

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

Case no. 854/2017

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

ADVOCATE M LOUW N.O.

Plaintiff

MATSHIDISO LUCY OLIPHANT

and

THE ROAD ACCIDENT FUND

Defendant

QUORAM: DE KOCK, AJ

HEARD ON: 20st APRIL 2022

JUDGMENT BY: DE KOCK, AJ

DELIVERED:

This Judgment was handed down electronically by circulation to the parties' representatives by e-mail and released to SAFLII. The date and time for hand down is deemed to be 11h00 on 9May 2022.

INTRODUCTION:

[1] The Plaintiff is Advocate M Louw N.O. obo Edward Oliphant, a major male born on the 6th July 2002.

[2] Edward Oliphant ("the Patient") is 20 years of age and was 12 years old at the time of the accident.

[3] This is a claim for personal injuries sustained by the Patient in a motor vehicle accident and damages suffered as a result thereof against the Road Accident Fund.

[4] At the onset of the trial Counsel for the Plaintiff indicated aspects on which the parties agree and aspects that the parties are in disagreement.

**ASPECTS WHICH ARE IN AGREEMENT AND WHICH IS NO LONGER
CONTENDED:**

[5] The issue of merits has been settled and the Defendant is liable for 100% of the proven or agreed damages of the Plaintiff in accordance with the Court order granted on the 6th of December 2017 by this Court. On the 28th of January 2022 the Defendant tendered an amount of R3,136,389.00 as interim payment towards the Patient's loss of income claim, the latter tender was made an order of Court. The Defendant made a direct offer towards the Patient's mother regarding general damages in the amount of R1,528,000.00. The Defendant subtracted 15% apportionment on the offer and paid the amount of R1,298,800.00 to the Patient's mother. The latter payment was made to the Patient's mother after the Patient was properly represented by his attorney and was done without the knowledge of the Patient's attorneys. The Defendant paid the amount in full and final settlement as an interim payment for general damages.

ISSUES THAT THE PARTIES ARE IN DISAGREEMENT:

[6] The parties disagree whether the amount of R1,528,000.00 is a full and final payment in terms of general damages and whether the Defendant has any further obligation to pay any amount regarding general damages. The parties are further in disagreement regarding the issue whether the Defendant was entitled to approach the Patient's mother directly whilst the Patient was legally represented. The parties are also in disagreement as to whether the Defendant was entitled to subtract any merits apportionment. Further the parties are in disagreement in regard to the amount of general damages that should have been awarded.

PAST AND FUTURE LOSS OF INCOME:

[7] The parties agreed that the Plaintiff's reports pertaining to loss of income may be handed up as evidence and that there was no need for oral evidence by any of the experts. In terms of the Joint Minutes of the Plaintiffs and Defendant's educational psychologist and industrial psychologist agreements were reached on all material aspects. Counsel on behalf of the Plaintiff and the Defendant's legal representatives agreed that the parties are bound by the minutes and that it will form the basis of the calculation of the Patient's loss of income. The Plaintiff's actuary Mr Sauer's calculation is based on the Joint Minutes and the parties agreed that the basis for the calculation is correct. The parties further agreed that the life table applied by Mr Sauer is correct. The disagreement between the parties regarding the calculation of the Patient's past and future loss of income is about the contingencies that have to be applied.

[8] The Defendant's attorney agreed that the issues as outlined are the correct issues which the parties agree with and evenly confirmed the issues as outlined as the issues that the parties are in dispute with. The Defendant's attorney indicated that the Defendant will not be calling any witnesses and that arguments will be advanced regarding the issues in dispute.

[9] As stated herein the Plaintiff's expert reports was handed in as evidence by agreement between the parties. The reports were handed in with affidavits signed by the experts and the reports was thus admitted in terms of Uniform Rule 38(2).

ISSUES THAT STAND TO BE ADJUDICATED:

[10] The aspect of general damages and the aspect pertaining to the contingencies that must be applied to Mr Sauer's calculation stands to be adjudicated. The Plaintiff requested costs on a punitive scale as between attorney and own client. The Court therefore also needs to adjudicate the issue of costs.

EVIDENCE BEFORE THE COURT:

DR OELOFSE, ORTHOPAEDIC SURGEON:

[11] According to Dr Oelofse the Patient is diagnosed with a serious brain injury (diffuse axonal injury) with residual chronic headaches, cognitive changes, learning difficulties and behavioural changes. Dr Oelofse further indicates that the Patient sustained a thoracolumbar spine injury. It is further indicated that the Patient sustained direct trauma to his spine evident by the yield scarring on his thoracolumbar junction. The Patient sustained a fracture to his T-12 vertebrae with changes to the end plate. The Plaintiff is already showing radiological signs of spondylosis at the levels adjacent to the fracture. The doctor further opined that the Patient sustained a much more serious injury than initially suspected and that at a young age he already has radiological changes of post-traumatic spondylosis. The Patient has a very high probability to have pain for the rest of his life. The Patient has the probability of more than 50% for surgery. The Patient was further diagnosed with united distal humerus fracture with residual elbow pain. It is Dr Oelofse, opinion that the Patient would have been able to work to the normal retirement age of 65 years, if not for the accident and injuries sustained. The doctor further indicated that the Patient must not be allowed to work in a spine unfriendly environment at all. Dr Oelofse also indicated that even if the

Patient is accommodated in a light-duty spine friendly environment provision must be made for ten (10) to fifteen (15) years earlier retirement.

MINUTES BETWEEN EDUCATIONAL PSYCHOLOGISTS, MS LIDA ROOS AND MR GRAHAM HALSE:

[12] The experts agree that as per the various medical records the Patient sustained a serious traumatic brain injury, fractured left humerus and laceration on his back. The experts concluded that had the accident not occurred the Patient would have had the potential to complete Grade 12 (NQF 4) with a certificate endorsement in a mainstream school. The experts agreed that following the accident the Patient would not be able to progress according to his estimated pre-incident potential. The experts indicated that the Patient has severe disabilities due to his severe brain injury. The Patient is slow-functioning and has multiple disabilities across a wide range of areas. The experts indicated that the Patient will never be employable and will remain a dependent for the remainder of his life. The Patient is in a special school and is expected to make slow progress. The Patient is severely cognitively challenged.

LINDLWA GROOBOOM, CLINICAL PSYCHOLOGIST:

[13] It is indicated that in terms of the neuro-cognitive functioning the Patient's profile reveals severe deficits mostly in right hemispheric functioning and executive functioning associated with frontal lobe injuries. The neuro-psychological results are in keeping with the diagnosed significant concussive head injury with an associated moderately severe to severe diffuse axonal brain injury. It is indicated that it appears that the right hemisphere and frontal lobe are mostly compromised. It is further indicated that the Patient's cognitive profile seems to confirm the estimated average pre-morbid functioning in that some construct (verbal) memory scales associated with left hemispheric functioning the Patient's performance is sound. It is indicated that the Patient has neuro-behavioural/personality changes post-accident which are brain injury sequelae. These include a short temper, aggressive behaviour and irritability, the

Patient also has bouts of social withdrawal and due to his limited cognitive functioning struggles to navigate relationships. It is stated that poor interpersonal relationships may not only impact social integration but may also affect family relations. It is the expert's opinion that the neuropsychological deficits are likely to severely hamper the Patient's scholastic functioning even in a special school. The expert indicated that the latter are directly attributable to the accident. The experts further indicated that the expert concurs with the educational psychologist, that the Patient is unemployable in the open labour market to the extent of the neuropsychological deficits. The expert also indicated that the Patient's personality changes adversely impact interpersonal relation, further limiting/impeding his chances of obtaining and retaining any form of employment. The expert is of the opinion that no spontaneous recovery is expected from a neuropsychological perspective and that the expert's findings are permanent brain injury sequelae.

E KEMP, OCCUPATIONAL THERAPIST:

[14] It is indicated that the Patient was unable to re-enter mainstream schooling due to the extent of his cognitive and functional limitations. It is stated that it took some time to get the Patient enrolled into a remedial school. Since January 2017 the Patient follows a school curriculum at Lettie Fouché School in Bloemfontein. Following the injury sustained, the Patient had to relearn how to eat, walk, communicate, and swallow.

DR SMUTS, NEUROLOGIST:

[15] In the doctor's opinion the Patient sustained a significant concussive head injury. The resulting negative effects are likely to be mostly that of a cognitive and learning disability. The doctor indicated that the Patient also suffers from behavioural problems.

DR VAN HEERDEN, PLASTIC AND RECONSTRUCTION SURGEON:

[16] It is the doctor's opinion that the occipital and mid-lumber scars are amenable to improvement of surgical intervention but will always be present. The Patient's scares over the left humerus and left tibia are not amendable to improvement with surgical intervention will always be present. The doctor indicated that the Patient's scarring will always be visible and is therefore permanent.

JOINT MINUTES BETWEEN THE INDUSTRIAL PSYCHOLOGISTS, MR B MOODIE AND MRS KHESWA:

[17] The industrial psychologists agreed on the following: the Patient was 12 years and 2 months at the time of the accident and at the time of the accident a Grade 5 learner. If it was not for the accident the Patient would have completed Grade 12 (NQF 4) and further studies Higher Certification (NQF 5) whilst most likely being employed with an organization/ If it was not for the accident the Patient would have entered the labour market full-time, thereafter earning a basic salary on lower quartile of Patterson A3 and possible 13th cheque. Within six (6) to nine (9) years while progressing in a straight line earning an annual guaranteed package and a complete NQF 5 qualification. After one (1) year of completing NQF 5 qualification the Patient would have been promoted in line with the qualification. The experts indicated that whatever Patterson level he would have been on at that stage, due to his straight line increases he would immediately progress to the next Patterson level. The experts indicated that progress in a straight line to earn an annual guaranteed package on the median of Patterson C1 in reaching the pinnacle of career at the age of 45. The experts further indicated that the Patient would have received inflationary increase until the retirement age of 65. The experts also indicated that due to the severity of the Patient's injury he is considered unemployable for all practical reasons.

ACTUARY, JOHAN SAUER:

[18] Mr Sauer calculated the Patient's past loss of earnings before contingency deductions as R18,019.00 and the Patient's future earnings before contingencies as

R6,784,992.00.

[19] The actuary applied 5% total deduction for past losses (pre-morbid) and 0% total deduction for past losses (post morbid). The Patient's past loss earnings was therefor calculated to be R17 118.

RELEVANT CASE LAW AND LEGAL PRINCIPLES:

[20] **Du Toit obo Dikeni v RAF 2016 (1) SA 367 (FB)**, the Court also referred to **Bonesse v RAF and Ndokweni v RAF**, both judgments by Pickering J and I quote paragraphs [45] and [46]: In **Du Toit**:

"[45] In Bonesse v Road Accident Fund 2014 JDR 0303 (ECP), Pickering J considered the general principles applicable to contingencies and the dicta in Bailey. The Learned Judge concluded as follows: pertaining to the contingencies to be applied in respect of a claim of a 13-year-old girl (at 18):

(1) Mr van der Linde submitted ... that given Carly was 13 years old at the time of the accident it would be appropriate to apply a contingency factor of 30% to her future loss of earnings. Mr Frost however submitted that a contingency deduction of 20% should be applied. He referred in this regard to Koch: Quantum Yearbook 2014, page 114 where the learned author states that it has become customary for the Court to apply a so-called sliding scale to contingencies – i.e. 25% for a child, 20% for a youth and 10% in a middle age. It would appear that although contingency factors which have been applied in cases involving youths and children range from 15% to 40%., the Courts have generally been inclined to apply a contingency figure of 20% in respect of youths or plaintiffs in their teenage years. Having regard to all the circumstances of the matter including, his age, I am of the view that the contingency factor of 25%

should be applied.”

[21] It has become customary for the Court to apply the so-called sliding scale of contingencies which entails that half a percent for every year to retirement age i.e. 25% for a child, 20% for a youth and 10% in the middle age. **See in this regard: Goodall v President Insurance Co Ltd 1978 (1) SA 389 (W).**

[22] A Trial Court has a wide discretion when it comes to determining contingencies. **See: Hefer N.O. v Road Accident Fund (2019) JOL 458 – 7 (FB) at para [12].**

PLAINTIFF’S COUNSEL’S SUBMISSIONS:

[23] Plaintiff’s Counsel submitted that based on the calculation of Mr Sauer for loss of future income, that on the past loss scenario a 5% pre- and 0% post-morbid is the correct contingency deduction to be applied and there exists no reason why there should be a deviation on this contingency.

[24] Plaintiff’s Counsel submitted regarding future loss of income that the normal half percent ($\frac{1}{2}$ %) contingency for every remaining working year until age of 65 years should apply, this would be 22.5% pre-morbid and due to all factors mentioned by the experts a contingency deduction of 0% post-morbid be applied due to the vulnerability of the Patient and all experts agreeing that the Patient is in sympathetic employment.

[25] Plaintiff’s Counsel submitted that according to the experts the future earnings of the Patient amounts to R6,784,992.00. It is submitted that at a contingency deduction of 22.5% that an amount of R1,526,623.00 must be deducted and that the Patient’s future loss of earnings then amounts to an amount of R5,258,368.80. The Patient’s loss of earnings must then be added to the amount of past loss of earnings taking into consideration the 5% contingency deductions the amount of R17,118.00 must be added. The Patient’s total loss of earnings then amounts to R5,275,486.80.

DEFENDANT'S LEGAL REPRESENTATIVE'S SUBMISSIONS:

[26] The Defendant's legal representatives did not hold any instructions in regard to the Patient's past loss of earnings and submit that in regard to future loss of earnings a contingency deduction of 35% finds application. It was submitted on behalf of the Defendant that normal contingencies cannot be applied in the current matter before Court considering that the Patient was 12 years old at the time of the accident and further considering the Patient's family background. The Patient would be the first in his family to obtain his senior certificate.

PLAINTIFF'S COUNSEL'S SUBMISSION IN REPLY:

[27] Plaintiff's Counsel in reply submitted that the contingency deduction in line with the High Court of Appeal's judgment in the matter of **N Khoza obo Z Khoza (Case number 216/2001)** of 20% is the *locus classicus* but that the Court will not deduct more post-morbid contingencies of more than 22.5%.

COURT'S FINDINGS:

[28] With due regard to the facts and circumstances of this matter and with due regard to the case law as highlighted by this Court, the Court finds that the suitable contingency deduction to be applied on the past loss scenario is 5% pre- and 0% post-morbid and regarding the future loss scenario a contingency deduction of 22.5% pre-morbid and a 0% percent deduction post-morbid. The Patient's total loss of earnings then amounts to R5,275,486.80. Further considering the interim loss award of R3 136 389, the Court finds that the Patient's loss of income amounts to R 2 139 097.80

GENERAL DAMAGES:

Plaintiff's Counsel's submissions:

[29] It is submitted that as far as general damages are concerned the Patient qualifies in terms of the narrative test as per the RAF.4 of Dr Oelofse. Counsel for the Plaintiff submitted that an amount of R2,350,000.00 minus the interim payment of R1,298,800.00 paid directly to the Patient's mother thus an award of R1,051,200.00 would be a fair amount for the Patient's general damages.

[30] Counsel for the Plaintiff referred to numerous matters pertaining to general damages. The Court in this judgment only refers to the most relevant matters for purposes of this judgment. In **Megalane N.O. v Road Accident Fund 2006, 5A4 (QOD) (W)**, the Plaintiff sustained severe brain injury with diffuse and focal brain damage in the form of a subdural haematoma resulting in cognitive impairment characterised by poor verbal and visual memory, poor concentration and distractibility, impaired executive function characterised by frontal lobe disinhibition causing inappropriate behaviour, speech difficulties characterized by dysarthria and word retrieval difficulties, bilateral hemiparesis with severe spasticity of all four limbs and facial paralysis as well as aphasia. Confined to a wheelchair. Intelligence level that of a young child. Although limited, still has insight in his predicament. An above average scholar before the accident, who would probably have undergone tertiary education, left with permanent severe physical and mental disabilities rendering him unemployable. The Plaintiff was awarded R1,000,000.00 in 2006 for general damages. This will equate to R2,285,000.00 in 2021 monetary terms.

[31] In **M v Road Accident Fund (12601/2017) [2018] ZAGPJHC 438** the Plaintiff sustained severe head injuries, neurobehavioral deficits and multiple lacerations and abrasions. The Plaintiff was awarded R1,900,000.00 in 2018 for general damages, this will equate to R2,125,600.00 in 2021 monetary terms.

[32] In the matter of **VW v RAF Quorum Mbhele J**, heard on 29 October 2018 and delivered on the 1st of February 2019, Justice Mbhele awarded an amount of R2,100,000.00 in general damages, 2022 value R2,372,266.07. The Plaintiff's injuries were described by Dr Oelofse the orthopaedic surgeon as a traumatic brain injury with a

base skull fracture, pons bleed, mandible fracture, and right- lower leg – tib/fib fracture. The Patient was in a coma and transferred to ICU and ventilated on a T-piece still and with a GCS of 4/15. The Plaintiff's current symptoms were headaches and behavioural and emotional disorders.

[33] Counsel for the Plaintiff submitted that the Patient's injuries are far worse than latter matter.

DEFENDANT'S LEGAL REPRESENTATIVE'S SUBMISSIONS:

[34] It is submitted that in the matter of **VW v RAF**, referred to by the Plaintiff's Counsel is not comparable to the matter before Court as the Plaintiff in the **VW v RAF**, was suffering serious bodily injuries and physical effects on top of behavioural and emotional disorders. The Defendant referred to Section 17(3)(b) of the Road Accident Fund Amendment Act 19 of 2005 in terms of which it is stated that:

"In each and any order as to costs on making such award, the Court may take into consideration any written offer, including a written offer without prejudice in course of settlement negotiations, in settlement of the claim concerned, made by the Fund or an agent before the relevant summons was served."

[35] It is submitted that the Court must consider the amount of general damages paid to Me Oliphant who at the time had the relevant *locus standi* to enter into an agreement with the Defendant and who was the initial Plaintiff in the action which is currently before Court.

[36] The Defendant's legal representative evenly referred to numerous matters to Court herein only refers to the most relevant matters. In **Vakata v Road Accident Fund 2014 (7) A4 (QOD 1) (ECP)**, the Plaintiff suffered a moderately severe brain injury with a skull fracture and probable diffused injury resulting in frontal – limbic dementia and post-traumatic epilepsy. She suffered cognitive deficits in the form of limited ability to

learn new information, impairment of executive functioning disinhibition and lack of control of emotions, limited insight and behavioural difficulties. She was 3 years old at the date of the collision and the injuries left her with an intellectual capacity falling within the reigns of mild retardedness. Plaintiff for the Counsel submitted that she was awarded R650,000.00 which is in 2022 worth R737,160.45.

THE COURT'S FINDINGS:

[37] The Court has considered the Patient's injuries and sequelae as well as previous awards granted. The Court notes that each case must be adjudicated on its own merits within the overarching maxim of *stare decisis*. The Court finds that a fair, reasonable award for general damages is R2 100 000. Subtracting the amount of R1 298 800 paid to the Patient's mother the award of general damages amounts to R801 200.

COSTS:

[38] Counsel for the Plaintiff referred to numerous matters in support of the contention that the punitive of cost order must be awarded against the Defendant. The Court refers to the matters most relevant to the adjudication of the matter before Court.

[39] In the matter of **Tshabangu v RAF (South Gauteng High Court) (Case number 49589/2009)**, Wiener J stated the following:

"[20] It happens on virtually every occasion that the matter is called on the Trial Court that the parties are not ready to proceed because the defendant's counsel has not received proper instructions. Whether it is the attorney's fault for not keeping the defendant updated on a regular basis or the defendant's fault for not keeping abreast with the progress of the matter, is an issue which permeates the civil role on a daily basis ... most are settled at trial or postponed because the parties (usually the defendant) has been dilatory in

providing expert reports or offering a settlement.

[21] If the communication between the defendant and its attorneys was regular, timeous and informed these matters would in the main become settled as they should long before the trial. This would enable the Court's function to be exercised properly in the administration of justice and not as an eleventh hour power to force parties to get their house in order"

[40] In the matter of **Mlatsheni v Road Accident Fund 2009 (2) SA 401 (E) (2009) 2 SA p. 401**, it was held that it is expected of Organs of State that they behave honourably – that they treat the members of the public with whom they deal with dignity, honesty and fairly. This is particularly so in the case of the **Road Accident Fund**, it is mandated to compensate with public funds those who have suffered violations of their fundamental rights to dignity, freedom and security of person and bodily integrity as a result of road accidents. The Court held that by so frustrating the legitimate claim of the Plaintiff the employee of the Fund who gave the Defendant's legal representative instructions to raise the spurious defence had acted in violation of the Constitution: he/she has by unjustifiably frustrating the claim of the Plaintiff failed to protect, promote or fulfil his fundamental rights to human dignity to freedom and security of the person and the body integrity. The Court warned that if this type of conduct continues that the time might well have arrived for orders *costs de bonis propriis* to be awarded against employees of the Defendant who gave instructions that have effect of frivolous frustrating legitimate claims.

[41] The Defendant's legal representatives submits that there is no evidence before Court on which the Court can make a finding justifying a punitive cost order.

COURT'S FINDINGS:

[42] On the first day of the trial the Defendant's legal representative had no instructions to consent to the joint minutes compiled by the experts. It was only on the

second day of the trial that the Defendant's legal representative had instructions to consent that the joint minutes may be handed in as evidence. Evenly only on the second day did the legal representative of the Defendant have instructions to consent to Mr Sauer's calculations being used. On the second day of the trial the legal representative of the Fund still did not have instructions regarding the contingencies applicable to the past loss of income. This conduct had the effect that Court time was wasted, extra cost incurred for which the taxpayer is liable at the end of the day. Further the Patient's general damages has been under settled. The Defendant did not disclose to the Court what the legal basis was for the Defendant to approach the mother of the Patient directly while the Patient was properly represented by an attorney. This conduct can only be marked as *mala fide*. The Defendant was given an opportunity to produce evidence however elected not to do so. The Defendant further elected not to disclose to the Court how it came about that the merits was settled on an 85% basis during the general damages settlement as 15% merits apportionment was deducted. No explanation whatsoever was placed before Court. The Defendant filed a plea of bare denial and when all the facts and circumstances showed that the plea was not in line with the facts and knowledge the Defendant had of the case, it persisted with its plea. Taking all into consideration the Court finds that an attorney and client cost order is the appropriate cost order in the prevailing circumstances.

ORDER:

[43] In the circumstances the Court grants the following order:

1. The Settlement Agreement entered into on 12 January 2017 between ML Oliphant and the Defendant is set aside.
2. The Defendant shall pay to the Plaintiff In his representative capacity the amount of R **2 940 297.80** which is compiled as follows:

2.1 R801 200 for general damages.

2.2 R 2 139 097.80 for past and future loss of earnings.

3. Payment of the capital amount set out in paragraph 2 above is to be made within one hundred and eighty (180) days of this order failing which the Defendant shall become liable to pay interest *a tempore morae* on the capital amount aforesaid at the rate of 7% per annum from one hundred and eighty (180) days after the date of this order to date of final payment.

4. The Defendant is to pay the Plaintiff's costs on an attorney and client scale. The costs shall include:

4.1 The costs of Counsel including the costs of drafting Heads of Argument on instructions of the Court.

4.2 The reasonable and qualifying fees of the following experts:

- (a) J C Sauer, (Actuary);
- (b) L Roos, (Senior Educational Psychologist);
- (c) R van Biljon (Occupational Therapist);
- (d) B Moodie, (Industrial Psychologist);
- (e) L F Oelofse, (Orthopaedic Surgeon);
- (f) J A Smuts, (Doctor – Neurologist);
- (g) Dr SP Van Heerden, (Plastic/Reconstructive Surgeon);
- (h) L Grootboom, (Clinical Psychologist).

DE KOCK, A.J.

Appearance on behalf of the Plaintiff:

Advocate: D.J MARX

Attorney: VZLR Incorporated Attorneys, c/o Du Plooy Attorneys, 49 Parfitt Avenue, Park West, Bloemfontein.

Appearance on behalf of the Defendant:

Attorney: C Bornman, Office of the State Attorney, 11th Floor, Fedsure Building, 49 Charlotte Maxeke Street, c/o the Road Accident Fund, Ground Floor, Fedsure Building, 62 St Andrews Street, Bloemfontein