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**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

- |     |                                        |
|-----|----------------------------------------|
| (1) | REPORTABLE: <b>NO</b>                  |
| (2) | OF INTEREST TO OTHER JUDGES: <b>NO</b> |
| (3) | REVISED:                               |

Date: **10<sup>th</sup> November 2020** Signature: \_\_\_\_\_

**CASE NO:** 6661/2019

**DATE:** 10<sup>TH</sup> NOVEMBER 2020

In the matter between:

**M[....], M[....], for and on behalf of:**

**M[....], B[....] C[....]**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

**Coram:** Adams J

**Heard:** 10 November 2020

**Delivered:** 11 November 2020 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 17:00 on 11 November 2020

**Summary:** Civil procedure – settlements and consent orders – offer made by the RAF and accepted by the plaintiff does not accord with the facts in the matter – no legal basis to make settlement agreement an Order of Court – application for an order by consent refused – court granted order and awarded damages, which it believes to be fair and reasonable to both parties, including to the RAF.

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### ORDER

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- (1) The defendant shall pay to the plaintiff an amount of R1 842 633 in full and final settlement of the plaintiff's entire claim herein.
- (2) The aforesaid capital sum of R1 842 633 shall be paid by the defendant within ninety calendar days from the date of this order by electronic funds transfer into the trust account of the plaintiff's attorneys, the details whereof are as follows: Smit & Herbst Trust Account, account number: [...], Absa Bank, branch code: 630 142, refer: W Herbst/ BM2212.
- (3) In the event of failure by the defendant to effect payment of the capital sum within ninety days from date hereof, interest will be payable by the defendant to the plaintiff from day 91 at the rate of 8.75% per annum on the amount of R1 842 633.
- (4) The defendant shall furnish the plaintiff with an undertaking as envisaged in Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for all of the costs of the future accommodation of the minor child, B[...] C[...] M[...], in a hospital or nursing home and such treatment, services or goods as she may require as a result of the injuries that she has sustained as a result of the accident which occurred on the 13<sup>th</sup> of January 2018 and the sequelae thereof, after such costs have been incurred and upon proof thereof.
- (5) The defendant shall pay the plaintiff's taxed or agreed party and party costs to date on the High Court scale, which costs shall include, but not be limited to:

- 6.1 The reasonable costs in respect of the preparation of the medico-legal reports, addendum medico-legal reports, RAF 4 Serious Injury Assessments, as well as the actuarial calculations, of the following experts: Dr M M Malan – orthopaedic surgeon; Dr M M Malan – RAF Serious Injury Assessment Report; Dr Jaap Earle – Neurosurgeon; Dr Lucky K Tshikovhele – clinical psychologist; Dr Robyn Hunter – occupational therapist; Stephan Van Huyssteen – Industrial Psychologist; Burger Radiologists Incorporated – Radiologists; and M M Lautenbach – educational psychologist.
- 6.2 Consultations when detailed instructions were given due to the complexity of the matter.
- 6.3 The costs of Counsel, inclusive of the costs of preparation for trial and the attendance at and the preparation for trial.
- 6.4 The travelling costs of the plaintiff to and from all medico-legal appointments and consultations.
- 6.5 The costs of the preparation and the making of five X copies of all bundles for purpose of trial.
- 6.6 Any costs attendant upon the obtaining of payment of the capital amount referred to paragraph 1 *supra*, as well as costs attendant upon obtaining payment of the taxed costs.

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## JUDGMENT

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### **Adams J:**

[1]. This matter came before me on Tuesday, the 10<sup>th</sup> of November 2020, in the specialised *Settlements and Consent Orders Court* of this division. The matter had become settled in that the Road Accident Fund ('the Fund') had made to the plaintiff a formal tender to pay an amount of R2 116 557.60 in full and final settlement of the plaintiff's claim herein. The amount of the tender, which was made in writing by the Fund on the 22<sup>nd</sup> of October 2020, was

constituted, according to the formal offer, as follows: R500 000 in respect of the plaintiff's general damages and R1 616 557.60 in respect of the minor child's future loss of earnings.

[2]. A perusal and consideration of the documents in support of the plaintiff's claim for loss of earnings did not, in my view, support the quantification of this head of damages, and I accordingly invited the parties, including the RAF, to a hearing of the application. The purpose was for the parties to explain and motivate the basis on which settlement was reached in the matter. Not surprisingly, the RAF did not respond. Ms Rourke appeared on behalf of the plaintiff and made submissions and responded to certain queries raised by me in relation to the quantification of the minor child's future loss of earnings. I am grateful to her for her assistance.

[3]. In *Maswanganyi v Road Accident Fund* 2019 (5) SA 407 (SCA) the court had this to say, in the context of a settlement agreement which the parties require to be made an order of court:

'[34] The RAF is an organ of state, established in terms of s 2 of the Road Accident Fund Act 56 of 1996 (the Act). It is thus bound to adhere to the basic values and principles governing the public administration under our Constitution. Section 195(1) requires, *inter alia*, that "[a] high standard of professional ethics must be promoted and maintained"; and that "[e]fficient, economic and effective use of resources must be promoted".

[35] In cases involving the disbursement of public funds, judicial scrutiny may be essential. A judge is enjoined to act in terms of s 173 of the Constitution to ensure that there is no abuse of process. Judges in all divisions have expressed concern that in many RAF cases, there is an abuse of process. Settlements are concluded where, for example, the substantial damages agreed to bear no relation to the injuries sustained. In this case the judge had a legitimate concern that the only reason for the settlement was the lack of preparation of the RAF's case and that there may, in truth, as appeared to be the case from the evidence she heard from a passenger in the vehicle, have been no negligence on the part of the insured driver and thus no liability on the part of the

[36] Concern has been noted that to require a Judge to scrutinize every settlement in a RAF case would cause delays in the administration of justice. However, it is not every case that will require this form of judicial scrutiny. When a Judge expresses

concern over the terms of a settlement, the court must ensure that those concerns are addressed by the parties to prevent an abuse of process and the unjustified disbursements of public funds.'

[4]. It is on the basis of this authority and my concerns that there may be an unjustified disbursement of public funds, that I requested submissions from the parties. The concerns I had are dealt with in the following paragraphs, which, in my judgment, are grounds for me to refuse to grant an order in terms of the Consent Order.

[5]. The plaintiff sues herein on behalf of her minor daughter, whose date of birth is 21 June 2009, making her 11 years old at present. In the pedestrian vehicle accident on the 13<sup>th</sup> of January 2018 the child, according to the hospital and medical records, sustained a right midshaft femur fracture. She was admitted to the Johannesburg Academic Hospital for a period of twelve days. An open reduction (tension nail) of the right femur was done and she received pain medication. The internal fixation was removed on the 3<sup>rd</sup> of June 2018. In his report of the 22<sup>nd</sup> of January 2020, the plaintiff's Neurosurgeon, Dr Jaap Earle, concluded that the minor child suffered at least a mild traumatic brain injury with no neurological deficit. Dr Earle also expressed the opinion that there was no neurological deficit that would restrict her in entering the open labour market in the future.

[6]. In the light of the foregoing and the fact that after the accident the child was still doing well at school, I was concerned that there is no evidence, whether factual or by experts, in support of the plaintiff's contention that in future the minor child's projected income would be R1 616 557.60 less than what it would have been but for the injuries sustained by her in the accident on the 13<sup>th</sup> of January 2018.

[7]. As a starting point, it is apposite to note that the amount of the minor child's alleged future loss of earnings, being R1 616 557.60, represents about 70% of the child's pre-morbid projected income, being R2 309 368, which, in turn implies that after the accident the minor child's income earning capacity had been reduced by 70% compared to her capacity disregarding the accident.

This assumption is not born out by the facts in the matter – far from it. So, for example the plaintiff's experts assessed the plaintiff's whole person impairment ('the WPI') from a physical point of view at 14%. This begs the question how a 14% WPI results in a 70% reduction in the child's income earning capacity. As indicated above, the agreement on the quantum of the child loss of income at R1 616 557.60, howsoever one views the matter, is not supported by the facts.

[8]. It requires emphasising that from an intellectual and neurocognitive point of view, there is no difference between the child's capacity pre- and post-morbid. The facts *in casu* certainly do not suggest otherwise and for the calculations to be based on an assumption that post-morbid the child would only be able to attain an NQF1 remedial / vocational qualification boggles the mind – there is no basis on which such an assumption could have been made in this matter.

[9]. In light of these facts, there is no factual or legal basis for the damages award offered by the Road Accident Fund. On the probabilities the plaintiff's pre-morbid career path and projected income are mirrored by her post-morbid career and income, subject to the proviso that she is probably compromised to a certain degree – not to the tune of 70% - by the orthopaedic injury and if it is accepted that she suffered a mild traumatic brain injury.

[10]. On that basis, and for the benefit of the child I will accept, for purposes of this judgment, that the pre- and post-morbid scholastic and career paths, and the consequent projected income, are as postulated by the plaintiff's Actuary. Therefore, before the application of contingencies, I accept that the child would have earned R2 309 368 if the accident is disregarded and R504 861 having regard to the accident. This, in my view, is being extremely generous to the plaintiff's claim and in order to address the concerns expressed *supra* the contingencies should be adjusted. In that regard, I propose to apply normal contingencies of 20% on the pre-morbid income and 0% contingencies on the post-morbid income. That would result in calculations as follows: R1 847 494 – R504 861 = R1 342 633. To this total should be added an amount of R500 000 in respect of the general damages, giving a grand total of R1 842 633.

[11]. In the circumstance, an order as per the Draft Order, duly amended to adjust the award of damages to R1 842 633, should be granted.

### **Order**

Accordingly, I make the following order: -

- (6) The defendant shall pay to the plaintiff an amount of R1 842 633 in full and final settlement of the plaintiff's entire claim herein.
- (7) The aforesaid capital sum of R1 842 633 shall be paid by the defendant within ninety calendar days from the date of this order by electronic funds transfer into the trust account of the plaintiff's attorneys, the details whereof are as follows: Smit & Herbst Trust Account, account number: 406 228 4622, Absa Bank, branch code: 630 142, refer: W Herbst/ BM2212.
- (8) In the event of failure by the defendant to effect payment of the capital sum within ninety days from date hereof, interest will be payable by the defendant to the plaintiff from day 91 at the rate of 8.75% per annum on the amount of R1 842 633.
- (9) The defendant shall furnish the plaintiff with an undertaking as envisaged in Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for all of the costs of the future accommodation of the minor child, B[....] C[....] M[....], in a hospital or nursing home and such treatment, services or goods as she may require as a result of the injuries that she has sustained as a result of the accident which occurred on the 13<sup>th</sup> of January 2018 and the sequelae thereof, after such costs have been incurred and upon proof thereof.
- (10) The defendant shall pay the plaintiff's taxed or agreed party and party costs to date on the High Court scale, which costs shall include, but not be limited to:
  - 6.7 The reasonable costs in respect of the preparation of the medico-legal reports, addendum medico-legal reports, RAF 4 Serious Injury Assessments, as well as the actuarial calculations, of the following experts: Dr M M Malan – orthopaedic surgeon; Dr M M Malan – RAF

Serious Injury Assessment Report; Dr Jaap Earle – Neurosurgeon; Dr Lucky K Tshikovhele – clinical psychologist; Dr Robyn Hunter – occupational therapist; Stephan Van Huyssteen – Industrial Psychologist; Burger Radiologists Incorporated – Radiologists; and M M Lautenbach – educational psychologist.

- 6.8 Consultations when detailed instructions were given due to the complexity of the matter.
- 6.9 The costs of Counsel, inclusive of the costs of preparation for trial and the attendance at and the preparation for trial.
- 6.10 The travelling costs of the plaintiff to and from all medico-legal appointments and consultations.
- 6.11 The costs of the preparation and the making of five X copies of all bundles for purpose of trial.
- 6.12 Any costs attendant upon the obtaining of payment of the capital amount referred to paragraph 1 supra, as well as costs attendant upon obtaining payment of the taxed costs.

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**L R ADAMS**

*Judge of the High Court*

*Gauteng Local Division, Johannesburg*

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|---------------------|------------------------------------------------------------------------|
| HEARD ON:           | 10 <sup>th</sup> November 2020                                         |
| JUDGMENT DATE:      | 11 <sup>th</sup> November 2020                                         |
| FOR THE PLAINTIFF:  | Advocate Michelle Rourke                                               |
| INSTRUCTED BY:      | Smit & Herbst Attorneys                                                |
| FOR THE DEFENDANTS: | No appearances -<br>Mr Justice Nghomani (Claims Handler<br>at the RAF) |
| INSTRUCTED BY:      | The Road Accident Fund,<br>Johannesburg                                |