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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 5489/2019

In the matter between:

Z V S obo
S R M Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

CLAIM NO: […]

LINK NO: […]

CORAM: VANZYL, J

HEARD ON: 27 SEPTEMBER 2023

DELIVERED ON: 31 MARCH 2023

[1] In this matter the merits, future medical costs, general damages and costs up to 30 August 2022 were settled between the parties. On 30 August 2022 I granted an order by agreement between the parties with regard to the aforesaid issues. The said order also made provision for the creation of a Trust for purposes of the administration of the minor child's estate.

[2] In paragraph 16 of the aforesaid order of 30 August 2022 the following order was made, also by agreement between the parties:

"16. The plaintiff's claim for loss of income/earnings is postponed *sine die* for judgment by this Honourable Court, after consideration of the Heads of Argument filed by the plaintiff's and defendant's legal representatives, which Heads of Argument shall be served and filed as follows:

16.1 Plaintiff's Heads of Argument to be served and filed no later than 9 September 2022.

16.2 Defendant's Heads of Argument to be served and filed no later 23 September 2022."

[3] Pursuant to the aforesaid order the plaintiff's heads of argument were indeed filed on 9 September 2022. The defendant duly filed its heads of argument on 16 September 2022. Thereafter, and with my leave, the plaintiff filed further heads of argument in reply to the defendant's heads of argument on 23 September 2022. Subsequent thereto and upon the defendant's request, I granted the defendant leave to file short further heads of argument in response to issues raised in certain paragraphs of the plaintiff's replying heads of argument, which further heads of argument were filed on 27 September 2022.

Interlocutory application:

[4] Due to an issue raised in the defendant's heads of argument pertaining to alleged hearsay evidence regarding the minor child contained in the expert reports, the plaintiff, as applicant, filed an interlocutory application for leave to re-open the plaintiff's case and that a confirmatory affidavit of the plaintiff, dated 22 September 2023, be admitted into evidence. Ms Bornman, who is representing the defendant, addressed an email, dated 26 September 2022, to Ms Hattingh-Boonzaaier, who is

representing the plaintiff, and to my Registrar, in which she indicated that she received instructions from the defendant that it does not oppose the request that the aforesaid confirmatory affidavit of the plaintiff be admitted into evidence.

[5] I consequently accept the confirmatory affidavit of the plaintiff, dated 22 September 2022, into evidence as exhibit "X".

[6] The essence of the affidavit is that the plaintiff confirms the facts contained in the medico-legal reports and supporting documents as correct insofar as it relates to her.

Background:

[7] The plaintiff is claiming damages for loss of earnings on behalf of her minor son, S R M ("the minor child"), who was involved in a motor vehicle collision on 12 March 2019 at approximately 07h40 along Slovo Park Road, Phuthaditjhaba, Free State Province. The minor child was a pedestrian at the time of the collision, which involved a motor vehicle with registration number […].

[8] The minor child was born on 9 July 2012.

[9] As a direct result of the accident the minor child suffered the following injuries: several lacerations and abrasions to the face and head and a traumatic brain injury.

[10] I am now called upon to determine the amount of damages the minor child suffered, if any, in respect of his loss of earnings, which include a determination of the contingencies to be applied.

[11] The plaintiff filed reports by the following experts: General Practitioner: Dr Makua
Neurologist: Dr Townsend Clinical Psychologist: T Da Costa
Occupational Therapist: S Fletcher Educational Psychologist: A Matheus Industrial Psychologist: L Leibowitz Actuary: W Loots

[12] By agreement between the parties, the plaintiff filed confirmatory affidavits by all of the aforesaid experts, which affidavits are received as exhibits A-G. The plaintiffs expert reports are consequently received into evidence in terms of Rule 38 by agreement between the parties.

[13] Both Ms Hattingh-Boonzaaier and Ms Bornman filed well- researched, well-reasoned and thorough heads of argument, which were very helpful and for which I express my sincere appreciation. The high standard of their respective heads of argument is indicative of the strong work ethic of both legal practitioners.

[14] Moreover, the relevant pleadings, expert reports, notices and all other papers filed in the action, including the respective heads of argument, were duly and properly filed and indexed in a strong, neat and user-friendly binder. The effort and time which the plaintiffs attorneys, being the attorneys responsible for placing a matter before a presiding Judge, put into producing same are highly appreciated.

Past loss of earnings:

[15] There is no past loss of earnings applicable in this matter.

Future loss of earnings:

Approach to the evidence:

[16] In paragraph 6 of the defendant's heads of argument the following is stated:

> "6. It appears that Defendant's consent that affidavits may be filed (which merely facilitates the tendering of the evidence and shortens the proceedings), is misconstrued or interpreted by some Plaintiffs as the Defendants "admitting" the evidence (which means that it would be common cause and later argument will be nonsensical). Logically, this cannot make sense, and Defendant is still entitled, *inter alia,* to highlight issues arising out

of the evidence, refer to contradictions between witnesses, and deal with improbabilities. This issue was also discussed with Plaintiff's counsel prior to the agreement that the reports may be handed up by means of affidavit.

[17] Under the heading **"Evaluation of the expert evidence on loss of earnings"** in the defendant's heads of argument the following contentions are, *inter alia,* made:

"47. The matter *in casu*-is a prime example of the danger of hearsay evidence being regarded by the experts, without testing the veracity thereof. In this case, the ripple effect could have dire consequence for the minor's claim.

48. The so-called golden thread that runs through all the expert reports, from the Neurologist, to the Industrial Psychologist, is the untested, hearsay evidence of the minor and his mother.

49. The ripple effect starts with Dr Townsend, the Neurologist, who makes diagnosis of posttraumatic epilepsy as well as severe posttraumatic neurobehavioral disorder, seemingly based merely on the saying-so of the minor and his mother. The Court should disregard her report based on the following reasons:

(a) In support of diagnosis of posttraumatic epilepsy as well as severe posttraumatic neurobehavioral disorder, Dr Townsend refers back to information provided by the mother and the minor and not to any test that she had performed.

(b)

(c)

(d)

(e) Dr Townsend then further speculates that the minor might have suffered a frontal lobe injury, which could possibly have been picked up by an MRI, but instead of sending the minor for an MRI to turn speculation into fact, she proceeds to conclude that the minor suffered a moderate traumatic brain injury.

(f) Without running any tests for epilepsy, she concludes that the minor suffers from posttraumatic epilepsy, based on the say- so of the mother and minor. It deserves special mention that Dr Townsend does not prescribe any treatment for the epilepsy, nor does she mention any treatment or medication that the minor is receiving for the epilepsy, She also does not defer to any other expert to either assess or treat the alleged epilepsy.

50. The diagnosis by Dr Townsend is not based on test results or other facts, but on speculation and hearsay, and it is therefore submitted that it should be disregarded as a whole.

51. ...Ms De Costa, who relies on the diagnosis of epilepsy and neurobehavioral disorder made by Dr Townsend....

52. Both Ms Mattheus and Ms Fletcher, take specific note of the diagnosis made by Dr Townsend, which had a direct and adverse effect on their postulations for the minor's post-accident academic and ultimately employment career.

53. Mr Leibowitz, the Industrial Psychologist, quotes the reports and findings of the other experts, and does not seem to have any independent opinion. He postulates only one pre-accident scenario for the minor, one where the minor would have entered the labour market and more specifically the corporate sector with a NQF 5. There are at least two other possibilities (1) that the plaintiff would have obtained his senior certificate without further studies, due to financial or other reasons, and (2) that the minor, much like his

mother and father, would not have completed Grade 12.

56. The postulation by the Industrial Psychologist is clearly biased and misleads the Court by not indicating that only 25% of the total workforce in the country is represented by the corporate sector surveys. He further fails to state the percentage of chance of achieving the postulated level of earnings, which considering the statistics, the minor's current economic background and level of education of parents, is highly unrealistic and improbable. The Industrial Psychologist failed to show honour and integrity to the administration of justice in preparation of this report, and his report should be disregarded and his fees should be disallowed.

57. The last report under scrutiny, is that of the actuary. Mr Loots received specific instructions to only calculate one pre-accident scenario. He was further instructed to use the corporate sector's surveys, which as stated above, places the Court at risk to overcompensate a plaintiff. The instructions provided, detracts from the actuary's neutrality, used merely as a 'calculator' and as such, his report is not based on his expertise, but is merely a computer generated product based on instructions.

60. The basis on which the postulations are made, has not been proven. There is no proof before Court of any test done to justify a diagnosis of posttraumatic epilepsy, nor neurobehavioral disorder. In amplification of no diagnosis being made, there is not treatment plan discussed for the minor's alleged epilepsy, or deference to any other expert to assess and to treat the minor's alleged epilepsy. The only reasonable inference to be made is that the epilepsy does not exist.

61. **<u>In Radebe v Road Accident Fund (2457/2017) 2020 ZAFSHC</u> <u>(unreported).</u>** the Court held:

'[24] The common theme is that courts must jealously protect their role and powers. Courts are the ultimate arbiters in any court proceedings. The facts

that caused the expert opinions in this case are vital. It was supplied by the plaintiff.

[25] It is not for the opposing party to prove the true facts of the plaintiff's case; it is the onus of the plaintiff.

[26] Only if the expert's opinion based on the correct facts is questioned could it be expected that a countering expert should be called. It is the expertise that will then be at issue and not the accuracy of the facts on which it is based. Counsel must identify and separate the two aspects. The argument of the actuary in this case that the failure to call an expert in the defendant's case is tantamount to a default judgment is wrong. It is not the expert's veracity that is in dispute; it is the facts on which he based his calculations. Experts must assist the court not a party to the dispute.'

65. It is the defendant's submission that the Court cannot come to a fair decision based on the speculative, hearsay evidence before it, and that the loss of earnings component of the minor's claim should be dismissed with costs."

[18] In the plaintiff's heads of argument which were filed in reply to defendant's heads of argument, the following contentions are, *inter alia,* made:

"21. The defendant, without having filed any expert reports of their own, now at this stage, allege that the reports filed by the plaintiff's experts are based on hearsay evidence as a result of evidence received from the minor child and his mother and their 'say-so'.

22. It is indeed correct that the parties agreed to submit the expert reports by way of affidavit and then *ex /ege* agree that the defendant will be able to build an argument based on the plaintiff's expert reports and will be able to dissect the said expert reports. However, once an expert report is admitted into

evidence there is no room for submissions that the expert reports are now hearsay evidence and are thus inadmissible. Submissions regarding the law of evidence and admissibility of evidence must be done before expert reports are admitted into evidence and marked as exhibits. Had the issue been raised from the outset same would have been addressed in the heads of argument from the beginning or by way of calling all of the relevant witnesses.

31. The defendant relies quite heavily on certain judgments which were referred to by Honourable Judge Opperman in the matter of MR v Road Accident Fund (2457/2017) [2020] ZAFSHC 24, the said judgments can be found from paragraphs 34 to 38 of defendant's heads of argument. It is of vital importance to point out that the matter of MR v Road Accident Fund is based on a completely different set of facts and are thus not applicable to the matter *in casu.* The aforesaid matter refers to *viva voce* evidence of the plaintiff and the discrepancies between the evidence led and that of the report filed by the Industrial Psychologist.

32. In the matter at hand there was no *viva voce* evidence led and no factual discrepancies therefore came about as a result of testimony led. I humbly submit that the case law from paragraph 34 to 38 of defendant's heads of argument are taken out of context and are thus not applicable to the matter before this Honourable Court.

33. It seems that it is not mere hearsay being put forth but the credibility of the plaintiff's witnesses. It must be borne in mind that there was no cross-examination put forth affording the experts an opportunity to defend their opinions, the defendant has foregone the right and/or opportunity to do so. The Constitutional Court in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** 2000 (1) SA 1 (CC) made the following instructive remarks pertaining to the cross-examination of witnesses which is of utmost importance in this matter:

"[61] The institution of cross-examination not only constitutes a right; it also imposes certain obligations. As a general rule it is essential,when it is

intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts."

34. ... One cannot simply attack the credibility of an expert witness in heads of argument when there was no cross-examination done affording the witness an opportunity to defend his own opinion and his/her character.

48. The submissions made by defendant in the heads of argument regarding the views of STATSSA and that there should be more than one pre-morbid scenario are unfortunately not corroborated by the expert evidence of an industrial psychologist or an actuary from the side of the defendant, which would have assisted to rebut the evidence of the plaintiffs industrial psychologist and actuary.

49. The defendant is allowed to once again dissect the report of the actuary and that of the industrial psychologist and make out an argument regarding what the loss and contingency should be. But making submissions regarding which survey should be used and the amount of pre-morbid scenarios applicable is for an industrial psychologist and actuary to decide as they- are the experts in the field."

<u>Consideration of the aforesaid submissions:</u>

[19] Rule 38(2) determines as follows:

"38(2) The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: rovided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit."

[20] What is of utmost importance is that if the parties agree that the deponent to the affidavit will not be cross-examined, like the parties did *in casu,* the factual allegations in the affidavit stand unchallenged and, accordingly, no dispute of fact in respect thereof, arises. In **Esorfranki (Pty) Ltd v Mopani District Municipality** 2022 (2) SA 355 (SCA) the Supreme Court of Appeal pronounced on this issue at paras [23], [27] and [28] of the judgment, the crux of which is contained at para [27]:

"The status of the affidavits before the High Court

[23] ... To the contrary, it is clearly recorded that the affidavits were received as evidence before the trial court. It was accepted by Mopani that the deponents need not be called since there was to be no cross- examination of them. It was on this basis that Esorfranki closed its case. It was accordingly simply wrong to suggest that Esorfranki did not present evidence to support its pleaded case. The evidence it presented in the trial was, by reason of the failure to cross-examine witnesses or to lead evidence in rebuttal, uncontested. As will be seen hereunder, this is of considerable significance in the outcome of the appeal.

[24] ...

[25] ...

[26] ...

[27] <u>There is no procedural impediment to the reception of evidence, by</u>

a trial court. by way of affidavit. If the parties agree that facts may be placed before a court by way of affidavit and agree that the deponent will not be cross-examined, then the factual allegations contained in the affidavit stand unchallenged. Where that occurs, no dispute of fact arises.

[28] It must be emphasised that Mopani was not obliged to accept the manner in which the evidence was placed before the trial court. It was entitled to challenge the evidence by subjecting the witnesses to cross-examination. Not only did it not do so, it also elected not to present any evidence at all, despite being possessed of affidavits which had been presented in the review application and in the numerous interlocutory applications. The upshot of this was that the only evidence before the trial court was the extensive allegations of fact presented by Esorfranki's witnesses." (Own emphasis)

[21] As correctly submitted on behalf of the plaintiff, the circumstances and facts in **M R v Road Accident Fund** (2457/2017) [2020] ZAFSHC 24 (5 February 2020) (to which judgment the defendant referred as **Radebe v Road Accident Fund)** were different to the matter *in casu* and the two matters should consequently be distinguished. However, the following principles enunciated therein are, in my view, also applicable to the present matter (which I quote again for the sake of ease of reference):

'[24] The common theme is that courts must jealously protect their role and powers. Courts are the ultimate arbiters in any court proceedings. The facts that caused the expert opinions in this case are vital. It was supplied by the plaintiff.

[25) It is not for the opposing party to prove the true facts of the plaintiffs case; it is the onus of the plaintiff.

[26] Only if the expert's opinion based on the correct facts is questioned could

it be expected that a countering expert should be called. It is the expertise that will then be at issue and not the accuracy of the facts on which it is based. Counsel must identify and separate the two aspects. The argument of the actuary in this case that the failure to call an expert in the defendant's case is tantamount to a default judgment is wrong. It is not the expert's veracity that is in dispute; it is the facts on which he based his calculations. Experts must assist the court not a party to the dispute.'

[22] A distinction is to be drawn between the facts upon which an expert's opinion are based, on the one hand, and the expert's opinion as such, on the other hand. It appears that the defendant is attacking the veracity of both these aspects of the evidence placed before court by the plaintiff.

[23] The defendant was not obliged to agree to the evidence being placed before court by means of affidavits. This includes the evidence of the plaintiff, specifically with regard to the facts pertaining to the sequelae of the minor child's injuries. If the defendant wanted to dispute the alleged facts, it should not have agreed to the evidence being placed before court by means of affidavits. It should have insisted that the plaintiff present her case in the normal manner, being by means of *viva voce* evidence. The defendant would then have been entitled to challenge the evidence, especially also that of the plaintiff with regard to the minor child's condition, by subjecting the witnesses to cross-examination. However, as correctly submitted on behalf of the plaintiff, the defendant has agreed to forfeit that opportunity.

[24] It is not open for the defendant to now attack the admissibility of the evidence on the basis that it constitutes hearsay evidence. The same goes for the credibility of the witnesses.

[25] The facts conveyed by the plaintiff to the respective experts, what the defendant refers to as the so-called *"say-so"* of the plaintiff, are consequently accepted as having been properly proven by the plaintiff.

[26] Insofar as the defendant is attempting to discredit the expert witnesses with regard to their respective opinions based on the aforesaid facts and their own respective evaluations, that cannot be done now either, without having cross-examined the said experts in order to have given them the opportunity to defend their respective opinions and without and without having called countering expert witnesses of its own.

[27] I completely agree with the submissions on behalf of the plaintiff that the defendant is attempting to attack the veracity of the experts' opinions by, *inter alia,* referring to the view of STATSSA and that that provision should have been made for more than one pre-morbid scenario etc., which cannot be done without the corroboration thereof by evidence of counter expert witnesses.

Evaluation of the expert evidence:

[28] In **Coopers (South Africa) (Pty} Ltd v Deutsche Gesellschaft Fur Schadlingsbekampfung Mbh** 1976 (3) SA 352 (A) the following was stated at 371:

> "As I see it, an expert's opinion represents his reasoned conclusion based on certain facts on *data,* which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is no of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert."

[29] The following relevant principle was reiterated in **Road Accident Fund v Zulu and Others** (50/11) [2011] ZASCA 223 (30 November 2011):

> "[14] I have already alluded to the fact that the learned judge in the court below relied heavily on the evidence of Dr Holmes, an expert witness. A useful guide to the approach of expert evidence is found in *Michael v*

Linksfield Park Clinic (Pty) Ltd where the court stated:

'... what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning."'

[30] I do not intend dealing with the detail of the expert reports. I have considered the contents of the said reports, in conjunction with the respective heads of argument.

[31] I will, however, shortly refer to the report of the Neurologist, Dr Townsend, dated 11 December 2021. She performed a general examination, a neurological examination, ancillary tests and she also considered the medical records of the minor child, as well as information gathered from an interview with the minor child and with the plaintiff, which interview was conducted in English with a translator.

[32] Dr Townsend stated, *inter a/ia,* the following with regard to the minor child's prognosis:

"10. As more than two years have passed since the accident, S's deficits would be considered stable and permanent as the natural window for spontaneous recovery has lapsed "

Dr Townsend recorded th.e following with regard to the minor child's present disability:

"10.2.1 S has persistent posttraumatic headaches, symptoms of posttraumatic epilepsy and has severe neurobehavioral problems, which include non-epileptic events.n

Dr Townsend concluded as follows regarding the neurological outcome:

"11. ... Although on surface level it might appear he sustained a mild

traumatic brain injury (TB!), the accident injury has resulted in a severe neurobehavioral disorder and posttraumatic epilepsy. These *sequelae* are more in keeping with at least a moderate TBI."

[33] When I apply all the principles I have dealt with above, there is, in my view, no basis upon which I can or should reject the evidence and expert conclusion of Dr Townsend.

[34] There was consequently also no impediment for the other experts to have relied upon the conclusions of Dr Town.send.

[35] In my view it is also evident from the other expert reports, as submitted in paragraph 50 of the plaintiffs replying heads of argument, that the relevant experts *"have set out reasoned conclusions based on certain facts or data (being the medical records, interviews and information received from the minor child and his mother), which are indeed established by their own evidence (their own tests/assessments and investigations completed) or the evidence relied upon by the various other experts involved'.*

[36] I consequently accept their respective expert opinions, including that of Ms Leibowitz, as properly proven by the plaintiff.

[37] The Industrial Psychologist, Ms Leibowitz, having also considered the Educational Psychologist's postulation, concluded as follows in paragraph 7.1.10 of his report with regard to the minor child's <u>pre-accident scenario:</u>

"7.1.10 Had S entered the labour market with a Higher Certificate (NQF level 5), he may have been eligible for roles at around the Paterson 81/82 level (10th percentile, basic only). With time, experience and the acquisition of additional skills (which may be obtained through on the job training), he may have progressed further in his career, and reached his career ceiling by age 45. Upon reaching his career ceiling, he may have been earning at around Paterson C1 levels (median total package). See Appendix B. Thereafter, he

would have received annual inflationary related increases until retirement at age 65."

[38] For purposes of the <u>post-accident scenario,</u> Ms Leibowitz took all of the respective expert reports into consideration and he concluded as follows in paragraphs 7.2.6 - 7.2.1O of his report:

"7.2.6 In view of the above, it would be fair to acknowledge that S has been rendered vulnerable, and that the accident- related sequelae have had significant implications for his educability, future employability, and overall functioning.

7.2.7 It is the writer's opinion that due to the difficulties identified by the various experts, S will face significant challenges in educational and work contexts, and he ultimately will not be able to secure and sustain gainful employment in the open labour market.

7.2.8 With regard to Ms Mattheus' and Ms Fletcher's reference that S would need sheltered employment, the writer notes that relatively few people with disabilities manage to secure this type of employment given the scarcity of sheltered employment factories (SEF) in South Africa. There are also extensive waiting lists for placement in these facilities. Moreover, the writer notes that even if S were fortunate enough to be placed in a sheltered employment facility, people who work in SEF are unable to obtain gainful employment in the open labour market because of their disabilities. Thus, if an individual is eligible for placement in SEF, that individual would be precluded from qualifying for gainful employment.

7.2.9 Having taken all of the available information into consideration, the writer anticipates that in all probability S will not be able to secure and sustain gainful employment, and that for all intents and purposes he will remain largely unemployed."

[39] Based on the aforesaid findings and postulation in the report of Ms Leibowitz, which I have already indicated I accept as properly proven by the plaintiff, the plaintiffs actuary made an actuary calculation based on the aforesaid. He furthermore made provision for a 20% contingency in the said calculation. The calculation amounts to R4 276 988.00.

Determining the contingency to be applied in respect of the future loss of earnings:

[40] It is trite that it is for the court to determine the percentage of contingencies to be applied in a matter such as this.

[41] Contingencies discount the vicissitudes of life and it is a method used to arrive at fair and reasonable compensation. The question of contingencies was dealt with in **Southern Insurance Association Ltd v Bailey N.O.** 1984 (1) SA 98 (A) at 113G and 116G-117A:

> "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.
>
> Where the method of actuarial computation is adopted, it does not mean that the trial Judge is 'tied down by inexorable actuarial calculations'. He has 'a large discretion to award what he considers right' *(per* HOLMES JA in *Legal Assurance Co Ltd v Botes* 1963 (1) SA 608 (A) at 614F). One of the elements in exercising that discretion is the making of a discount for 'contingencies' or the 'vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General*

Insurance Co *Ltd* 1980 (3) SA 105 (A) at 114 - 5. The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case.

It is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable. In dealing with the question of contingencies, WINDEYER J said in the Australian case of Bresatz *v Przibil/a* (1962) 36 ALJR 212 (HCA) at 213:

'It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned... (The) generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse: All 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad."'

[42] In the judgment of **Gillbanks v Sigournay** 1959 (2) SA 11 (N) which was referred to in the plaintiffs heads of argument, the following was stated at 17 E - F in respect of contingencies in an estimation of a plaintiffs claim for loss of earnings:

"In any estimate of a person's loss of earning capacity allowance must be made for all contingencies including the accidents of life and certain deductions must be made from the estimated gross income to allow for unemployment benefits, insurance and so on. These contingencies would include -

(i) a possibility that plaintiff's working life may have been less than sixty-five years;

(ii) a possibility of his death before he reaches the age of sixty-five years;

(iii) the likelihood of his suffering an illness of long duration;

(iv) unemployment;

(v) inflation and deflation;

(vi) alterations in the cost-of-living allowances;

(vii) an accident whilst participating in sport such as hockey or cricket, or at any other time which would affect his earning capacity; and

(viii) any other contingency that might affect his earning capacity."

[43] In the judgment of **Dlamini v Road Accident Fund** (59188/13) [2015] ZAGPPHC 646 (3 September 2015) at para the court dealt with and applied some guidelines referred to by Koch in The Quantum Year Book:

"[30) Koch refers to the following as some of the guidelines as regards contingencies:
'Normal contingencies' as deductions of 5% for past loss and 15% for future loss.
'Sliding scale': 1/2 % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age and relies on Goodall v President Insurance 1978 (1) SA 389.
'Differential contingencies' are commonly applied, that is to say one percentage applied to earnings but for the accident, and a different percentage to earnings having regard to the accident.

[31) When a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to minimize the adverse hazards of life rather than to accept them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should in exercising its discretion lean in favour of the plaintiff as he would not have been placed in

the position where his income would have to be the subject of speculation if the accident had not occurred."

[44] It was submitted on behalf of the plaintiff that a 20% contingency would be just and reasonable in the circumstances, especially when considering the age of the minor child, being 10 years of age. Taking into consideration that the sliding scale of 0,5% per year would amount to a contingency of 17,5 %, it was submitted that 20% would be appropriate and fair.

[45] It was submitted that in the alternative a contingency of 30% can be applied, should I deem it necessary to take into account and make provision for the possibility of the minor child obtaining sheltered employment.

[46] Considering the conclusions of Ms Leibowitz with regard to the improbability of the minor child obtaining sheltered employment, and should he be able to do so, he will on probabilities be unable to obtain gainful employment in the open labour market, considered with the other relevant contingencies and the calculation of sliding scale approach, I deem a contingency of 20% just and fair in the circumstances.

Conclusion on future loss of earnings:

[47] I consequently conclude that the defendant is to pay the plaintiff the amount of R4 276 988.00 in respect of the future loss of earnings of the minor child.

Costs and other outstanding issues:

[48] With regard to the costs of the action since the previous costs order contained in the court order of 30 August 2022, the defendant will be responsible for such costs, considering the outcome of this part of the action.

[49] A detailed draft order was previously placed before me with regard to, *inter*

a/ia, the issue of costs, which I then included in the court order of 30 August 202. I deem it appropriate and in the interest of both parties that a draft order again be prepared and that I be approached in chambers for an order by agreement with regard thereto.

[50] The court order of 30 August 2022 made provision for the creation of a Trust for purposes of the administration of the minor child's estate. In paragraph 6 of the said order it was agreed between the parties that an amount of R200 000.00 of the amount awarded for general damages was to be paid to the plaintiff and would not be subject to the discretion of the Trust.

[51] I was not addressed in the heads of argument regarding a similar type of order with regard to the payment of the award for damages which stands to be made in terms of the present order. I would prefer for the parties to take instructions in this regard and to then also make provision in a draft order for any similar or other agreement, if any, with regard to the manner in which the payment of the award for damages in terms of the present order is to be made.

<u>Order:</u>

The following order is consequently made:

1. The defendant is ordered to pay the plaintiff the amount of R4 276 988.00 (FOUR MILLION TWO HUNDRED AND SEVENTY-SIX THOUSAND NINE HUNDRED AND EIGHTY-EIGHT RAND) in respect of loss of earnings.

2. The aforesaid payment will be made directly to the trust account of the plaintiff's attorneys of record, the details of which are as follows:
Account Holder: Mokoduo Erasmus Davidson Attorneys
Trust Account
Bank and Branch: […]
Account No:[…]
Code:[…]

Ref: […]

3. The parties are granted leave to approach the presiding Judge in Chambers for an order by agreement pertaining to the costs of the action since 30 August 2022 and with regard to any possible further order, if any, pertaining to the arrangements with regard to the payment of the aforesaid amount considering the Trust referred to in the order of 30 August 2022.

C.VAN ZYL, J

On behalf of the plaintiff: Adv. D.C. Hattingh-Boonzaaier
Instructed by: MED Attorneys BLOEMFONTEIN

On behalf of the defendant: Ms C Bornman
Instructed by: The State Attorney BLOEMFONTEIN