REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 3988/2022

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

DATE: 30-09-2024

SIGNATURE:

In the matter between:

M[...] T[...] P[...] obo M[...] M[...]	**PLAINTIFF**
And	
ROAD ACCIDENT FUND	**DEFENDANT**

JUDGEMENT

MASHAMBA AJ

INTRODUCTION

1. The plaintiff acts on behalf of her minor child namely M[...] M[...], a male minor (hereinafter referred as a minor) born on the 27th February 2009. The minor was seven (7)

years old when the accident occurred and currently fifteen (15) years of age, at Grade 8. The plaintiff and her son reside at 2[...] B[...] Village, Malamulele, Limpopo Province.

2. The defendant is the Road Accident Fund, a legal persona constituted as such and endowed with legal personality in terms of the provisions of section 2 of the Road Accident Fund Act 56 of 1996, as amended, with its principal place of business at 38 Ida Street, Menlo Park, Pretoria, Gauteng Provinces.

3. On the 16th day of September 2016, at Malamulele, along Mphakati public road, the minor was a pedestrian walking outside the road when knocked by a motor vehicle, Toyota Fortuner, with registration number H[...], Grey in colour, driven by Richard Mzamani Mashaba.

4. The summons against the defendant was issued on the 09th December 2020, and served by sheriff on the 26 April 2022, at the defendant principal place of business. The defendant did not enter his appearance to defend as required.

5. The merits were finalised on the 07th November 2023, by an order granted by Maphelela AJ, and the quantum was postponed *sine die*.

6. The plaintiff has sued the Defendant for a total amount of R 12 000 000,00 (Twelve Million) which amount was calculated as follows;

4.1 Past Medical expenses	R 100 000.00
4.2 Future Medical expenses	R 900 000.00
4.3 Future Loss of Earning	R 6 500 000,00
4.4 General Damages	R 4 500 000,00

7. The plaintiff abandoned the claim for past medical expenses since there were no proves of invoices and the Plaintiff submitted that the Future Medical Expenses should be substituted by a section 17 (4)(a) -(b) of the Road Accident Fund 56 of 1996, as amended, ("the Act") undertaking certificate.

8. The plaintiff submitted that the court should decide on the two heads of damages, the first for the minor's Past and Future Loss of Earnings and the second, for general damages.

9. The matter was set down for trial on the 10th September 2024. The defendant did not defend the matter. So, this court allowed the plaintiff's counsel to proceed with his submissions based on the experts' reports filed before court.

PLAINTIFF'S EVIDENCE

10. The Plaintiff relied on the following medical experts reports to prove his case;

11.1Dr Kumberai (Orthopaedic Surgeon)
11.2 Annette Swanepoel (Clinical Psychologist)
11.3 V.P Cloete (Educational Psychologist)
11.4 N.J Mabote (Occupational Therapist)
11.5 Siphesihle Mkabile (Industrial Psychologist)
11.7 Robert J Koch (Actuaries)

11. In **Prince v Road Accident Fund**[1] the Court held at paragraphs 55, 56 and 59 in the evaluation of the probabilities in respect of expert evidence.

"[55] Sufficient proof is established when an inference can be drawn about the fact in issue, providing that the inference is consistent with all the proven facts. In civil matters, it suffices if the inference is the most probable inference.

[56] Further, once prima facie proof or evidence has been provided, that is proof calling for an answer. This becomes conclusive proof on the point in issue usually if no evidence is produced to rebut it. The fact of the matter is, however, that the Court

[1] (CA 143/2017) [2018] ZAECGHC 20 (20 March 2018)

must at the end of the case review all the evidence and evaluate this according to the applicable primary criterion.

[59] It must be accepted, of course, that where, for example, a Defendant fails to produce evidence, this does not mean necessarily that the opponent's version in the case, falls to be accepted. The acceptance of Plaintiff's case depends on the probative strength of Plaintiff's case, being whether it is sufficient to cast, an evidential burden on the Defendant to present evidence."

12. After the occurrence of the accident the minor was evacuated to Malamulele Hospital for medical treatment. The minor had multiple abrasions on the head, bilateral femur fracture and loss of consciousness and regained it at the hospital.

13. The minor received the following medical treatment; clinical and radiological examination, pain management, neurological observation. The minor was later transferred to Tshilidzini Hospital where he received the following definitive treatment; Titanium Elastic Nail System (TENS) to the right and left femur, anti-septic management, physiotherapy, Crutches and rehabilitation.

14. The minor spent three (3) weeks in Malamulele Hospital and two (2) weeks at Tshilidzini Hospital before discharged as an outpatient.

15. The minor was examined by Dr P.T Kumberai, an Orthopaedic Surgeon (Ortho) on the 01 February 2022. The Ortho noted the major minor's complaints which among others include; painful right and left thigh/femur- this is exacerbated by prolonged standing, walking and in cold weather, Sequelae of Head Injury; poor academic performance, recurrent headaches and poor concentration span- opinion deferred to the educational psychologist and neurosurgeon.

16. The ortho noted 2 scars each 2 cm on the medial and lateral distal femur and the same in the right thigh. The ortho calculated WPI = 6%, and opined that the minor qualifies

the minor with narrative test, the injuries will have serious long-term impairment /loss of body function.

17. The minor was examined by N.J Mabote. An Occupational Therapist (OT), on the 15th February 2023. The OT noted that the minor currently complains of bilateral knee pain with squatting and prolonged standing. The OT further noted that inclement weather triggers pain over the fractured site. The OT opined that the minor performance TVPS was average in 6 subtests and impaired in visual memory subtest. The OT further opined that his performance was in 6 subtests and impaired in visual memory. The OT reported that the minor repeated two grades after accident. The OT reported that the minor has emotional liability with aggressive tendencies which are displayed at home and at school even towards the teachers. The OT opined that if the minor current academic performance and emotional trajectory is maintained, he is unlikely to pass grade 12. The minor will benefic from remedial education intervention to help him to deal with perceptual problem.

18. The minor was examined by Annette Swanepoel, a clinical psychologist (clinical psyc) on the 08 April 2022. The clinical psych opined that the minor displays a very low self-esteem or maladaptive behaviours and that his behaviour do affect his functioning in the society environment or very negatively impact on his normal living. The clinical psych opined that the minor needs to go to a special school facility for learning. The minor needs more medication care for the blood in his urine in the summer times. The minor also needs more psychology counselling to help him to cope with his difficult situations for his future.

19. The minor was examined by V.P Cloete, an educational psychologist on the 14th April 2022. Cloete opined that pre-accident, the minor was most probably a child of atleast average intelligence, he was probably had the ability to pass grade 12 and probably the ability to pursue tertiary studies. The Educational Psychologist further opined that after considering that the minor experiences learning difficulties and has failed grade 4 and 6 post-accident, this is an indicator that he might probably find it difficult to complete grade 12 in a mainstream school. The minor should unless benefit from recommended sessions, he might have to be referred to a remedial school or school for learners with special educational needs (LSEN) school.

LOSS OF EARNINGS

20. The minor was examined by the Industrial Psychologist (IP), S Nkabile on the 28 July 2023. The IP made projection of pre-accident earning and employment scenario; The IP noted the opinion of the Educational Psychologist that the minor was most probably a child of at least average intelligence and further that the minor was probably had the ability to pass grade 12 and probably the ability to pursue tertiary studies. In the light of the available information as well as the Educational Psychologist's opinion, the IP opined that the minor's pre-accident learning and earning potentials are likely to have been as follows;

21. **Scenario 1: Degree (NQF Level 7)**, after completing his matric, probably in 2026, the minor could have enrolled for a bachelor's degree of his choice. Upon completion of his degree probably in 2029/30. It could have taken him about 12 months to do a learnership or internship in which he could have earned on par with suggested learnership allowance of R 105 872 per annum as per Quantum yearbook 2023.

22. Then after completing his learnership, it could have taken him at least 0-06 months to secure employment which is in line with his qualification. In this regard, he is likely to have started earning between the lower and upper quartile of Paterson level B5/C1. With experience, better employment opportunities and promotional prospects, the minor is likely to have progressed and reached his ultimate earning level at the upper quartile of Paterson D1 (total package) when he reached 45 years with applicable inflationary increase thereafter. The minor would have been able to work in the open labour market until the normal retirement age of 65 years depending on a variety of factors such as his health status, personal circumstances and conditions of employment.

23. Post-accident scenario 1, The reported challenge will preclude the minor from competing fairly for employment. It is likely that he will come across an employer who will be willing to accommodate his reported challenges in the open labour market. The minor will in all probability experience extended periods of unemployment.

24. However, in the unlikely event that he secures employment in his injured state, he is likely to earn at the lower quartile of unskilled workers with periods of unemployment in between. Should he be fortunate enough to sustain his employment, he will most likely reach his ultimate earning potential between the median and upper quartile of unskilled workers when he reaches 45 years with applicable inflationary increases for as long as he manages to sustain employment. According to Robert J Koch, Quantum yearbook 2023, unskilled non-corporate workers earn between R 26 000.00- R 47 000- R 104 000 per year. The IP concluded that in terms of future potential that application of high contingencies take place.

25. The Plaintiff used the services of Robert J Koch Consulting Actuaries and the calculations were done based on the Industrial Psychologist report. The calculations are as follows;

RESULTS:	**Uninjured**	**Injury**	**Net Value**
Future income (unlikely)	R 13 921 876	R 1174302	R 12 747 574
Future income(likely)	R 13 921 876	0	R 13 921 876

26. The actuarial calculations are useful in that it provides the value of the loss on some logical basis. In Southern Insurance Association Ltd v Bailey NO,[2] the court held:

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

[2] 1948 [1] SA 1988 at 1135

Plaats v South African Mutual Fire and General Insurance Co Ltd[3]*. The rate of the discount cannot of course, be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case".*

27. The plaintiff's Counsel submitted that considering the minor's age, qualification, injuries and the injuries sequelae, 35% contingency deductions are reasonable. The court finds the contingency deductions of 35 % being reasonable when considering all factors, among others, the injuries sequelae, and the minor child's school reports.

28. The court took into account all the medical expert reports, particularly, the Industrial Psychologist who postulated the minor's future loss of earnings and the above calculations by Robert J Koch Actuarial Consultants. The court is satisfied with the medical expert's evidence. The future loss of earning after the deduction of 35% contingency is calculated as follows; R 12 747 574 – 35 % (R 4 461 650) = **R 8 285 923.00**

GENERAL DAMAGES

29. In dealing with general damages, I considered the court order granted on the 19th May 2023 by the learned brother Judge Kganyago, and in brief the order compelled the defendant to within 10 (ten) days from the date of service of the Court Order to indicate that the plaintiff injuries had been correctly assessed as serious as per the RAF 4 form by Dr P.T Kumberai. The Court Order required the defendant to exercise his rights in terms of regulation 3(3)(d) to reject or direct the plaintiff for assessment by designated medical practitioner of his choice. The court order further indicates that if the defendant fails within 10 (ten) days from the date the Defendant received the court order the plaintiff will be deemed to have qualified for general damages. The court order was served to the defendant Menlyn office on the 08 September 2023. The defendant did not comply with the court order, instead, defendant is mute. The court order was not varied nor rescinded in terms of Rule 42, of the Uniform Rules of the High Courts. This Court shall proceed to adjudicate on the issues of general damages.

[3] ***1980 (3) SA 105*** *(A) at 114 - 5*

30. The Plaintiff submitted that the amount of R 900 000.00 (nine hundred thousand Rands) is fair and reasonable to compensate the plaintiff for general damages. The Plaintiff referred the court in the case of *Mokwena v Road Accident Fund* (75931/2017) [2020] zagpphc 320 (03 July 2020), a 37 years old man was involved as a pedestrian in a motor vehicle accident and suffered a compound fracture of the right humerus, a left closed fibula fracture, a head injury and soft tissue neck injury. The Court awarded R 850 000.00 in general damages (2020)

31. In another case the *Woolley v Road Accident Fund (3123/19P) [2022] ZAKNPPHC (05 Aungust 2022) an adult female person suffered open tibia and fibula fracture on the right leg, fracture of left tibia among other injuries. The court awarded R 850 000.00 in general damages (2022)*

32. The plaintiff's counsel referred the to several case laws in relation to general damages. It is so that one cannot find a case that is exactly the same as that of the plaintiff, however there are injuries and sequelae that informs the court to determine a reasonable amount to compensate the plaintiff for general damages. I have considered the injuries and I am inclined to agree with the plaintiff's counsel that the plaintiff must be compensated for general damages. I am of the view that the amount that is fair and appropriate in this matter is the sum of **R 850 000.00** for general damages.

COSTS

The court shall not deviate to the general rule that the issue of cost follows the successful party, in this case the plaintiff succeeded in her claim and should be awarded cost in party and party scale.

33. In the circumstances, the following is the order of the Court;

1. The defendant shall pay to the plaintiff the amount of **R 8 285 923.00** (eight million, Two Hundred and Eighty-Five Thousand, Nine Hundred and Twenty-Three Rand) in relation to the future loss of earnings.

2. The defendant shall pay the amount of **R 850 000.00** (Eight hundred and Fifty Thousand Rand) for general damages.

3. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4) of Act 560f 1996 for payment of 100% for the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supply of goods to her, arising from the injuries sustained by her in the motor vehicle collision on 16th September 2016.

4. The Amount in paragraph 1 above shall be paid into following Bank Accounts;

NAME OF BANK: FNB
ACCOUNT HOLDER: ISHMAEL PHALA ATTORNEYS
ACCOUNT NO: 6[...]
BRANCH CODE: 260146
ACCOUNT TYPE: CHEQUE ACCOUNT

5. The Defendant shall be liable to pay interest on the aforesaid amounts *tempore morae* at the rate of 7% per annum from 180 days after the date of this order to date of the payment*.*

6. The defendant shall pay the Plaintiff 's taxed or agreed party and party costs until the date of this order including costs of a counsel scale B.

7. The costs consequently in the preparation of and obtaining the medico legal and actuary reports that were served on or provided to the Defendant.

8. The reasonable taxable preparation, qualifying and reservation fees, if any of the Plaintiff's experts for trial of whom notice was given to the Defendant.

9. The reasonable taxable costs of necessary consultations with the said experts and the reasonable taxable traveling, subsistence and accommodation costs of the Plaintiff for attending the medico legal examination, subject to the discretion of the taxing master.

10. The reasonable taxable costs of traveling, subsistence, accommodation costs of the Plaintiff for attending court.

11. The Defendant shall be liable to pay interest on the amount of the Plaintiff's costs of suit, as taxed or agreed, at 7 % per annum from 14 (fourteen days) of the allocatur of the taxing master or the date of the agreement, whichever applies, to date of payment.

12. The trust account shall be opened on behalf of the minor child.

MASHAMBA AJ
JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION

APPEARANCES

FOR THE PLAINTIFF : PROF/ADV JLH LETSOALO
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FOR THE DEFENDANT : NO APPEARANCE
INSTRUCTED BY :

DATE OF HEARING : 10 SEPTEMBER 2024
DATE OF JUDGEMENT : 30 SEPTEMBER 2024