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

CASE NO.: 46082/2018

REPORTABLE: **NO**

OF INTEREST TO OTHER JUDGES: **NO**

REVISED: **NO**

23 September 2022

In the matter between:

P [....], D [....] B [....] obo

Plaintiff

P [....], K [....]

and

ROAD ACCIDENT FUND

Defendant

Heard: 23 July 2022

Delivered: 23 September 2022

JUDGMENT

FORD AJ

Introduction

[1] This judgment concludes the dispute between D [....] B [....] K [....] 1 P [....] acting on behalf of K [....] P [....] (“the plaintiff”) and the Road Accident Fund (“the

defendant”). The plaintiff was represented by Mr. Van Den Barselaar and Ms. Moyo represented the defendant.

[2] The matter was finalised by way of oral submissions made by the parties’ respective counsel. It was agreed that the expert reports tendered by the plaintiff will form the evidence, without requiring the experts to physically testify. This raises an obvious and important question, namely; can parties to a dispute agree to have expert reports admitted as evidence without requiring such experts to testify (whether under oath by way of an affidavit or physically). I will deal with this question below.

Brief factual background

[3] On 22 March 2017, at approximately 17h00, along Crown Road, Fordsburg, K [...] P [...], a minor, then aged 6 (“the minor”), was involved in a motor vehicle collision. He was a pedestrian. He suffered various injuries directly attributable to the accident. The plaintiff instituted a claim for damages against the defendant, in her personal as well as representative capacities as mother and natural guardian of the minor.

[4] On 11 December 2018, the plaintiff instituted action against the defendant in this court, for damages suffered by the minor in the abovementioned collision. The defendant entered an appearance to defend the action and pursuant thereto, on 10 April 2019, served its plea.

[5] The issue of liability became settled between the parties on 5 February 2019, by way of a formal offer which the plaintiff accepted. The terms being that the plaintiff was to receive 100% of her agreed or proven damages as compensation.

[6] The issue of general damages, and future medical expenses became similarly settled between the parties on the eve of the trial. In respect of general damages, the parties settled that head of damages in the amount of R900 000.00 (nine hundred thousand rand) and agreed that a section 17(4)(a) undertaking be issued to cover the plaintiff’s future medical expenses.

[7] The only outstanding issue in dispute is the plaintiff's award for loss of earnings, having particular regard to the minor's pre and post -accident career potential, by applying appropriate contingency deductions.

RAF litigation

[8] The RAF (in this section "the Fund") is created in terms of section 2 of the Act¹. The object of the Fund is the payment of compensation in accordance with the Act for loss or damage wrongfully caused by the driving of motor vehicles². RAF litigation proceeds, in summary, on the basis set out below.

[9] Claims for compensation against the Fund arises in principally two instances, firstly where the injury or death of a person has been caused by the negligent driving of a vehicle by the owner of an unidentified vehicle or the driver of an unidentified vehicle or secondly where the injury or death of a person has been caused by the negligent driving of a vehicle by the owner of an identified vehicle or a driver of an identified vehicle³.

[10] In a claim for compensation arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established, the Fund is obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic of South Africa. The Fund is also obliged to pay compensation, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee⁴.

[11] Where a claim for compensation arises in circumstances provided for under section 17(1) (a) or (b) in respect of a claim that includes a claim for the costs of the

¹ RAF Act 56 of 1996 (section 2)

² Ibid (section3)

³ Ibid section 17(1)(a)

⁴ Ibid section 17(1)(b)

future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate the third party in respect of the said costs after the costs have been incurred and on proof thereof⁵.

[12] Similarly, where a claim for compensation arises in circumstances provided for under section 17(1) (a) or (b) in respect of a claim for future loss of income or support, the Fund or an agent shall be entitled, after furnishing the third party in question with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to pay the amount payable by it or the agent in respect of the said loss, by instalments in arrears, as agreed upon⁶.

[13] A party seeking to institute action against the Fund must lodge a claim in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or the owner thereof has been established, within a period of three years from the date upon which the cause of action arose⁷. Prescription shall however not run, in respect of claims relating to minors, any person detained as a patient in terms of any mental health legislation; or a person under curatorship⁸.

[14] A party seeking to institute action against the Fund must lodge a claim in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of neither the driver nor the owner thereof has been established, within a period of two years from the date upon which the cause of action arose. A claim arising in circumstances contemplated above, which has been lodged with the Fund shall not prescribe before the expiry of a period of five years from the date on which the cause of action arose⁹.

⁵ Ibid section 17(4)(a)

⁶ Ibid section 17(4)(b)

⁷ Ibid section 23(1)

⁸ Ibid section 23 (1)(a)-(c)

⁹ Ibid section, 23(3)

[15] Summons can however only be issued against the Fund if a period of 120 days had lapsed, from the date that the claim¹⁰ was lodged with the Fund or the Fund or the agent repudiates in writing liability for the claim before the expiry of the said period. The third party may at any time after such repudiation serve summons on the Fund or the agent, as the case may be. Importantly, no claim shall be enforceable by legal proceedings commenced by a summons served on the Fund or an agent before the expiry of a period of 120 days from the date on which the claim was sent or delivered by hand to the Fund or the agent or before all requirements contemplated in section 19(f) have been complied with¹¹. In terms of the aforementioned section, a third party is required to submit to the Fund or such agent, together with his or her claim form as prescribed or within a reasonable period thereafter and if he or she is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out; or to furnish the Fund or such agent with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof¹².

[16] In order to succeed with a claim against the Fund in circumstances contemplated above, and where liability is at issue, a third party must demonstrate 1% (one per cent) negligence on the part of the insured driver. Once negligence has been established, by way of admission of liability, or trial on the merits, the third party can adjudicate his claim for compensation. This need not always be a two-stage process. It has however been, in circumstances warranting such, convenient for our courts to first deal with the issue of liability and consequent thereupon, determine the issue pertaining to the quantum of damages.

Delictual action against the RAF

[17] In the recent decision of *Gumede v Road Accident Fund*¹³ the court, Bhoolah AJ, concisely set out the requirements that a litigant must pass in order to establish a

¹⁰ RAF 1 and RAF 4

¹¹ RAF Act 56 of 1996, section 24(6)(a)-(c)

¹² Ibid section 19(f)

¹³ [2021] ZAGPPHC 568 (24 August 2021) unreported decision

delict against the Fund. The court held as follows, with reference to liability as contemplated in Regulation 2(d), framed under section 26 of the Act:

23. By an analysis of the above section, liability of the defendant is founded upon the principles of delict. Six jurisdictional facts will need to be proved by the plaintiff in order for the defendant to be liable in each claim in respect of the Act and the Amendment Act added a seventh jurisdictional fact. These jurisdictional facts are as follows:

23.1 Conduct: Conduct refers to an action or a motion, which is limited to the driving of a motor vehicle, or other wrongful act as committed by certain persons within the parameters of the RAF.

23.2 Wrongfulness: Wrongfulness is presumed when an injury to a person or property has been proved by all the other delictual elements herein. (Cape Empowerment Trust Ltd v Fisher Hoffman Sithole (200/11) [2013] ZASCA 16 (20 March 2013) para 21)

23.3 Fault: Fault encompasses both intention and negligence on the part of the insured driver. It follows that if negligence suffices as a form of fault, that intent will also give rise to liability (Van der Merwe v Road Accident Fund and Another [2006] ZACC 4; 2006 (4) SA 230 (CC)).

23.4 Causality: The plaintiff must allege and prove the causal connection between the negligent act relied upon and the damages suffered. The requirement that there must be a causal link between the conduct, the resulting injury or death and consequent damage is expressed by the phrase "caused by or arising from" as it is found in section 17 of RAF Amendment Act. Grove v Road Accident Fund [2017] ZAGPPHC 757 (28 November 2017). In determining the causal nexus between the negligent driving of the driver of the insured vehicle and the injuries sustained by the plaintiff, Van Oosten J, in Miller v

Road Accident Fund [1999] 4 All SA 560 (W), at p 565(i), formulated the inquiry as follows:

“Two distinct enquiries arise, which were formulated by Corbett CJ in International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) at 700E–I as follows:

“The first is a factual one and relates to the question as to whether defendant’s wrongful act was a cause of the plaintiff’s loss. This has been referred to as ‘factual causation’. The enquiry as to factual causation is generally conducted by applying the so-called ‘but-for’ test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff’s loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff’s loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called ‘legal causation’.”

23.5 Damages: Only damages for bodily injury or loss of maintenance are recoverable under the Road Accident Fund Amendment Act (Amendment

Act 19 of 2005) subject to the limitations of section 17 of Amendment Act. The damages sustained must arise from the driving of a driver of the motor vehicle who was negligent. The heads of damages that can be claimed as compensation by the third party in respect of damages suffered as the result of bodily injuries are usually past medical expenses, future medical expenses, past loss of earnings, future loss of earnings and general damages. The issue of quantum of damages is not for determination today and is to be postponed sine die.

23.6 The damage must occur at any place within the Republic of South Africa.

23.7 General Damages only for Serious Injuries: The Amendment Act added a seventh element to be proved: a third party will only be compensated for non-pecuniary loss (general damages) for a serious injury.

[18] For reasons, that will become clearer below, I am satisfied that the plaintiff has succeeded in proving that the defendant is liable for each claim against it in respect of the Act and the Amendment Act. I will for completeness' sake address the issue of general damages and loss of earnings below. But before doing so, I intend first to deal with the critical question, namely whether expert reports *per se* can, by agreement, constitute evidence.

Factors to consider when admitting plaintiff's uncontested expert reports without requiring the witnesses to testify

[19] The defendant did not file any expert reports in this matter. I was advised by counsel for the defendant, Ms. Moyo, that the defendant does not contest the plaintiff's expert reports and that the defendant will argue its case on the plaintiff's expert reports. I was advised by the plaintiff's counsel, Mr. Van Den Barselaar, that there is an agreement between the parties that the expert reports will constitute the entire evidence, principally, on account of the fact that the reports are uncontested. Written confirmation of the aforementioned position was also tendered by the parties.

[20] In action proceedings evidence is placed before the court by way of a witness' testimony. In application proceedings, the evidence is placed before the court by way of an affidavit. It does happen at times, like in the present instance before me, that it is both convenient and expedient to have the report by an expert, where it is uncontested, admitted as the evidence, as though given by the expert in open court, without requiring the expert to testify. This approach does not detract from the evidentiary value that a court places on the evidence admitted in that manner. I am persuaded that in action proceedings, an uncontested expert report can be admitted as evidence without a party having to call the expert to testify if the following conditions are met:

- (a) The parties to the dispute admit the evidence contained in the uncontested reports by agreement or in a stated case;
- (b) The court, after considering the following factors, is satisfied that it would be expedient to admit the evidence without requiring the witness to testify in person, namely:
 - (i) whether any party to the dispute will be prejudiced by the admission of the uncontested reports; and
 - (ii) whether the court's inherent prerogative to treat and consider the evidence contained in the reports, as if it had been delivered in open court, remains intact.

[21] In applying the aforementioned principles to the current matter, I conclude that:

- (a) There has been agreement between the parties to admit the plaintiff's uncontested reports as evidence;
- (b) I am satisfied that it is expedient to admit the plaintiff's expert reports as evidence, having regard to the fact that our courts operate with severely constrained resources and it seems rather superfluous to have seven

experts come and testify in open court simply to restate their respective uncontested opinions. Such an approach to tendering evidence is not only monumentally impractical it is also inconvenient and costly. I have further considered the fact that:

(i) neither party has claimed any prejudice occasioned by the admission of the uncontested reports as evidence; and

(ii) the court's inherent prerogative to treat and consider the evidence contained in the reports, as if it had been delivered in open court, remains intact. In this regard the court will deal with and consider the evidence contained in the expert reports in exactly the same manner it would have, had the evidence been delivered in open court.

General damages

[22] General damages refer to the damages awarded to compensate a plaintiff for any harm suffered as a result of injuries sustained. It includes damages for pain and suffering, disfigurement, emotional harm, permanent disability and loss of amenities of life.

[23] The defendant's liability to compensate third parties for general damages, is statutorily circumscribed. From 1 August 2008¹⁴, the limitation applies in relation to claims of third parties who sustained serious injuries. In RAF litigation, it is only the defendant who is eligible to determine whether injuries are serious or not. If the injuries are not determined as serious, the third party cannot claim compensation in respect of general damages.

[24] Our RAF legislation requires a medical determination of the seriousness of injuries sustained by a third party in motor vehicle accidents in order to determine whether that party is entitled to claim for general damages. Such medical assessments are submitted in the form RAF 4 Serious Injury Assessment Reports. A

¹⁴ Road Accident Fund (RAF) Amendment Regulations, 2008

claimant who disputes a RAF finding on the seriousness of an injury may lodge an appeal with the Health Professions Council of South Africa (“HPSCA”). The contested claim will accordingly be referred to the Appeal Tribunal for final determination. In making a decision as to the seriousness of an injury, legislation prescribes two instruments that are to be employed in making a determination, namely the American Medical Association (AMA) Guides (6th edition) and the Narrative Test.

[25] The AMA Guides provide criteria for determining an injured person’s so-called “Whole Person Impairment” (WPI). WPI is expressed as a percentage of the body. The Minister of Transport sets the threshold percentage for determining serious injury at 30%. What this means, in practical terms, is that a claimant must be assessed as being 30% WPI in order to qualify for an award of general damages.

[26] The Narrative Test is a medical instrument prescribed by the Regulations forming part of the RAF Amendment Act, 19 of 2005, which amends the RAF Act 56, 1996. The Narrative Test stands apart from the American Medical AMA ‘Guides. The RAF Amendment Regulations do not provide any guidelines pertaining to the structure, content or criteria of the Narrative Test. This guideline is published by the HPCSA’s Appeal Tribunal as a guideline to the performance of the Narrative Test, as well as the required structure, content and criteria thereof.

[27] In the *HPCSA Serious Injury Narrative Test Guidelines*, published in the South African Medical Journal, Dr. H.J. Edeling *et al*¹⁵ addresses the question of the need for the Narrative Test and matters incidental thereto as set out below.

[28] The learned authors explain that the need for the Narrative Test arises in cases where the injuries sustained by a claimant are found to have resulted in less than 30% Whole Person Impairment (WPI) according to the method of the AMA Guides but the medical practitioner completing the RAF 4 Serious Injury Assessment Report, nonetheless considers the injuries as serious. The authors explain that there

¹⁵ SAMJ Vol 103, No 10 (2013): *HPCSA Serious Injury Narrative Test guidelines*, published in the South African Medical Journal, Drs. H.J. Edeling, (Neuro), Dr. N B Mabuya (Occ Med) Dr. P Engelbrecht (Ort), Dr. K D Rosman (Neuro) and Dr. D A Birrell (Edin)

are two reasons why cases that have been regarded as serious by HPCSA Appeal Tribunals, despite those cases having less than 30% WPI according to the methodology applied in terms of the AMA Guides, namely:

(a) The failure of the AMA Guides to take the 'circumstances of the third party' into account properly or effectively; and

(b) Inherent shortcomings of the AMA Guides, especially with respect to estimating the life-altering impact of injuries that have resulted in more abstract and subjective impairments and suffering¹⁶.

[29] In an earlier work¹⁷ Edeling expressed himself as follows in respect of the Narrative Test, which sentiments, I completely align myself with:

After the completion of an assessment, where the result is less than a 30 per cent WPI, the claimant may well be able to show that he or she qualifies for compensation by the RAF in terms of the narrative test.

In Mngomezulu v RAF (Unreported case no 4643/2010, Gauteng High Court) the court held that with regard to assessing the injury after an accident as serious in terms of the amendments to the RAF Act 1996, the two alternatives tests that can be used are: the

"whole person impairment test as per Regulation 3(1)(b)(ii) and the so-called narrative test as per Regulation 3 (1)(b)(ii)(aa)-(dd)".

The narrative test is a safety net providing an alternative assessment where the AMA Guides would not result in a finding of serious injury according to the prescription of the Regulations.

¹⁶ Slabbert M, Edeling HJ. The Road Accident Fund and serious injuries: The Narrative Test. Potchefstroom Electronic Law Journal 2012;15(2). [<http://dx.doi.org/10.4314/pelj.v15i2.10>]

¹⁷ The Road Accident Fund and serious injuries: the narrative test [2012] PER 23 par 3

In the Mngomezulu case the plaintiff was involved in a hit-and-run motor vehicle accident, as a result of which he suffered injuries. He instituted action against the RAF. The basis for the plaintiff's claim was for general damages via the narrative test in terms of Regulation 3(1)(b)(iii)(aa)-(cc). Various reports and RAF 4 forms had been completed by medical specialists confirming that the injuries he sustained were serious as per the narrative test. The RAF opposed the action.

The RAF contended that the medical practitioners had not completed the RAF 4 form correctly in that they failed to assign a "whole person impairment" rating and instead chose to rely on the narrative test, yet the court pointed out that there was nothing in the Regulations which prevented the plaintiff from being assessed in terms of the narrative test. Either of these tests may be used.

In Daniels and 2 Others v RAF (Unreported case no 8853/2010, Western Cape High Court), a woman was struck down by a motor vehicle and sustained severe injuries to her lower leg. As a result of this she was unable to resume her work as her previous employment required her to run about physically. She claimed her injuries were serious within the meaning of section 17(1) of the RAF Act and she claimed compensation for general damages. She could not afford to pay the R7 000 required for a serious injury assessment report and submitted a request to the Fund for financial assistance. The Fund refused this request and contended that it was liable to pay the costs of a serious injury assessment only in the event that the claimant had sustained serious injuries that resulted in not less than 30 per cent WPI. The Fund did not consider the narrative test adequate to ascertain the seriousness, or lack thereof of the injury.

In the court papers the Fund explained that they will assist a person financially only if there is a prima facie indication of a serious injury. It further stated that the narrative test is there only to cover the isolated and rare cases where the whole person impairment test fails. It is thus a fallback position.

The court stated that the narrative test falls to be applied as an integral part of any serious injury assessment and this is indeed confirmed by the contents of part 5 of the RAF 4 form, which gives effect to regulation 3(1)(b)(iii). There is nothing in the Regulations which suggest that the narrative test should be applied only in "rare and isolated cases". The decision by the Fund to decline the applicant's request in terms of regulation 3(2)(b) was set aside.

The whole person impairment test is largely based on the table of activities of daily living, which includes basic activities such as grooming, toileting, feeding, dressing and bathing, as well as advanced activities such as driving a car, sexual function, money management, shopping, housework and moderate activities.

It is submitted that a person should be tested not only against activities of daily living when using the narrative test, but also according to the roles he or she plays in life. By way of example, life roles include being a mother, a husband, a friend, an accountant, a professor, a politician, a sportsperson and so on. For example, if an academic or a professional practitioner with a pre-accident IQ of 130 has been reduced to an IQ of 115 by a head injury, the impairment may seem minor as many people excel on an IQ of 115. However, for the head-injured academic or professional practitioner the injury results in serious disability as the loss of intellectual capacity renders him or her unable to work or engage in other life roles as before. In many cases the result is that the individual suffers permanent and distressing losses of status, dignity and respect.

[30] In order to determine general damages, the court has regard to the injuries that the plaintiff sustained and the sequelae. In the present matter, the minor sustained the following injuries:

(a) A moderate primary diffuse brain injury (TBI) with focal damage to the left temporal lobe¹⁸;

(b) A head injury with concussion as well as fractures to the skull and facial bones;

(c) A moderate brain injury.

[31] The plaintiff's uncontested reports list a number of neuro-cognitive *sequelae* flowing from the injuries that the minor sustained. I will address these at length when I comment on the individual expert reports.

[32] On the evidence before me it is uncontested that the minor suffered a serious injury and is therefore entitled to compensation for general damages. In respect of general damages, the plaintiff relied on the following authorities to justify the compensation for the minor. *Ngubeni v RAF*¹⁹ and *Penane v RAF*²⁰.

[33] *Ngubeni* concerned a 13-year old minor who sustained a head injury and orthopaedic injuries. The sequelae of the brain injury were of a moderate to severe nature, with likelihood of the minor developing post-manic epilepsy. The court awarded R600 000.00 (six hundred thousand rand) compensation which according to the plaintiff's counsel amounts to a present-day value of R829 063.00 (eight hundred and twenty-nine thousand and sixty-three rand).

[34] *Penane* concerned circumstances where a minor child sustained a brain injury with neuropsychological and neuropsychiatric disorders, which had stabilized and become permanent, with resultant educational and employment disability. Cook AJ awarded a sum of R 450 000 in respect of the minor child's general damages pertaining to the brain injury, which renders a present-day value of approximately R 1 007 956.

¹⁸ Dr. Townsend's report p5-6, par9.1

¹⁹ (2016) ZAGPJHC 349 (24 November 2016P)

²⁰ Unreported decision 06/7702 1 August 2007 (Johannesburg)

[35] In light of the above, I have no hesitation in endorsing the amount of R900 000 as agreed between the parties for appropriate compensation for general damages suffered by the plaintiff.

Loss of earnings

Dr Taniel Townsend

[36] Dr Taniel Townsend (Neurologist) opines, drawing on the medical records, that the minor was seen by a doctor at 19h10 on 22 March 2017 who documented that he had been hit by a car at approximately 18h00 and had, according to bystanders, lost consciousness for 2-3 minutes. He stated further that the doctor noted that the minor had initially been taken to Garden City Hospital where he had vomited twice. On examination, the minor's Glasgow Coma Scale score (GCS) was 15/15 and presented a swelling on the left side of his forehead was noted. A CT brain scan was done which indicated skull fractures and a left temporal lobe contusion. The minor was seen by a Neurosurgeon at 18h00 (on 23 March 2017) who advised on conservative management with analgesia and antiepileptic prophylaxis. The minor was discharged 4 days later.

[37] Immediately after the accident, the minor presented the following problems. Headaches that started when he was in hospital. These occur once a week which his mom conservatively treats with Panados. Townsend graded these as being in the 6/10 severity on the Pain Rating Scale. The headaches are located temporally and resolve once the minor has taken pain medication. According to Townsend, the minor's concentration is not as good as it was, and his teachers have complained about it at school. There were however no similar complaints prior to the accident. The minor's mood has changed and he is easily angered. He sometimes screams and is quite emotional. The minor enjoys being with his friends but cannot spend significant amounts of time with them as he gets irritated and fights with them. Notably, the minor's sleep is sometimes disrupted by nightmares.

[38] Townsend explains, by way of the neurological examination done on the minor, that he is neurologically largely intact. Notably that the minor did not elicit any

focal neurological deficit. And more importantly that formal neuropsychological testing should be done by an Educational Psychologist.

[39] Townsend opined in summary that, the minor sustained a moderate primary diffuse brain injury with focal damage to the left temporal lobe of his brain. His CT brain scan reported skull fractures and a temporal lobe contusion. He explains that a traumatic brain injury (TBI) is defined as a traumatically induced structural injury and/or physiological disruption of brain function as a result of an external force and is indicated by new onset or worsening of at least one of the following clinical signs immediately following the event:

- (a) Any period of loss of or a decreased level of consciousness ;
- (b) Any loss of memory for events immediately before or after the injury (posttraumatic amnesia);
- (c) Any alteration in mental state at the time of the injury (e.g., confusion, disorientation, slowed thinking, alteration of consciousness/mental state); and
- (d) Neurological deficits (e.g., weakness, loss of balance, change in vision, praxis, paresis/plegia, sensory loss, aphasia) that may or may not be transient

[40] Due to the nature of the head injury, Townsend believes that the minor is at increased risk for developing late posttraumatic epilepsy, which risk he estimates to be in the region of 5%.

Ms. Talita Da Costa

[41] Ms. Talita Da Costa is a Clinical Psychologist with a special interest in neuropsychology. She stated that the minor's performance on the neuropsychological testing revealed the neuropsychological difficulties with:

- (a) Auditory Attention and Concentration;
- (b) Working Memory;
- (c) Slow psychomotor processing;
- (d) Visual and perceptual difficulties;
- (e) Difficulties with sustained attention and concentration;
- (f) Poor auditory short-and-long term;
- (g) Perceptual and abstract reasoning;
- (h) Planning, organizing, and problem solving on complex tasks;
- (i) Difficulty with auditory attention and auditory memory deficits for newly learned factual information;
- (j) Difficulties with verbal fluency and verbal concept formation;
- (k) Presence of emotional and behavioural difficulties.

[42] She found that the following additional factors have influenced the minor's performance:

- (a) Family/Educational/Occupational History: The minor's parents both have tertiary education. He has one sibling who is in grade 3 with no reported difficulties. His educational and familial history indicates an average level of intellectual functioning pre-accident;
- (b) Possible head injury resulting in cognitive deficits: The minor must have sustained a brain injury of some extent as is evidenced by cognitive deficits mentioned in her report.
- (c) Possible head injury resulting in neuropsychological and neuro-behavioural difficulties are indicated by the facts that following the accident, the minor appears to have developed behavioural and emotional difficulties secondary to the head injury.
- (d) Pre-existing medical and psychological conditions: No significant medical or psychological difficulties were reported.

[43] She states in summary that the minor has been left with severe neuropsychological impairments that negatively impact on his cognitive, emotional, and behavioural functioning. Further that the minor's behavioural and psychological difficulties are likely to worsen as he grows older due to his noticeable difficulties. If untreated, his emotional and psychological wellbeing will deteriorate affecting his overall personal, educational, and social functioning.

[44] She noted further that it is most unfortunate that head injuries are very common with children and some neurologic deficits after a head trauma may not manifest for many years. Frontal lobe functions, for example, so she explained, develop relatively late in a child's growth, so that injury to the frontal lobes may not become apparent until the child reaches adolescence as higher-level reasoning develops. Since the frontal lobes control social interactions and interpersonal skills, and executive functioning, early childhood brain damage may not manifest until such frontal lobe skills are called into play later in development. However, behavioural changes and level of aggression are taken into account regarding the functions of the frontal lobes. This appears to be the case with the minor who is currently presenting with behavioural and emotional difficulties. Likewise, injury to reading and writing centers in the brain may not become apparent until the child reaches school age and shows signs of delayed reading and writing skills. She concludes that the minor likely sustained a moderate traumatic brain injury resulting in neurocognitive deficits as a result of the accident.

Ms. Alet Mattheus

[45] Ms. Alet Mattheus is an Educational Psychologist. She assessed the minor's pre-accident potential having regard to his developmental history, informal and formal schooling reports, family circumstances, parental educational levels and/or patterns and employment history of parents and/or siblings. She noted that no developmental difficulties or difficulties during the minor's mother's pregnancy or development were reported. The minor appears to have been a healthy boy prior to the accident. It is noted that the minor's biological parents both completed tertiary training (degrees). He has one sibling who was in Grade 3 at the time of the assessment.

[46] The minor started pre-school at the age of 3 years and 10 months at S [...] B [...] 1 S [...] 1 M [...] school in 2014. In 2016 he completed Grade R at H [...] School. At the time of the accident, he was in Grade 1 at [...] B [...] 2 Primary School. According to the school reports made available, the minor was coping well with academic demands. Mattheus is of the view that the minor would probably have been able to complete at least a Grade 12 level of education with an endorsement and would then have had the capacity to complete either, a Diploma/Degree (NQF level 6/7) before attempting to enter the open labour market.

[47] Post-accident, she notes, having regard to the other experts' opinions regarding the nature and severity of the injuries the minor has sustained in the accident in question. Notably, Dr. Townsend's opinion that the minor sustained a moderate primary diffuse TBI and the educational assessment results which reveal that the minor presents with severe cognitive difficulties that most probably can be ascribed to the combination of the sequelae (emotional, TBI and ongoing pain) of the injuries sustained.

[48] In light of the deficits attributable as a direct result of the injuries sustained in the accident and related *sequelae* Mattheus is of the opinion that the minor will probably need placement in a Vocational School after the age of 13 years. Within this environment, so she held, the minor will probably be able to acquire some vocational skills which would allow him to seek employment (usually after the age of 18 years) in a sheltered work environment. She noted that the minor's level of education upon exiting the vocational school will be equivalent to a NQF level 2 (Grade 10).

Ms. Sharilee Fletcher

[49] Ms. Sharilee Fletcher is an Occupational Therapist. She noted her agreement with the findings of Ms Alet Mattheus that the minor will in all likelihood require placement in a vocational school after the age of 13 in which he can acquire vocational skills that would allow him to seek employment and that he would exit schooling with an equivalent of a NQF Level 2. Whilst she takes cognisance of Ms.

Mattheus' opinion that the minor would need sheltered employment, she holds the view that the minor would in all likelihood be able to find employment in which he would be able to work under supervision.

Ms. Lee Leibowitz

[50] Ms. Lee Leibowitz is an Industrial Psychologist. She noted, in regard to the post-accident scenario, that the minor was involved in an accident on 22 March 2017, in which he sustained serious injuries. The minor passed Grade 1 at the end of that year and at the time of his assessment in 2020 he was a Grade 4 scholar. It was established prior to completion of her report, that at the end of the 2020 school year, the minor had been promoted to Grade 5.

[51] In the pre-accident scenario Leibowitz noted, having regard to the conclusions drawn by the Educational Psychologist, Ms Mattheus, that but for the accident, the minor would probably have been able to complete at least a Grade 12 level of education with an endorsement and would then have had the capacity to complete either a Diploma/Degree (NQF level 6/7) before attempting to enter the open labour market.

[52] Given Ms. Mattheus' postulations, Leibowitz opined that it is arguable that had the accident not occurred, the minor would have completed his Grade 12 schooling at the end of 2028, provided that he progressed through school without failing/repeating any grades. And if the minor had the motivation and opportunity to embark on tertiary studies, he could have completed a Diploma or Degree (NQF level 6/7), as per Ms. Mattheus' findings.

[53] Thus, given the Educational Psychologist's (Mattheus') postulations, Leibowitz denoted the following two scenarios. Firstly, had the minor entered the labour market with a Diploma (NQF level 6) qualification, he initially would have been competitive for semi-skilled positions, at around the Paterson B2/B3 level. His earnings upon securing these roles may have initially been somewhat aligned to 10th to 25th percentile, basic salary figures for the Paterson B2/B3 levels. However, with time, experience, and the acquisition of additional skills (which may have been obtained

through various interventions including on the job training), the minor may have progressed to the Paterson C3/C4 level, which is where he would likely have reached his career ceiling. Speculatively speaking, it may be considered that the minor may have reached his career and earnings ceiling at around age 45 to 50, and his earnings at this point may have been aligned to the median total package figures for the Paterson C3/C4 levels. The minor would thereafter have received annual inflationary related increases until retirement, at age 65.

[54] Leibowitz postulated that had the minor entered the labour market with a Degree (NQF level 7) qualification, he initially would have been competitive for positions at around the Paterson B4 level. Had the minor managed to secure a job at the Paterson B4 level, he initially may have earned somewhat in line with the 10th to 25th percentile basic salary figures for this grading. However, with time, experience, and the acquisition of additional skills (which may have been obtained through various interventions including on the job training), the minor may have progressed to the Paterson D1 level, which is where he would likely have reached his career ceiling. Speculatively speaking, it may be considered that the minor may have reached his career and earnings ceiling at around age 45 to 50, and his earnings at this point may have been aligned to the median total package figures for the Paterson D1 levels. The minor would thereafter have received annual inflationary related increases until retirement, at age 65.

[55] Leibowitz noted that the minor has noted several complaints and experiences difficulties post-accident. She noted that individuals without a Grade 12 or the equivalent thereof tend to take longer to enter the labour market and face increased obstacles in their attempts to secure employment compared to their counterparts who hold a Grade 12 or higher educational qualification. Thus, after discontinuing with their schooling, uninjured individuals without a Grade 12 (matric) level of education may remain unemployed for several years before they are able to secure employment. She noted further that when these individuals are also unable to obtain distinguishing vocational skills, they tend to be limited to elementary/ basic-skilled occupations. Furthermore, they tend to experience periods of unemployment during their working lives. She noted that although cognisance has been taken of Ms.

Mattheus' opinion that the minor would be dependent on sheltered employment, she notes that according to the Occupational Therapist, this would not be the case.

[56] She stated that it is accepted that sheltered employment options are scarce and should the minor ultimately be limited to such contexts he would likely remain largely unemployed. She indicated a greater inclination to agree with the opinion of Ms. Fletcher (i.e., that the minor would be able to find employment albeit where he would have to work under supervision). In this instance, she explains, it could be considered that he could qualify for unskilled jobs but that it is however difficult to provide timeframes in this regard (save to say that it would probably take the minor several years to enter the labour market).

[57] She explained that broadly speaking, it may be considered that if the minor were fortunate enough to secure a full-time employment opportunity, then his initial monthly earnings could range from around the R3 036.152 to the R 4048.203 levels. Alternatively, it could be considered that the minor would also in theory be eligible for roles at the Paterson A1/A2 levels, and initially could earn in line with the 10th percentile basic salary figures for jobs at these Paterson gradings. The minor could in time progress to the Paterson A3 level, and by age 45 to 50 could earn in line with the median basic salary figures for jobs at this grading which is where he would in all likelihood reach his earnings ceiling. He may thereafter receive annual inflationary related increases until retirement, at age 65. She stated that it is noted that even in the above scenario, due the cumulative effects of his deficits, the minor would be at a significant disadvantage in his occupational endeavours and would likely encounter obstacles in sustaining continued employment. As such, it is considered that he would likely experience long and frequent periods of unemployment, instability of income, plus he may not even be able to earn at the levels provided for. She explained further that the full financial implications of these risks cannot be accurately predicted at this stage, and should thus be dealt with by means of a higher than normal post-accident contingency.

The Law

[58] In so far as loss of earnings is concerned, this court is only to determine future loss of earnings on a postulated basis, given the fact that the matter concerns a minor.

[59] Dr. R.J. Koch in *The Quantum of Damages Year Book*²¹ notes that the usual contingencies that the Road Accident Fund accepts as 5% in respect of past income and 15% in respect of future income. Whilst this approach is largely a guideline, it indicates the general approach adopted by the defendant in similar matters. Koch suggests that based upon the authorities of *Goodall v President Insurance* and *Southern Insurance Association v Bailey N.O*²², that as a general rule of thumb, a sliding scale can be applied, i.e. “ ½ % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in middle age.”

[60] In the matter of *Road Accident Fund v Guedes*²³ the court referred with approval to The Quantum Yearbook, by Dr. R.J. Koch, under the heading 'General Contingencies', where the following is noted:

“...[when] assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court...”

[61] In *Phalane v Road Accident Fund*²⁴ the court expressed itself as follows in respect of the issue of contingencies:

Contingencies are the hazards of life that normally beset the lives and circumstances of ordinary people (AA Mutual Ins Co v Van Jaarsveld reported in Corbett & Buchanan, The Quantum of Damages, Vol II 360 at 367) and should therefore, by its very nature, be a process of subjective impression or estimation rather than objective calculation (Shield Ins Co Ltd

²¹ Page 118 thereof

²² 1984 (1) SA 98 (AD)

²³ 2006 (5) SA 583 (SCA) par 9

²⁴ (48112/2014) [2017] ZAGPPHC 759 (7 November 2017)

v Booyesen 1979 (3) SA 953 (A) at 965G-H). Contingencies for which allowance should be made, would usually include the following:

- (a) the possibility of illness which would have occurred in any event;*
- (b) inflation or deflation of the value of money in future; and*
- (c) other risks of life such as accidents or even death, which would have become a reality, sooner or later, in any event (Corbett, The Quantum of Damages, Vol I, p 51).*

[62] I note the 45% post-morbid contingency applied by the plaintiff's actuary, ostensibly on account of what the Industrial Psychologist postulated. I am not persuaded that the basis for seeking a higher post-morbid contingency is not already catered for within the band of normal contingencies.

[63] I have applied my mind to the minor's circumstances, his background and family history and having regard to the fact that in terms of the "sliding scale" a 25% contingency deduction for a child is not unusual, I have concluded this to be a fair and reasonable contingency deduction in respect of future loss of earnings. Ms. Moyo sought to persuade me, successfully so that a contingency deduction of 30% ought to be applied to uninjured earnings, principally on account of the fact that the acquisition of a degree or diploma in current day South Africa is no longer full proof certainty of employment.

[64] I agree with Mr. Loots' calculations that the median of the premorbid scenario is justifiable. Accordingly, the calculations for loss of earnings in respect of the minor shall be as follows:

UNINJURED EARNINGS (AVERAGE BETWEEN SCENARIO 1 & 2)

Earnings had accident not occurred	R 8, 582 078.00
Less 30%	R 2,574 623.40
TOTAL	R 6, 007 454.60

INJURED EARNINGS

Earnings but for the accident	R 2, 257 174.00
Less 25%	R564, 293.50
TOTAL	R1, 692 880.50

[65] The total loss of earnings in respect of the minor is accordingly calculated as R4,314 574.10.

[66] The experts have alluded to the fact that any compensation awarded to the plaintiff acting on behalf of the minor is to be protected. The order, as set out below, takes care of those concerns.

ORDER

[67] In the result, I make the following order:

1. The Defendant is ordered to pay the Plaintiff an amount of **R900 000.00** (Nine Hundred Thousand) constituting an agreed amount in respect of general damages and **R4,314 574.10** (Four Million, Three Hundred and Fourteen Thousand, Five Hundred and Seventy-Four Rand, Ten Cents) in respect of loss of earnings in full and final settlement of the Plaintiff's claim with link number: 4452742. Payment to be made to the Plaintiff's Attorneys of record, within 180 days from date of Judgement, by payment into their trust account, details as follows:

Mokoduo Erasmus Davidson Attorneys Trust Account

First National Bank, Rosebank Branch

Account Number: [...]

Branch Code: [...] .

2. The Defendant is ordered to furnish the Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for the costs of the future accommodation of **K [...]** **P [...]** (hereinafter referred to as "the minor") in a hospital or nursing home or treatment of or rendering of a

service or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision of 22 March 2017, after such costs have been incurred and upon proof thereof.

3. In terms of the statutory undertaking referred to in paragraph 2 above, the Defendant shall pay:-

3.1 the reasonable costs of the creation of the Trust referred to in paragraph 5 below and the appointment of the Trustee;

3.2 the reasonable costs of the furnishing of security by the Trustee;

3.3 the costs of the Trustee in administering the minor's estate, as determined by Section 84(1)(b) of the Administration of Estates Act 66 of 1965, as amended, according to the prescribed tariff applicable to curators;

3.4 the costs of the Trustee in administering the minor's Estate and the costs of administering the Statutory Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, as determined by the Administration of Estates Act, 66 of 1965 as amended, limited to the prescribed tariff applicable to a Curator Bonis, as reflected in Government Notice R1602 of 1st July 1991, specifically paragraphs 3(A) and 3(B) of the schedule thereto.

4. The Defendant is ordered to pay the agreed or taxed party and party High Court costs of the action up to and including the date on which this draft is made an order of the above Honourable Court, such costs to include:

4.1 the costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 1 above;

4.2 the trial costs up to and including 21 to 25 July 2022;

4.3 the costs of the Plaintiff's expert reports. Such experts to include, but not limited to Dr. Scher, Dr. Townsend, Dr. Makua, Ms. Da Costa, Ms. Mattheus, Ms. Fletcher, Ms. Leibowitz, and Mr. Loots, if any as may be agreed or allowed by the Taxing Master; and

4.4 the Plaintiff's attorneys shall serve the notice of taxation on the Defendant's attorneys and shall allow the Defendant 14 (FOURTEEN) court days within which to make payment of such costs.

5. The requisite steps shall be taken by the Plaintiff's Attorneys with a view to forming a trust to, inter alia, administer and/or manage the financial affairs of the minor and that such trust shall be formed within 6 (SIX) months of the date of this order.

6. The trust instrument shall provide for the following as a minimum:

6.1 there shall be a minimum of two trustees and a maximum of three, of which at least one shall be a qualified professional person; to the extent possible and practical, an adult family member of the Plaintiff, more particularly the minor's biological mother D [...] B [...] P [...], shall be appointed as one of the trustees and she shall be exempt from providing security to the satisfaction of the master;

6.2 if the number of trustees drops below the prescribed minimum the remaining trustees are prohibited from acting other than to appoint a replacement trustee;

6.3 the composition of the board of trustees and the voting rights shall be such that any single trustee cannot be outvoted in relation to management of trust assets by any other trustee who has a personal interest in the manner in which the trust is managed;

6.4 the powers and authority of the trustees shall not exceed those usually granted to trustees of special trusts;

6.5 procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Honourable Court;

6.6 the trust should be stated to have the purpose of administering the funds in a manner which best takes account of the interests of the minor;

6.7 the separation of the property of the trustee/s from the trust property;

6.8 ownership of the trust property vests in the trustee/s in their capacity as trustee/s;

6.9 the independent trustee/s (other than the family member above) shall provide security to the satisfaction of The Master in terms of Section 6(2)(a) of the Trust Property Control Act, 57 of 1988;

6.10 amendment of the trust instrument shall be subject to the leave of the above Honourable Court;

6.11 the trustee/s is authorised to recover the remuneration of and cost incurred by the trustee/s in administering the Section 17(4)(a) RAF undertaking in accordance with the undertaking;

6.12 the minor shall be the sole income and capital beneficiary;

6.13 the trust property is excluded from any community of property in the event of the marriage of the minor;

6.14 the trust shall terminate on the death of the minor whereafter the trust assets shall devolve on the minor's estate;

6.15 the trust property and administration thereof is subject to annual reporting by an accountant;

7. The capital amount referred to in paragraph 1 above, shall be paid by the Defendant directly into the trust account of the Plaintiff's Attorneys of record, Mokoduo, Erasmus, Davidson Attorneys, for the benefit of the minor.

8. The statutory undertaking referred to in paragraph 2 above shall be delivered by the Defendant to the aforesaid Mokoduo, Erasmus, Davidson Attorneys within 30 (THIRTY) days of the date of this Order;

9. 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, when created;

10. Mokoduo, Erasmus, Davidson Attorneys shall render an attorney and client statement of account to the trustee, of the trust to be formed, in terms of the fees contract entered into between the Plaintiff and Mokoduo, Erasmus, Davidson Attorneys. Provided that the Plaintiff's attorneys of record shall not invoke the Contingency Fee Agreement entered into between them and their client until such time as the matter has become finalized in its entirety, and the party and party costs have been collected;

11. The party and party costs referred to in paragraph 4 (Four) above, as taxed or agreed, shall be paid by the Defendant directly into the trust account of Mokoduo, Erasmus, Davidson Attorneys for the benefit of the minor. After deduction of the legal costs consultant's fee for drawing the bill and attending to its settlement or taxation, the balance shall be paid into the trust unless same has not yet been created, in which event, such balance shall be invested 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 and shall be utilized as may be directed by the Trustee of the Trust, when created.

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

B. FORD

Acting Judge of the High Court
Gauteng Division of the High Court, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 23 September 2022 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 23 September 2022.

Date of hearing: 22 and 23 July 2022

Date of judgment: 23 August 2022

Appearances:

For the plaintiff: Adv. M. Van Den Barselaar

Instructed by: MED Attorneys

For the defendants: Ms. M. Moyo

Instructed by: State Attorney