) at para [11], the Court said:

“There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss.”

See also *Southern Insurance Ltd v Bailey* NO 1984 (1) SA 98 (A) at 113G-H.

In *Bane and Others v D’Ambrossi* 2010 (2) SA 539, the following was said:

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs 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 the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent.”

ACTUARIAL ASSESSMENT

[21] In the present matter, an actuarial assessment has been prepared at the instance of the plaintiff by Mr R J Koch, consulting actuary, on 5 August

2011. The report is based almost exclusively on the report of Ms Ngoako.

The actuarial assessment of Dr Kock reflects the following:

<i>"Results:</i>	<i>Uninjured</i>	<i>Injured</i>	<i>NetValue</i>
	<i>R</i>	<i>R</i>	<i>R</i>
<i>Past income:</i>	303,898	40,894	263,004
<i>Future income:</i>	3,875,554	1,592,130	2,283,534
<i>Control total for above items</i>			2,546,538

Note that the above values have not been adjusted for general contingencies save that full allowance for early and late death, in accordance with the life table, has been included in the capitalization process.

ROBERT J KOCH

Our ref: MTH18915

05 August 2011"

GENERAL CONTINGENCIES TO BE APPLIED

[22] The only remaining issue on the subject of the plaintiff's claim for loss of earnings and earning capacity, is the contingencies to be applied. The parties agreed that no contingency is to be applied to the uninjured earnings, based on the patent conservative approach of the plaintiff's expert witnesses. In regard to the injured earnings, the parties agreed also that a 40% contingency deduction be applied and based on the plaintiff's documented medical problems as well as the probability of the plaintiff developing epilepsy. Prof Mokgokong testified that such probability is about 25%. The agreement of the parties on the contingencies is laudible and finds favour with the basic principle underlying an award of damages that the compensation must be assessed as to place the plaintiff, as far as possible, in the same financial

position he would have had, had the wrongful act causing him injury not being committed. In *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA (A) at 917A-B the following was said:

“In the present case there has been a loss of earning capacity the value of which must be calculated in terms of what the plaintiff would have earned in money if he had not become incapacitated. The claim for loss under the lex Aquilia in our law is wholly compensatory and is, in a case like the present, entrenched in s 11 of the Motor Vehicle Insurance Act 29 of 1942, see Beyleveld’s case supra at 152H, 171E. In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff’s estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person’s estate and the loss of impairment of that capacity constitutes a loss, if such loss diminishes the estate.”

It is equally trite that a defendant who commits a delict and harms the victim, must take the victim as he finds him/her.

[23] In applying the agreed contingency deduction to the actuarial assessment, the following picture emerges:

	Uninjured	Injured	Net value
Past Income	R303 898,00	R40 894,00	R263 004,00
Future Income	R3 875 564,00	R1 592 130.00 – 40%	
		= R955 278,00	R2 930 286,00
	TOTAL LOSS		R3 183 290,00

[24] In the particulars of claim, para 8.2, the plaintiff claimed the amount of R2 546 538,00 in respect of future loss of income and loss of earning capacity. However, as the credible and uncontroverted evidence established a greater loss than the amount originally claimed, plaintiff's counsel moved for an amendment of para 8.2 of the plaintiff's particulars of claim in order to claim the amount of R3 183 290,00. The amendment, which was not opposed, was granted, and it could not prejudice the defendant. In my view, the amount of R3 183 290,00 represents fair and just compensation for the plaintiff in the circumstances of the case.

COSTS

[25]

25.1 I have to deal with the question of costs at some length, regrettably. This matter, which was said down for trial on 31 August 2011 and to run for approximately three days, should not have been allowed to proceed to trial. On the first day of the trial, the matter could not proceed immediately as I was informed by the parties that they were engaged in settlement negotiations. In the course of the morning it became clear that counsel for the defendant was awaiting instructions from the Fund's management or relevant claims handler, to settle the plaintiff's claim without proceeding to trial. It appeared that the relevant claims handler was not available. This was to be the

pattern throughout the trial. When the trial finally commenced, it was unclear exactly what the defendant's opposition entailed.

25.2 On the second day of the trial, I conveyed to counsel for the defendant, who was visibly eager to settle the matter, but frustrated by the lack of response from the Fund, that I was considering a punitive costs order at the end of the trial should the above conduct persist. I also expressed the view that it was unacceptable for officials of the Fund to run the trial by remote control, so to speak, and to hold the Court at ransom with impending settlement proposals which proved later to be unreasonable. The matter was frequently stood down for the defendant's counsel to obtain reasonable settlement instructions from the Fund. In the meantime the plaintiff was compelled to commence his case by calling witnesses.

25.3 It however, transpired later in the trial that the defendant disputed that the plaintiff had suffered a head injury. Despite having no counterpart, the defendant insisted that Prof Mokgokong testify. As shown above, the findings of Prof Mokgokong were not seriously challenged. In addition, in spite of the fact that the plaintiff had been assessed by the defendant's neurosurgeon, Dr Percy Miller, and that the defendant subsequently filed the relevant notice in terms of Rule 36(9) of the Uniform Rules to call him as a witness, Dr Miller

was in fact not called. His report was not served and filed. Although the inescapable inference is that Dr Miller supported the opinion of Prof Mokgokong, or alternatively, opined a worse outcome for the plaintiff, the true reason for such failure later conveyed to the Court, suggested something more absurd. I need not expand. Similarly, Dr G Prag, who assessed the plaintiff at the behest of the defendant, but whose report was filed and served, did not testify. The evidence of the only witness called by the defendant, Ms Sandra Moses, was discredited justifiably.

25.4 The fact of the matter is that there were truly no triable issues. The plaintiff's expert witnesses were called upon to testify despite not having counterparts. Counsel for the plaintiff, who strongly contended for a punitive costs order, was quite correct, in my view, in labelling the conduct of the defendant as spurious and unacceptable.

25.5 That this practice, which is a common occurrence in this High Court, should be discouraged as it leads to a complete waste of valuable Court time, and contributes greatly to unnecessary expense in litigation, is unquestionable. On a daily basis, in term, more than 60% of the matters on the civil roll involve the defendant. In *Bovungana v Road Accident Fund* 2009 (4) SA 123 (E), Froneman J dealt with a matter in which the Fund

contested its liability towards the plaintiff on the merits until shortly before trial. On the first day of trial the Fund sought a postponement which was refused. In ultimately awarding a costs order on an attorney-client scale against the Fund, Froneman J at para [7] of the judgment said:

“This sorry saga should not have happened. It is, unfortunately, not an isolated instance of how the Fund conducts litigation in this province. I do not intend to refer to many judgments in the relatively recent past where concern has been expressed about the Fund’s conduct, except to refer to the judgment of Pickering J in Ngwane v The Road Accident Fund, Bisho Case No. 151/2007, where he states, after referring to a number of judgments by different judges in this province, the following:

‘It does not appear that the relevant officials in the employ of the defendant have paid any heed to the criticism contained in these judgments. In Mlatsheni’s case, supra, Plasket J considered that the time may well have arrived for orders of costs de bonis propriis to be awarded against employees of the defendant who give instructions that have the effect of frivolously frustrating legitimate claims. I respectfully agree. There is no reason why costs which have been occasioned by the improper conduct of an employee of the defendant should be paid out of the public purse. If the Board of the Road Accident Fund does not take seriously what has been stated in the various judgments then the relevant officials will find themselves saddled with orders of costs de bonis propriis.’

The time for such orders has now arrived.”

It is truly regrettable to note that in spite of the fact that Froneman J also ordered that a copy of his judgment be forwarded by the registrar of the Court to the Board of the Road Accident Fund, the conduct complained of has not improved in any significant manner. That was more than two years since.

25.6 In the matter of *Mlatsheni v Road Accident Fund* 2009 (2) SA 401 (E), referred to above, judgment was handed down by Plasket J on 6 December 2007. In *Madzunye and Another v Road Accident Fund* 2007 (1) SA 165 (SCA), where the Fund had opposed an appeal which was based on a clearly wrong judgment of the High Court (Venda), Maya JA at para [17] said:

“In an unreported judgment of this Court, Road Accident Fund v Roman Klisiewicz, Case No. 192/2001, handed down on 29 May 2002, Howie JA set out the extent of the respondent’s responsibilities, saying in para [42]:

‘The [Road Accident Fund] exists to administer, in the interests of road accident victims, the funds it collects from the public. It has the duty to effect that administration with integrity and efficiency. This entails the thorough investigation of claims and, where litigation is responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence. These are not exacting requirements. They must be observed.’

The appeal succeeded with costs on the attorney and client scale.

25.7 A copy of the judgment of Plasket J in *Mlatsheni supra*, was also ordered to be served on the Chairperson of the Board of the Road Accident Fund. However, it appears to me that the whole exercise of forwarding copies of judgments expressing disapproval of the conduct of the defendant in litigation matters, has not yielded the desired effect. I shall therefore desist from following such exercise. Similarly, costs orders on the attorney

and client scale against the defendant seem to have proved fruitless. Counsel for the defendant argued strongly against a punitive costs order. However, his argument was not convincing at all. I remain convinced that whilst an order for costs *de bonis propriis* seems attractive, an order of costs on the attorney and client scale is fully justified in the circumstances of this case. Counsel for the plaintiff also argued, persuasively, that a trust should be formed for the benefit of the plaintiff in this matter. I respectfully agree. The proposal was not opposed.

ORDER

[26] In the result the following order is made:

1. The defendant is ordered to pay the sum of R2 543 303,00 (being R3 183 290,00 plus R450 000,00 less 30% apportionment) directly to the trustee within 14 days of this order.
2. The defendant is ordered to furnish the plaintiff with an undertaking, limited to 70%, in terms of s 17(4)(a) of the Road Accident Fund Act.
3. A trust is to be formed for the benefit of the plaintiff and the plaintiff's attorney is authorised to sign all documents necessary

for the formation of the trust. The trustee is to furnish security to the satisfaction of the Master in terms of s 77 of the Administration of Estates Act, No. 66 of 1965, the annual costs of security to be paid by the defendant. Should the trustee fail to furnish security within a reasonable time or vacate his office for whatever reason, the Master of the High Court is authorised to appoint an alternate nominee of his choice.

4. The defendant is to pay:
 - 4.1 The costs of the appointment of the trustee;
 - 4.2 The costs, remuneration and disbursements of the trustee in administering the trust as well as the undertaking; and
 - 4.3 The costs of furnishing annual security for as long as the trust remains in existence.

5. The defendant is ordered to pay the plaintiff's costs on an attorney-client scale which costs shall include:
 - 5.1 The costs of all medico-legal reports obtained by the plaintiff;
 - 5.2 The preparation fees of all the plaintiff's experts;

5.3 The reasonable appearance fees of the following experts who gave evidence on behalf of the plaintiff or who were in attendance at Court:

- (a) Prof M S Mokgokong;
- (b) Ms M Gibson; and
- (c) Ms P Ngoako.

6. The defendant shall pay interest on the sum awarded (R2 543 303,00) at the applicable rate and calculated from a date of 14 days from the date of the order to date of final payment.
7. As soon as the plaintiff's bill of costs has been taxed by the plaintiff's attorney, or agreed upon between the defendant and the plaintiff, the trustee is to receive and collect payment thereof from the defendant directly for the benefit of the plaintiff.
8. In the event that a trust is not formed timeously, the defendant shall pay all the amounts referred to above directly to the plaintiff's attorneys. The plaintiff's attorneys shall invest the capital amount so received in terms of s 78(2) of the Attorneys Act No. 53 of 1979, the interest thereof accruing for the benefit of the plaintiff.
9. The trustee is to pay the plaintiff's attorneys' costs in terms of the contingency fee agreement entered into between the

plaintiff's mother and the plaintiff's attorney, duly ratified by the plaintiff.

10. The trustee of the trust to be formed shall be entitled to call for an appropriate taxation of the attorney and own client fees and disbursements to be recovered by the plaintiff's attorneys, should this be deemed to be necessary.
11. This order is to be served by the plaintiff's attorneys on the Master of the High Court, Pretoria, and the trustee of the trust to be informed within 15 days of the granting of this order.

**D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG**

COUNSEL FOR THE PLAINTIFF	M PATEL
INSTRUCTED BY	M P MOTHA ATTORNEYS
COUNSEL FOR THE DEFENDANT	M J C MAAKE
INSTRUCTED BY	MOHLALA ATTORNEYS
DATE OF HEARING	2 SEPTEMBER 2011
DATE OF JUDGMENT	8 DECEMBER 2011