

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

Case no: **394/2021**

**Reportable: YES/NO**

**Of Interest to other Judges: YES/NO**

**Circulate to Magistrates: YES/NO**

In the matter between:

**D[...] A[...] R[...]**

**PLAINTIFF**

**Obo B[...] R[...]**

**and**

**ROAD ACCIDENT FUND**

**DEFENDANT**

**JUDGMENT BY:    MOLITSOANE, J**

**HEARD ON:        31 MAY 2023**

**DELIVERED ON:   26 SEPTEMBER 2023**

[1]     A 12-year-old minor child (the minor) was injured in a motor vehicle accident. Her mother and guardian instituted a claim for damages arising out of injuries sustained by the minor. The defendant conceded liability on the basis that it shall pay 100% of the plaintiff's proven or agreed damages. Prior to the hearing before me, the Court had granted an order to the effect that the Defendant is to pay the amount of R800 000 in respect of the Plaintiff's claim for general damages. The Court also

ordered the defendant to furnish the Plaintiff with an undertaking in accordance with section 17(4) of the Road Accident Fund.

[2] On the date of the hearing, the Plaintiff brought an interlocutory application on an unopposed basis in terms of which this Court granted the following relief:

a) That the Plaintiff is granted leave to present her evidence and that of her expert witnesses by way of affidavits in terms of Rule 38(2);

b) That this Court admits into evidence in terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988 the following:

b.a) The Applicant's hospital and clinical records;

b.b) the collateral evidence provided to the applicant's expert witnesses.

[3] The effect of this order is that the defendant waived its right to challenge the evidence of the Plaintiff's expert witnesses and thus accepted it. The parties are further in agreement that the minor child does not have a loss of income/ earning capacity.

[4] Dr Sher, an orthopaedic surgeon also confirmed the injuries as noted by Dr Makua. He confirmed that the head injury was treated conservatively. Dr Townsend, a neurologist indicated that from the available medical records, the minor child had evidence of an injury to her head and her Glasgow Coma Scale Score(GCS) was 15/15. A brain CT scan revealed a comminuted parieto occipital skull fracture and a punctate intracerebral haemorrhage. According to Dr Townsend, after the accident, the minor child complained of posttraumatic headaches, a deterioration in her academic performance at school, and occasional pain in her genital area. Dr

Townsend, ultimately concluded that the minor child sustained moderate primary diffuse brain injury.

[5] Ms Talito Costa, a clinical psychologist opines that the minor child was left with significant neuropsychological impairments that negatively impacted on her cognitive, emotional, and behavioural functions. She further opines that the minor child was left with moderate traumatic brain injury resulting in neurocognitive deficits as a result of the accident. When dealing with the prognosis going forward, she opines that the minor child will not likely be able to return to pre-accident levels of mental functioning due to cognitive deficits and physical pain. She also opines that the minor will struggle to maintain employment in the open labour market in her adult years due to neuropsychological, neurocognitive, neurophysical, and neurophysiological deficits.

[6] Alet Mattheus, an educational psychologist also consulted with the minor child and compiled a report. According to her, the pre accident school reports reflect that she experienced some difficulties with mathematics. She opines that she would probably have been able to complete a Grade 12 level of education with an endorsement and would then have had the capacity to complete a Higher Certificate (NQF Level 5). On the post-accident scenario, she indicates that the educational assessment results reveal that the minor child presents with severe cognitive difficulties that most probably can be ascribed to a combination of the sequelae of the injuries sustained.

[7] Ms Fletcher, an occupational therapist opines that the minor child needs placement in a vocational skill (NQF level 2) which would assist her in seeking sheltered employment. She further opines that the minor would be disadvantaged when competing against individuals without cognitive, visual perceptual or cognitive difficulties in a competitive open labour market.

[8] Mr Lee Leibowitz, an industrial psychologist evaluated the minor child in order to determine the effect and impact of the accident related injuries to predict the

employability of the minor child. He alludes to the fact that when postulating the career paths of minor children, the industrial psychologists are guided by the indication of learning potential as per the opinion of the educational psychologist. In this case he refers to the opinion of Ms Mattheus where she opines that the child would probably be able to complete a Grade 12 level education with an endorsement and would then have had the capacity to complete a Higher Certificate (NQF level 5), if given the opportunity to do so before attempting to enter the open labour market. Mr Leibowitz confirms that there are many uncertainties when dealing with minors, and thus pre-morbid contingencies must be applied.

[9] With reference to the post morbid scenario, Mr Leibowitz opines that the minor child has been negatively affected and that her educability as well as her employment prospects have been negatively affected. According to him it would appear that the accident and related sequelae have rendered the minor child vulnerable and as postulated by the educational psychologist, will not attain the ultimate level of education provided for in the pre-morbid postulation, i.e. a Higher Certificate/ NQF 5 level. He further opines that the child would remain limited to basic unskilled work (Paterson A level), however her ability to function effectively in any work environment has been undermined given the cumulative impact of her injuries. Of further importance the industrial psychologist is of the view that 'realistically speaking, the minor child would likely remain unemployed and would thus be not attain her pre-accident earning level.

[10] Wim Loots, an actuary was instructed to perform actuarial calculations, in the pre-morbid scenario, on the assumption, inter alia, that the minor injured child was to complete Grade 12 and a tertiary qualification with retirement age being 65 years. The actuary was instructed to apply the contingency deduction of 20% on the pre accident scenario. It is submitted on behalf of the minor child that a 20% contingency deduction will be just, fair and reasonable in the circumstances. In the post-morbid scenario, he was instructed that the child was unemployable and he therefore assumed that the child would have nil earnings.

[11] It is submitted on behalf of the defendant that the evidence does not support the notion that the minor child was unemployable rather than she might struggle to find employment. The defendant attacks the findings and conclusions of the plaintiff's experts in the Heads of Argument. By way of illustration, the following is submitted:

i That no EEG's were done to present evidence to the effect that the minor has already developed post-traumatic epilepsy;

ii "There's no evidence that the minor was sent to be assessed by an Optometrist to monitor her visual acuity, as well as her visual tracking, which may be influencing her overall visual perception skill"

[12] The defendant further attached to the Heads of Arguments the statistics in the 2021 report of the Department of Higher Education. The approach sought to be followed by the defendant does not assist it as I illustrate below.

[13] In *M.P.L obo RIM v Road Accident Fund*<sup>1</sup> this court had the opportunity to deal with the status and/ or evidential value of the expert reports accepted into evidence by agreement in terms of Rule 38(2). This Court said the following:

*"[16] As a starting point, the first issue to deal with would be the status of the reports of the plaintiff as accepted by agreement into evidence. Rule 38(2) is instructive in this regard and provides 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: provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness*

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<sup>11</sup> (1371/2019[2023] ZAFSHC (2 August 2023)).

*can be produced, the evidence of such witness shall not be given on affidavit."*

*[17] Mr Pohl SC referred this court to the unreported judgment of this court in ZVS obo SRM v Road Accident Fund<sup>2</sup>. In my view that case is on all fours with the case before me. I align myself with the reasoning in that case and I refer liberally to Van Zyl, J where she says:*

*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 **Esofranki (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 Esofranki closed its case. It was accordingly simply wrong to suggest that Esofranki 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] ...*

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<sup>2</sup> (5489/2019) [2023] ZAFSHC 99(31 March 2023).

[26] ...

[27] There is no procedural impediment to the reception of evidence, by 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)

[18] What is palpably clear in my view is that the defendant chose not to put in issue or cross-examine the experts on whose affidavits the plaintiff relied upon. The affidavits and the evidence contained therein were handed by agreement. Rule 38(2) does not oblige a party to accept the evidence by way of an affidavit. In this case, not only did the defendant allow for the admission of the expert reports in terms of Rule 38(2), but the correctness of the said reports was pertinently accepted.

[19] The only evidence before the court about the issue in dispute is the evidence as led by the plaintiff. Having this in mind, one has to remind oneself that once evidence has been led, it calls for a reply. If no evidence in rebuttal

*is adduced, such evidence becomes conclusive proof and the party giving it discharges the onus<sup>3</sup>.*”

[14] In my view, the remarks as quoted above hold true in the matter before me. The defendant chose to allow the plaintiff to adduce evidence by invoking the procedure as laid out in Rule 38(2). This can clearly be seen when the defendant chose not to oppose the interlocutory application in this regard. There was no obligation on the part of the defendant to accede to this procedure. It is impermissible to accept the evidence to go through only to attack same in the Heads of Argument when the other party can no longer such attacks. Such conduct goes to the heart of the fairness of the procedure in litigation. The defendant had the right and opportunity to dispute the findings of the plaintiff’s experts but chose not to do so. At the end of the day, the expert reports as well as the collateral information as accepted by the defendant is the only evidence before court.

[15] The defendant also attached evidential material in the form of Annexures A and B to the Heads of Argument. It should become clear to the defendant that such approach would clearly be prejudicial to the plaintiff. Firstly, it is introduced only during the address or the filing of the Heads of Argument, the stage at which it cannot be interrogated or disputed by the Plaintiff by way of evidence. Secondly, it should also be clear that while the Heads of Argument deal in a summary manner with the evidence adduced and the applicable law, they (the Heads of Argument) themselves, do not constitute evidence. I agree with the sentiments expressed in *Maboho v Minister of Home Affairs*<sup>4</sup> as referred by Counsel for the Plaintiff in the reply to the defendants Heads of Argument. The court in *Maboho* said the following:

“Argument is not evidence and it is not given under oath. It is merely persuasive comment by the parties or legal representatives with regard to questions of fact or law. Argument does not constitute evidence, and cannot replace evidence.”

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<sup>3</sup> Ex parte Minister of Justice: In re R v Jacobson and Levy 1931 AD 466 at 478.

<sup>4</sup> 2011 JDR 104 (LT) at para 12.

[16] The defendant cannot thus impermissibly '*adduce evidence*' in the Heads of Argument to the prejudice of the plaintiff. Absent any evidence to rebut the evidence of the plaintiff, the only evidence this Court has to grapple with, is that of the plaintiff. Seemingly based on the attack in the Heads of Argument, the defendant is of the view that a contingency of 50% in '**the but for**' scenario should be applied and 75% in '**the having regard to**' scenario.

[17] It is settled that a trial Court has a wide discretion to award what it considers fair and adequate compensation to an injured claimant.

[18] The difficulty a Judge has in the application for the proper contingency to be applied cannot be over-emphasised. The simple reason is that the future is uncertain and a Judge has no benefit of a '*crystal ball to look into the future*' and come to a decision. The contingencies to be applied is not merely a matter of mathematical calculation. The uncontested evidence is that according to Dr Townsend, the child has an increased risk of developing late post traumatic epilepsy. The attack on this finding by the defendant holds no water where it is said the Plaintiff led no evidence of EEG's performed. Had the defendant not allowed this kind of evidence, then such questions would have been put to the witness and I suppose the bases of the finding properly explained. The attack on the finding of the neurologist is unfair and has no merit.

[19] I take note of the evidence that the minor child struggled with mathematics and English. This, in my view cannot be an indicator that she will not attain Grade 12 or even a tertiary education. The converse may on the other hand hold true if we accept the assumption aforementioned, namely, the mere fact that a child passes mathematics and English well does not necessarily mean that, such a child will pass Grade 12 or even obtain a tertiary qualification. The uncontested evidence by Ms Mattheus regarding the minor is that "the educational results reveal that she presents with severe cognitive difficulties that most probably can be ascribed to the combination of the sequelae of the injuries sustained." It is common cause that the

minor child suffered no loss of earnings. The Industrial Psychologist, after having considered the reports of other experts, opines that the minor child will not meet her pre- accident earning level.

[20] I however agree with the submissions on behalf the defendant that the evidence does not suggest that the minor child is not employable. In my view, the experts hold the view that but for the accident, a possibility existed that the child could get employment having passed grade 12 with a possibility of gaining a Higher Certificate at tertiary level, but that has been rendered an illusion due to the injuries sustained and their sequelae.

[21] I am unable to comprehend why the actuary was instructed to perform calculations only on the basis that the minor child was unemployable. The opinions of the Plaintiff's own experts hold otherwise. The Plaintiff's educational psychologist, on whose opinion, the other experts rely upon is that the minor child "needs placement in a Vocational School where she will be able to attain a vocational skill (NQF level 2) which would assist her in seeking sheltered employment. Her Occupational therapist opines that should the minor child be placed at the Vocational school she would be able to obtain a (NQF 2). She further agrees with the educational psychologist that this would assist her in seeking sheltered employment.

[22] With reference to the future loss of earnings, the Industrial psychologist holds the view that the minor child will not meet her pre-accident level. He goes on to say that should this Court accept the opinions of the educational psychologist and occupational psychologist, then in that event he also opines that the minor child would be dependent on sheltered employment. He goes on to say that it is 'accepted that there are very limited opportunities for gaining entry in a sheltered work environment. Without any inkling of the evidence to back up his opinion he holds the view that realistically speaking the child would likely remain largely unemployed. In my view, that opinion runs against the opinions of the educational psychologist and the occupational therapist on whose opinion he relies upon. If the opinion is based on the fact that there are limited opportunities for gaining entry on sheltered work,

then in that case, there is no evidence to back up the opinion. The end result is that, the supposition that the minor child is unemployable stands to be rejected. I hold the view that but for the accident the child is employable, albeit as a vulnerable individual who cannot compete equally in her level of employment.

[23] During the preparation of this judgment I requested the Plaintiff to request her actuary to perform other calculations, based on the assumption that the Plaintiff was employable and could be accommodated on the sheltered environment. In the first calculations (where it is assumed that the child would be unemployable), the loss of earnings had the accident not occurred, was calculated as of 1 August 2022 and it amounted to R5 902 080.00. The actuary applied 20 percent contingencies on the pre-accident scenario and nil percentage on the post-accident scenario. In the second calculations (where it is assumed the minor child will find employment in the sheltered environment) the loss of earnings had the accident not occurred was of 1 November 2023. It was calculated at R 6 637 539.00 with 20% contingencies to be applied on the pre-morbid scenario and 40% on the post morbid scenario

[24] I am of the view that the 20% contingency to be applied as suggested by the plaintiff is appropriate. I also agree that the 40 % contingencies applied on the post-morbid scenario is appropriate. The evidence led does not suggest that the minor child is not employable. It is also clear that she also had issues with schooling, like language barriers even before the accident. On the other hand, the contingencies suggested by the defendant are extremely high and suggested without any basis having regard to the remarks I made above. Accordingly, the damages awarded to the minor child are computed as follows:

|                                    | FUTURE         |
|------------------------------------|----------------|
| Earnings had accident not happened | R 6 637 539.00 |
| Less: Contingencies( 20%)          | R 1 327 508.00 |
| Subtotal                           | R 5 310 031.00 |
| Earnings having regard to accident | R 2 463 826.00 |
| Less Contingencies( 45%)           | R 1 108 721.70 |

|                  |                |
|------------------|----------------|
| Subtotal         | R 985 530      |
| LOSS OF EARNINGS | R 3 831 735.00 |

## ORDER

1. The Defendant is to pay the Plaintiff the sum of **R3 831 735.00( Three million eight hundred and thirty –one thousand seven hundred and thirty-five Rands)** in respect of the Plaintiff's claim for loss of income.

2. Payment of the capital amount referred to in paragraph 1 above, will be paid by the Defendant directly into the trust account of the Plaintiff's Attorneys of record, Mokoduo, Erasmus, and Davidson Attorneys, for the benefit of the Minor, within 180 days from the date of this order, the details are as follows:

|                         |                                                         |
|-------------------------|---------------------------------------------------------|
| <b>Holder:</b>          | <b>Mokoduo Erasmus Davidson Attorneys Trust Account</b> |
| <b>Bank and Branch:</b> | <b>First National Bank (FNB), Rosebank</b>              |
| <b>Account number:</b>  | <b>6[...]</b>                                           |
| <b>Code:</b>            | <b>253305</b>                                           |
| <b>Ref:</b>             | <b>R80</b>                                              |

3. Interest *a tempore-morae* shall be calculated in accordance with the Prescribed Rate of interest Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund Act 56 of 1996, one hundred and eighty (180) days **from the date of this order.**

4. The Defendant is to pay the Plaintiff's agreed or taxed High Court costs as between party and party of the action, trial costs and any further costs incurred up until and including the date on which this order is made, such costs to include inter alia:

4.1. The costs attendant upon the obtaining of payment of the capital

amount referred to in paragraph 1 above;

4.2. The preparation, reservation, and attendance fees of counsel, up until 31 May 2023, and including fees of counsel for written heads of argument.

4.3. The qualifying fees, if any, as may be agreed or allowed by the Taxing Master of the plaintiff's experts, including but not limited to the Plaintiff's reports and addendum reports inter alia by: -

- 4.3.1. Dr Makua (General Practitioner);
- 4.3.2. Dr Scher (Orthopaedic Surgeon);
- 4.3.3. Dr Taniel Townsend (Neurologist);
- 4.3.4. Talita da Costa (Clinical Psychologist);
- 4.3.5. Alet Mattheus (Educational Psychologist);
- 4.3.6. Sharilee Fletcher (Occupational Therapist);
- 4.3.7. Lee Leibowitz (Industrial Psychologist);
- 4.3.8. Wim Loots (Actuary).

5. The Plaintiff's attorneys shall serve the notice of taxation on the Defendant's attorneys and shall allow the Defendant 180 (one hundred and eighty) days within which to make payment of such costs.

6. The party and party costs, as agreed or taxed referred to in par. 4 above, shall be paid by the Defendant directly into the trust account of Mokoduo, Erasmus, Davidson Attorneys for the benefit of the Minor / Plaintiff.

7. It is recorded that in the order dated 23<sup>rd</sup> of November 2022 by this Court, it was provided that a trust be established for the benefit for the minor child, B[...] R[...].

8. Mokoduo, Erasmus, Davidson Attorneys will invest the capital amount

less the reasonable attorney and client fees and disbursements in terms of Section 86(4) of the Legal Practice Act 28 of 2014, with First National Bank, Rosebank, for the benefit of the Minor, the interest thereon, likewise accruing for the benefit of the Minor which investment shall be utilized as may be directed by the trustee of the Trust.

9. The Plaintiff has entered a Contingency Fee Agreement with her Attorneys.

**P. E MOLITSOANE, J**

On behalf of the Plaintiff: Adv. Ilze Sander  
Instructed by: MED Attorneys  
BLOEMFONTEIN

On behalf of the Defendant: Ms Johandi Gouws  
Instructed by: Road Accident Fund  
BLOEMFONTEIN