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

**CASE NO: 26302/15**

(1) REPORTABLE: No  
(2) OF INTEREST TO OTHER JUDGES: No  
(3) REVISED: Yes

[25/1/2018]

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In the matter between:

**N C**

Plaintiff

**o.b.o. N Z**

**and**

**THE ROAD ACCIDENT FUND**

Defendant

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**JUDGMENT**

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WILLIS A.J.:

**Introduction**

1. This is an action for damages brought by Ms C N ("the plaintiff"). The plaintiff sues in her capacity as mother and guardian of her daughter Z N born on 12 June 2005 ("the minor child").
2. Between 06:30 and 07:00 on 22 November 2013 the minor child, eight years old at the time, was a passenger in a minibus taxi being driven to school when a collision occurred with another vehicle on Chris Hani Road, Dlamini, Soweto.
3. The plaintiff claims against the defendant in terms of the Road Accident Fund Act 56 of 1996 as amended ("the RAF act").
4. The merits and degree of liability of the defendant was settled 100% in favour of the plaintiff inasmuch as the minor child was a passenger in the motor vehicle accident.
5. Counsel for the parties confirmed that the defendant had provided the plaintiff with a section 17(4)(a) undertaking covering 100% of her future medical expenses. There were no past medical expenses or losses.
6. The issue and quantum of general damages did not fall to be decided by me as it had been referred to the Health Professions Council of South Africa ("the HPCSA") for determination and was accordingly postponed *sine die*.

7. The plaintiff pleaded that as a result of the collision, the minor child sustained a laceration of her tongue and a serious head injury with neurological, neurophysical and neuropsychological fallout.
8. The tongue laceration suffered by the minor children has on all accounts healed and the sequelae resulting therefrom will be considered under the head of "General damages" by the HPCSA.
9. What is left for my determination in this case is the quantum of damages under the head for future of losses (of: earnings, earning capacity and employability) which the plaintiff claims on the minor child's behalf in the amount of R7.5 million.

### **Preliminary Issue**

10. At the commencement of the trial action the defendant made application that the issue of future of losses be postponed and dealt with by the HPCSA in the same manner and at the same time as the referral of general damages pursuant to section 17(4) of the RAF Act and its Regulations. The timing of the application was ascribed to the joint minute only being received from the experts on or about the preceding Wednesday 4 October 2017. Pursuant to argument I gave an *extempore* ruling that the application be dismissed with costs, for the following reasons.
11. The grounds for the application were three fold. Relying essentially on the grounds in the rejection letter and the joint minute of the expert reporting neurosurgeons, and while it was common cause between the neurosurgeons that the minor child sustained a brain injury, mild in nature

(described in different terms by each report), the first basis was that there is what counsel called a “fallout between the neurosurgeons” i.e. a difference of opinion with regard to the *sequeli* of the injury. It was argued that this difference of opinion impacted the reports of the numerous other experts who reported on the *sequeli* from the perspective of their fields of expertise, such as the educational, industrial and clinical psychologists, who were allegedly compromised by the difference of opinion.

12. Accordingly, so it was argued, this difference of opinion was best considered and resolved with the assistance of a third investigation and report. It was argued that such third investigation and report ought or might as well be by the panel of doctors appointed by the HPCSA to deal with the seriousness of the injury when considering the seriousness of the injury.
13. The second basis is better described as the motivation for the application. It was argued that the approach contended for by the defendant was in the best interests of the minor child in light of the prejudice she may suffer if the difference of opinion between the two Neurosurgeons was not properly and further investigated. Counsel specifically alluded to the court’s duty as upper guardian of the minor child to protect her interests.
14. The third basis was that there could be no prejudice to the plaintiff if the matter were postponed.
15. Counsel for the plaintiff opposed the application disavowing all grounds and arguments. Four primary arguments were advanced.

16. Firstly that it was the role of the court to consider the expert oral evidence to be tendered and whether or not objective and persuasive. Put differently that it is not the role and function of the HPCSA to inquire into the evidence in relation to future loss of income, and for me to refer or defer this matter as contended for by the defendant would amount to the HPCSA usurping the function of the court.
17. Secondly the seriousness of an injury is not a pre-requisite for the determination of future loss of income.
18. Thirdly the difference of opinion expressed in the joint minute was identifiable as far back as 9 March 2016 when the report of the defendant's expert became available.
19. Fourthly there was no prejudice to the plaintiff in the matter proceeding but definite prejudice to the plaintiff if the matter was dealt with as the defendant contended for.
20. Regarding prejudice to the minor child. In my view, it is not for the defendant to dictate what the best interests of the plaintiff are. In this case the minor child was represented by her mother, attorneys and experienced counsel. I neither identified nor could I conceive of any sort of prejudice to the minor child that ought in a proper exercise of my discretion, to invoke my duties as the minor child's upper guardian, and order a postponement. The minor child was 12 years of age, had been assessed by approximately 19 experts in the approximate four years since the motor vehicle accident and injury and there was no good reason to postpone the assessment of whether or not the minor child would suffer a future loss of income.

21. Properly construed the argument advanced by the defendant was more why the plaintiff needed or ought to have the benefit of a postponement, or put differently that the court ought to order a postponement in the best interests of the plaintiff. I could discern no basis for why the defendant in fact needed and would otherwise be prejudiced in the absence of a postponement.
22. It is disconcerting that the defendant raised these grounds underpinning its application at the 11<sup>th</sup> hour. Apart from the fact that the defendant's expert reports had been available since approximately 9 March 2016, this approach could have been adopted at trial certification stage.
23. I did not understand counsel for the defendant to be advancing the proposition that as a rule damages for loss of future earnings had to be deferred until the determination of the HPCSA had been received. The defendant's contention as I understood it was that in the circumstances arising namely the nature of the expert opinions and the joint minute, the postponement sought was justified.
24. In my view section 17 (1)(b) read together with (1A) of the RAF Act clearly deals only with non-pecuniary loss. There is no basis to read pecuniary loss in the form of future loss of income into the wording. I was not persuaded that there was any basis in the Act for the postponement sought.
25. As to the difference of opinion between the neurosurgeons as expressed in their reports and joint minute, this is nothing new or extraordinary. On the contrary a difference of opinion is often the case if not expected. I asked counsel for the defendant for reasons why the opinions of the other

experts were compromised by the difference in opinion between the neurosurgeons. Counsel's point made was that these other experts defer to the opinion of the other experts. Indeed that may be so, but those experts are expected to report on their own investigations and opinions of what they find in their fields, which will either support or not support one or more of the neurosurgeon reports.

26. I considered two judgements in this division on substantially the same issue albeit that the issue arose on a different basis. I was in full agreement with these decisions in which I found support for my views. The first is by Victor J in JD Botha v The Road Accident Fund 2015 (2) SA 106(GP) and the second is by Sutherland J in Yvonne De Bruyn v Road Accident Fund case number 29608/2014 RTS/B30/B39.
27. In the result the application for a postponement of the issue pending the HPCSA's findings on the seriousness of the injury in the context of general damages was dismissed with costs and the trial continued on the issue of future of loss.

### **The Evidence**

28. The plaintiff called three experts namely Dr. M. Lewer-Allen, a Neuro-Surgeon; Ms R. Hovsha, a Neuro Psychologist; and Mrs M. Scott, an Educational Psychologist.
29. The defendant called Dr J. Earle, a Neuro-Surgeon; Ms L Swart, an Educational Psychologist; and Mr L Roper, a Clinical Psychologist.
30. All experts gave evidence in line with their reports and joint minutes.

31. The narrative in the reports of some of the expert witnesses called, which was not in dispute between the parties, was that the plaintiff mother was called to the scene of the collision. From there she travelled with the minor child per ambulance to Chris Hani Baragwaneth Hospital and the minor child was admitted sometime around 11:00. The minor child's father also attended at the hospital in the course of the morning. The tongue laceration required suturing under anaesthetic for which the minor child was eventually taken to theatre at around 22:00 that night.
32. In a pre-operative assessment signed off by the anaesthesiologist it was recorded *inter alia* that the minor child had sustained an isolated tongue laceration, head injury and experienced neck pain. Of particular interest was that a glasgow coma scale ("GCS") reading of 12/15 was measured and recorded. It appeared that the minor child had been hospitalised for some ten hours prior to the measurement of this GCS. Drooling and the swollen tongue were also recorded. There was no recordal or evidence of any other GCS measurement.
33. It is well known that the GCS severity categorization scale of severity of brain injury rates severe to lie between 3/8; moderate between 9/12; and mild between 13/15.
34. There was no evidence in the hospital records or narratives recorded by the experts that the minor child lost consciousness at any stage. At best there was hearsay evidence of the father reporting to Mr L Roper, the defendant's Clinical Psychologist, that the minor child seemed confused at a stage in the day. There was also no evidence whatsoever of post-traumatic amnesia ("PTA").

35. The plaintiff's case as introduced by Dr Lewer-Allen was that the GCS, while a monitoring indicator and useful to neurosurgeons and traumatologists to assess potential severity of brain damage due to a head injury, was merely an indicator of potential severity and did not rule out long term *sequelae* after even a mild head injury. He indicated that while in general terms GCS scores may be correct in approximately two thirds (depending on the sample substrate) of mild trauma brain injury ("MTBI") cases, there remained one third of MTBI's who suffer long term *sequelae*. Dr Lewer-Allen adopts the view that GCS does not recognise the diffuse axonal shear type of brain injury where there is a delayed loss of cerebral function as the trauma-induced chemical cascade of axonal degradation and destruction develops in the hours after the patient has left casualty.
36. Dr Lewer-Allen holds that the true severity of the brain injury is to be measured against the severity of the neurocognitive and neuropsychological deficiencies ultimately proven to exist after maximum medical improvement ("MMI"), rather than exclusively according to the criteria as assessed in casualty by GCS measurement. Dr Lewer-Allen divides the issue of severity of a brain injury into two concepts namely injury diagnosis (the severity of the injury at hospital level – accident/casualty diagnosis) on the one hand, and the outcome diagnosis (the severity of the outcome after MMI) on the other. Thus according to Dr Lewer-Allen the key to understanding whether or not a given patient has sustained a brain injury depends heavily on demonstration by psychometric testing by the Neuro Psychologists, for the presence or otherwise of neurocognitive and neuropsychological shortcoming. Where

such testing confirms deficit and malfunctioning, if that deficit is shown not to have been present prior to the accident, and not to have been caused by any non-accident related factor, then the damage could be attributable to the accident. This was whether or not one could prove the natural nature or mechanism of the injuries, and whether or not the patient complied with the stereotyped expectation that such patient must have had a significantly long PTA or reduced GCS before such can be considered a candidate for brain damages. Accordingly the severity of the demonstrated changes to the patient would describe the severity of the outcome diagnosis.

37. Dr Lewer-Allen explained this continuous progression of fallout sustained in a brain injury leading to long-term neuropsychological difficulties as the "sleeper effect". It was ultimately the defendant's case that the only way to deal with this unknown, taking into consideration the requirements of the once and for all rule, was to apply positive contingency deductions that would not negate these possibilities and not deny the minor child just compensation.
38. Ultimately Dr Lewer-Allen's conclusions were based on the report of Dr Hovsha the neuropsychologist who relied on the plaintiff's mother's reporting (who did not give evidence in the trial) and analysis by means of psychometric testing.
39. In so doing Dr Lewer-Allen concluded that the minor child is shown to be suffering from mild to moderate neuro cognitive deficits as well as neuro psychological deficits in keeping with her being included in the group of MTBI's with sequelae. He also referred to the educational psychologist's

reporting and industrial psychologist's reporting for an assessment of the impact of the head injury on the minor child's educability and ultimate earning capacity. In the joint minutes Dr Lower-Allen stated that he expected the aforementioned psychologists to bear in mind possible compromise of her scholastic abilities by virtue of the "*sleeper effect*".

40. In the result the evidence of Dr Lower-Allen was clearly to lay the foundation and understanding for why and the degree to which the plaintiff's case ultimately fell to be assessed on the evidence of Ms. Hovsha and to a lesser degree that of Ms Scott, the educational psychologist.
41. Dr Earle on the other hand testified that the approach of Dr Lower-Allen and others who subscribed to this approach, was novel but not mainstream medical science. He testified that brain injuries were diagnosed on three primary characteristics namely: loss of consciousness ("LOC"), PTA and the GCS measurement.
42. Dr Earle testified that the probabilities were that the minor child's GCS was taken when she was already prepared for theatre by which stage a sedative had already been administered and on this basis he concluded the reading to be inaccurate of her actual level of consciousness i.e. she had been more conscious before that. In other words her true GCS reading was above 12. Dr Earle doubted the minor child suffered a brain injury at all but if anything, it was mild and there was no basis on which to expect intellectual or cognitive impairment or anything that would affect her schoolwork or sustain a claim for loss of earning potential. Dr Earle confirmed his report that "*Should any further tests be done and these do*

*show some impairment of intellect it is absolutely not possible to relate it to this accident.” (sic)*

43. Dr Earle takes the position that applying the results of psychological tests randomly after the head injury, can in no way supersede the diagnosis of severity of brain injury according to primary characteristics as laid down by the World Health Organization Task Force on brain injuries. He said this is so because no similar prior tests were done on the individual and secondly similar tests applied to non-injured piers all show similar results not distinguishable from those with mild head injuries. He opined that accepting these sorts of statistical comparisons as modifying severity means relinquishing the scientific basis of brain injury totally and leaving the final diagnosis to a psychologist.
44. Dr Earle confirmed what he sets out in the joint minute with Dr Lewer-Allen namely that he regards the sleeper effect to be a myth dreamt up by psychologists which has absolutely no neuropathological basis for its existence.
45. There was some reference and discussion around a report by Dr Peché on an EEG test. Indeed Dr Earle signed this report by Dr Peché but the report gives no neuropsychological assessment and in my view took the issues nowhere.
46. There was also some debate in cross-examination of Dr Earle relating to certain collateral information obtained by Mr Roper (the defendant's neuropsychologist) from the minor child's father who noted that he saw his daughter a few hours after the accident and she seemed confused and in shock. In counsel for the plaintiff's heads of argument she sought to

criticize Dr Earle and the reliability of his evidence. The argument in the heads of argument did not weigh against my assessment of Dr Earle as an expert witness. Dr Earle indeed testified as an experienced expert witness but that in my view did not weigh against him. On the contrary he was a calm and collected witness unhinged by fairly assertive and competent cross-examination. Dr Earle's evidence was quietly assertive, informed and in my view did not fall to be criticized. At this juncture I may also point out that Dr Lewer-Allen was also competently cross-examined on the issues and like Dr Earle testified earnestly and in accordance with his report and the neuro surgeons' joint minute.

47. During the course of the trial counsel for the parties reached agreement on narrowing the issues and resolved the dispute in relation to possible postulations in respect of the minor child's future loss of earning capacity. The agreed postulation was to the effect that the plaintiff would have progressed at the same rate as she would have progressed had the accident not occurred, but with a one year delay. Counsel agreed on a pre-morbid 20% contingency but did not agree on a post-morbid contingency above 25%. Accordingly it fell to me to consider whether a post morbid contingency higher than 25% falls to be applied.
48. As reported in the various experts' pre-trial minutes, limited premorbid information on the minor child was presented at the hearing. Non contentious collateral information from the plaintiff to the experts was as follows. Her pregnancy with the minor child was normal and without complications. The minor child was born via natural vaginal delivery and was healthy at birth. All developmental milestones were within normal

limits. The minor child was in Grade 3 when the accident occurred and had passed every grade up to that point.

49. Ms Hovsha was of the opinion that the minor child was of at least average cognitive functioning pre-morbidly while Mr Roper noted that given her age at the time of the accident it was difficult to make any comment on her pre-morbid level of cognitive functioning, particularly given that there were no school reports available to compare her pre and post-accident academic performance. He concluded that the available information did not evidence any obvious pre-morbid cognitive difficulties.
50. As recorded in their joint minute both neuropsychologists deferred to the opinion of the neuro surgeons with regard to the presence, nature and severity of any traumatic brain injury sustained by the minor child.
51. Based on Ms Hovsha's interview with the minor child and the plaintiff, she reported post-accident complaints of headaches, neck pain, difficulty with mathematics at school, impaired memory and concentration, a change in personality, anhedonia and travel related anxiety. As a result of her investigative assessment, Ms Hovsha opined mild to moderate cognitive deficits in the areas of orientation, attention and concentration, processing/motor speed, visuopraxis, memory and executive functioning. In her opinion these deficits are in keeping with those found in individuals who have suffered a traumatic brain injury.
52. Based on his interview with the minor child, plaintiff and the father, Mr Roper noted the reports that the minor child is short tempered and moody and physically aggressive, suffers from headaches, irritability and impaired memory and that her teachers reported that her concentration

was poor. In his assessment Mr Roper found symptoms of increased anxiety related to walking near vehicles and concluded that the minor child has been suffering from mild symptoms of post-traumatic stress disorder. Mr Roper found poor working memory and double tracking abilities, difficulty distinguishing between different sets of rote verbal information, poor forward planning and problem solving abilities as well as two-dimensional non-verbal reasoning abilities. Mr Roper was of the opinion that her mild symptoms of posttraumatic stress disorder could have impacted negatively on her overall cognitive test results. He was further of the opinion that her increased anxiety related to her post-traumatic stress disorder and her ongoing headaches may have contributed to some attention and concentration difficulties. Difficulties with attention and concentration could in turn be expected to have contributed to her reported forgetfulness in her day to day functioning. Mr Roper concluded that the minor child suffered a mild to moderate head injury due to the accident however given the relative lack of severity of her symptoms, any impact in this regard would be considered fairly insignificant. He conceded that while it was possible for a head injury of this severity to bring about subtle, but ongoing neuropsychological difficulties, no enduring cognitive difficulties were usually expected. Mr Roper opined nonetheless that the minor child may be vulnerable to experiencing some future academic difficulties as her work becomes more complex. It falls to be noted that both experts noted that the minor child's mother did not report that she was experiencing difficulties at school at present, with the exception of mathematics. Both experts deferred to the opinions of the educational psychologists. Ms Hovsha

reported that the plaintiff reported that while having difficulty with mathematics at school her marks had not deteriorated. Furthermore they both also agreed that the minor child would benefit from psychotherapy for her emotional and behavioural difficulties.

53. It was argued for the plaintiff that Ms Hovsha's findings determined a nexus between the accident and the minor's psychological profile. However Ms Hovsha said the following:

*"The cognitive deficits found on the neuropsychological assessment are in keeping with those found in individuals who have suffered a traumatic brain injury. The deficits are in keeping with a mild to moderate traumatic brain injury. The writer defers to the opinion of a neurosurgeon to give a final opinion as to the presence, nature and severity of any traumatic brain injury sustained by Ms N in the accident."*

### **Discussion**

54. The educational psychologists were agreed in evidence that presently there are no real indicators of scholastic performance pre and post-accident.
55. In my view of the circumstances of this case, it was not for Ms Hovsha to establish pathologically the existence of a brain injury. Ms Hovsha looked to Dr Lewer-Allen for this. Her evidence and the results of her testing, do not in my view establish a nexus between the accident and brain injury on the one hand and the minor child's psychological profile and cognitive functioning on the other.

56. In the result the following was apparent from the evidence of the neurosurgeons. Dr Lewer-Allen's opinion was largely, if not entirely, dependent on the evidence of the neuropsychologist Ms Hovsha. Dr Earle on the other hand was of the opinion based on recognised criteria for the assessment of a brain injury and possible sequelae to conclude no sequelae pursuant to what could best be described as a mild brain injury.
57. I am not persuaded by the plaintiff's case against the defendant's evidence and argument that the deficits found by Ms Hovsha and Mr Roper can be present in individuals who have not suffered a traumatic brain injury.
58. In my view Dr Earle and Mr Roper's evidence adequately and persuasively dealt with Ms Hovsha's findings.
59. Taking all the available and presented evidence into consideration, and on a balance of probabilities, I do not agree with the submission on behalf of the plaintiff that the minor child faces a long and unsure future regarding her studies and subsequent employment and as such a much higher post morbid contingency should be applied to allow for just compensation keeping in the mind the once and for all rule.

### **Conclusion and Order**

60. I do however consider that given the young age of the minor child at the time of the accident (keeping in mind children recover better from brain injuries than adults do) as well as her young age at the time of assessments for the trial, the evidence available to the plaintiff is limited. While my finding is that the plaintiff failed to establish the requisite nexus

the agreed postulated delay of one year to conclude her studies was in my view in and of itself a concession by both sides.

61. Indeed the possibility exists that even the mildest of brain injuries could found difficulties that could progress as time goes on. In **Road Accident Fund v. Guedes 2006 (5) SA 583 (SCA) 587 A – B** the Supreme Court of Appeal addressing the assessment of compensation and a Trial Judge's discretion stated:

*"The court necessarily exercises a wide discretion when it assesses the quantum of the damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial court has a wide discretion to award what it believes is just."*

62. By agreement between the parties I was placed in possession of a series of actuarial calculations by the plaintiff's actuary Mr G A Whittaker of Algorithm Consultants and Actuaries CC. No part of this report is in dispute. Nonetheless it remains my discretion and responsibility to decide whether the results of these calculations and evidence accord with what is a fair and just award in each particular case. See **Carstens v. Southern Insurance Association Ltd 1985 (3) SA 1010 (C) at 1021 B**. The premorbid contingency has been agreed at a deduction of 20% the oft resultant allocation of 20% for a child. See **Goodall v. President Insurance Company Limited 1978 (1) SA 389 (W)** and **Road Accident Fund v. Guedes (supra) at 588 D – C**, also **Nonkwali v**

**Road Accident Fund (771/2004) [2009] ZAECMHC 5 (21 May 2009).** Counsel for the defendant submitted the post morbid deduction ought to be no more than 25%.

63. An enquiry into damages for loss of earning capacity is of its nature speculative. See **Southern Insurance Association Ltd v. Bailey 1984 (1) SA 98 (A) at 113 H – 114 E.**
64. Notwithstanding my findings that the plaintiff failed to persuade me on a balance of probabilities of a nexus between the brain injury and the minor child's cognitive function, the defendant has conceded some connection between the brain injury and the minor child's psychological profile and cognitive functioning. The concession of a 25% deduction is still a 5% differential. Arithmetically, it makes no difference whether the contingency exercise involves higher or lower contingencies, as long as the difference remains the same. See **Mashaba v. Road Accident Fund (15683/04) [2006] ZAGPHC 20 (2 March 2006).** Inasmuch as the defendant concedes fallout to the extent it has and if I am not to be remiss in my duty and not discount the evidence on which the defendant based its concession then in order to ensure justice and that the minor child is not prejudiced in all the circumstances of her case, to conclude a higher contingency. Especially in light of the evidence of Mr Roper that notwithstanding his other findings, the minor child may be vulnerable to experiencing some future academic difficulties as her work becomes more complex I am of the view that a 10% differential may be inadequate.
65. Accordingly I find for a 15% differential and that a 30% contingency be applied to the value of future injured earnings. The calculation by the

actuary on the capital value of the loss of income sustained by the minor child as a result of the motor vehicle accident on 22 November 2013 is R708 249.00 as at 1 October 2017.

66. I note that counsel for the parties handed me a draft order with terms I assume were agreed to, but omitting aspects I was still to find on. In the result I make the following order:

1. Judgment is granted in favour of the plaintiff in the amount of R708 249.00 in respect of future loss of income.
2. The issue of general damages is postponed *sine die*.
3. The amount referred to in paragraph 1 above shall be paid into the trust account of the plaintiff's attorneys of record with the following details: Rene Fouche Inc, Standard Bank/Trust Acc. Nr: 032956 630, Branch code: 004305, Ref: N[...]/RM/N203, who shall, after deduction of agreed attorney's fees, costs and disbursements, retain same in an interest bearing account in terms of section 78(2A) of the Attorneys Act, pending the creation of the trust referred to in paragraph 4 and 5 infra and the issuing of letters of authority.
4. In so far as the defendant has not already done so the defendant shall furnish to the plaintiff within 14 days of the granting of this order, an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for 100% of the costs of the future accommodation of Z N ("the minor child") in a hospital or nursing home or the like for treatment or rendering of a service to the

minor child or supplying of goods to the minor child arising out of the injuries sustained by the minor child in the motor vehicle collision which occurred on 22 November 2013, after such costs have been incurred and upon proof thereof, including the costs of the administration of a trust referred to hereinafter, which shall include:

- a. the reasonable costs of the creation of the trust referred to in paragraph 4 above and the appointment of the trustees;
  - b. the reasonable costs of the furnishing of security by the trustees;
  - c. the costs of the trustees in administering the minor child's estate.
5. A trust shall be established and administered on behalf of the minor child, to administer the net proceeds received from the defendant (after deducting attorney and client fees), which shall be paid over to a special trust to be created with the following provisions:
- a. the minor child is the sole beneficiary of the trust;
  - b. the trustee(s) to provide security to the satisfaction of the master;
  - c. the trust property vests in the trustee(s) of the trust in their capacity as trustee(s);

- d. at least two (2) but not more than three (3) trustees will be appointed of which one will be an independent professional trustee;
- e. the trust will have the purpose of administering the funds in a manner which will best take into account the interests of the minor child;
- f. trust property will be excluded from any community of property or accrual in the event of the marriage of the minor child;
- g. the trustees will have the right to purchase, sell and mortgage immovable property, invest and reinvest the trust capital and to pay out so much of the income and/or capital as is reasonably required to maintain the minor child (with due regard being had to the obligations of any person having a duty to support the minor child, the requirements of the minor child and the purpose of the award of damages);
- h. the powers and authority of the trustees shall not exceed those usually granted to trustees or special trusts;
- i. procedures shall be set out to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this court;
- j. the composition of the board of trustees and the structure of the voting rights of the trustees should be such that the

independent trustee cannot be overruled or outvoted in relation to the management of the trust assets by any trustee who has a personal interest in the manner in which the trust is managed;

- k. the amendment of the trust instrument be subjected to the leave of this court;
  - l. the termination of the trust upon the death of the minor child in which event the trust assets shall pass to the estate of the minor child;
  - m. the minor child shall after attaining the age of 21 years be assessed by appropriate experts with a view to determining whether the minor child is capable of managing the fund award and, if so, the trust will be terminated and the trusts assets shall pass to the minor child;
  - n. the trustees shall as far as possible recover the costs of the creation and administration for the trust from the defendant in terms of section 17(4)(a) undertaking;
  - o. that the trust property and the administration thereof be subject to an annual audit.
6. The defendant shall pay the plaintiff's taxed or agreed party and party costs of suit on the High Court scale, such costs including but not limited to:

- a. The costs of the expert reports (including RAF4 forms and addendum reports, if any) of Prof. L.A. Chiat, Dr A.P.J. Botha, Dr C. Kahanovitz, Dr L Fine, Ms R. Hovsha, Dr. Lewer-Allen, Ms M Scott, Dr O Guy, Dr A Peché, Dr J Goosen, Ms A Reynolds, C & N Diagnostics, Ms N Kotze and Mr Lottering;
  - b. The qualifying and reservation fees, if any, of Dr Lewer-Allen, Ms R Hovsha and Ms Scott;
  - c. The preparation, qualifying and attendance fees of Dr Lewer-Allen, Ms R Hovsha and Ms M Scott;
  - d. The qualifying fees of all experts who attended to the preparation of joint minutes;
  - e. The costs of counsel for 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> and 27<sup>th</sup> October 2017;
  - f. The costs of the actuarial reports of Mr G Whittaker (Algorithm Consulting Actuaries);
  - g. Plaintiff's reasonable travelling expenses to and from medico legal appointments;
  - h. The costs of the preparation and perusal of the six bundles;  
and
  - i. The costs of the assessor's reports.
7. In the event that the costs are not agreed, the plaintiff's attorney shall serve a notice of taxation on the defendant's attorneys of

record. The defendant shall be granted a period of 14 days post taxation to pay the taxed costs.

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**R S WILLIS**

**ACTING JUDGE OF THE HIGH  
COURT**

**Date of Hearing: 27 October 2017**

**Judgment Delivered: 4<sup>th</sup> April 2018**

**APPEARANCES**

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