REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2018/18540

- REPORTABLE: **NO**
- OF INTEREST TO OTHER JUDGES: **NO**
- REVISED: **YES**
-

24 January 2025 ____________________

Date of hearing: 24 October 2024

Date of judgment: 24 January 2025

In the matter between:

M[...] I[...] obo M[...] A[...] Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

INTRODUCTION

[1] The plaintiff Tovhowani I[...] M[...] ("the plaintiff") is an adulf female person who sues in her representative capacity as the biological mother and legal guardian of A[...] M[...] born on 31 December 2006 ("A[...]") as a result of a motor vehicle collision.

[2] On 26 November 2012 and at approximately 06h30, the minor child was walking and about to cross a street along R587 in Elim, Limpopo Province, when a red Toyota Cressida motor vehicle with registration number BPB 071 L ("the insured motor vehicle") collided into him. At the relevant time A[...] was 5 years 11 months old.

[3] The plaintiff instituted action for damages against the Road Accident Fund ("RAF") in terms of s17(1)(a) of the RAF Act 56 of 1996, as amended, as the statutory insurer. In paragraph 8 of his amended particulars of claim the plaintiff claims damages in respect of:

3.1	Past hospital and medical expenses	R20 000.00
3.2	Estimated future medical expenses	R80 000.00
3.3	Estimated loss of earnings (past and future)	R 2 500 000.00
3.4.	General damages	R1 000 000.00
TOTAL		**R3 600 000.00**

[4] Prior to the matter serving before me on 24 October 2024, the defendant had conceded merits 100% in favour of the plaintiff. Also, the issue of general damages had already been settled.

ISSUE FOR DETERMINATION

[5] In light of paragraph 3 above, the only issue remaining for determination by this court was the past and future loss of earnings. The core of the parties' disagreement relates to the contingencies that should be applied on the calculated figures as calculated by the actuaries.

PRELIMINARIES

[6] Mr L.L. Mathebula appeared on behalf of the plaintiff. There was no appearance on behalf of the defendant. The plaintiff had discovered multiple expert reports to prove their outstanding head of damages. However, the defendant did not discover any expert report. Mr Mathebula brought an application in terms of rule 38(2) of the Uniform Rules of Court that the factual evidence of the plaintiff and his witnesses as well as the reports of his experts, more specifically the facts, assumptions and opinions expressed by such experts as contained in their reports, notices of which were furnished in terms of rule 36(9)(b) of the rules to the defendant be admitted on affidavit. He submitted that there would be no prejudice that will be suffered by any party. Having properly considered the application and being satisfied that it would be fair and in the interest of justice to proceed as applied for, I granted same.

EVIDENCE BY WAY OF EXPERT REPORTS

[7] To establish a causal link between the accident and the injuries sustained by the plaintiff and the sequalae thereof, the plaintiff presented evidence by way of expert reports on affidavits of the relevant authors, the said experts having consulted with and examined the plaintiff post the accident. The following are the experts in question:

a. Industrial Psychologist- Dr Lieselotte Badenhorst;
b. Specialist Neurosurgeon- Dr Tshepo Moja;
c. Occupational Therapist- Relebogile Khwela;
d. Clinical Psychologist- Oscar Modipa
e. Educational Psychologist- Zenzele Kubheka and
f. Actuarial Calculations- Poneso.
g. Dr Peter Kumbirai - Specialist Neurosurgeon; and
h. Dr AJ Oosthuysen- Radiologist

[8] **Dr Lieselotte Badenhorst - Industrial Psychologist**

8.1. Dr Badenhorst posited the following:

8.1.1 That at the time of the collision the minor child was 5 years 11 months and that this factor together with his limited formal education (he was in grade R) at the relevant time makes it difficult for her to precisely predict what his future career potential and earnings capacity would have been but-for the accident, except to take his personal circumstances and expert opinion/s into account. To that end, her postulations are based on the educational psychologist's recommendation. Nonetheless, she postulated the following below herein:

Pre-morbid scenario:

- The plaintiff's pre-morbid career progression would have followed the following scope:

1. The minor child would have completed matric and at least a three-year bachelor's degree aligned to a NQF level 7 qualification in the field of his choice.

2. Although probably finding temporary employment only two years post his NQF level 7 qualification with earnings most likely not exceeding the equivalent of Paterson job Grade level A1/A2, the minor child would have probably thereafter found permanent employment with earnings starting on Paterson job Grade level B4/B5, towards a career and earning ceiling associated with Paterson job grade level D1 at age 45/55 until reaching the normal retirement age of 65 years old.

3. The minor child would have progressed onto the Paterson job grade level D1 by the age of 45 years and this would have represented his career and earning ceiling.

4. Thereafter the minor child would have earned inflationary increases until the retirement age of 65 years.

Post-morbid scenario:

- The plaintiff's post-morbid career progression will resultantly follow the following scope:

1. The minor child suffers from significant residual neuro-cognitive, emotional and behavioural problems.

2. The minor child has learning difficulties at school.

3. The minor child will achieve lower level of education and he has lost two years regarding his career profession.

4. The minor child is unlikely to secure a place in a non-corporate sector due his physical, emotional and cognitive limitations.

[9] **Dr Peter Tshepo Moja - Specialist Neurosurgeon**

9.1. Dr Moja reported and posited the following:

9.1.1 That on 19 September 2024 he interviewed the minor child for the nd time, that is, 11 years 10mnths post the collision. The minor child was accompanied by his mother during the interview and he was in Grade 12 and has not repeated a grade since his schooling. For the said interview he relied on the Elim hospital records and the communication from both the minor child and his mother. Placing reliance on the above sources, A[...] had sustained the following injuries:

1. Head injury with a laceration on the left temporal region of his head and a concussion (mild brain injury). This was diagnosed from the ordered X-rays of the skull, cervical spine, chest and pelvis;
2. Left thigh injury;
3. Lower back injury.

9.2 The treatment: From the hospital records, A[...] was fully conscious on admission to the hospital on the date of the accident, that is, 26 November 2012. On arrival at the hospital he had a Glasgow Coma Scale of 15/15. He was treated conservatively. The laceration on his head was sutured and he was admitted for neurological observation. He was discharged from the hospital two days after the accident on 28 November 2012.

9.3 Prior to the collision A[...] was healthy and had no prior history of neurological problems nor head injury. He no longer complains of back pain. According to his mother he complains of chronic, recurrent headaches and dizziness. From the minor child himself he complains of memory loss. He had no other complaints systemically.

9.4 He has a left temporal scar measuring 2cm. He has no deformities. On examining him neurologically, the outcome turned out normal.

9.5 Regarding his mental impairment/state, Dr Moja reported that A[...] continues to complain of headaches and memory loss post-accident. In respect of A[...]'s neuropsychological evaluation, Dr Moja deferred same to a Clinical Psychologist and regard to his scholastic performance, he deferred to an Educational Psychologist.

9.6 In regard to A[...]'s loss of earnings and earning capacity Dr Moja deferred same to an Occupational Therapist and Industrial Psychologist.

[10] **Ms Z Khubeka- Educational Psychologist**

10.1. Ms Khubeka reported and posited that A[...] is mildly to moderately cognitively challenged, which would inevitably cause him to struggle with the demands of tertiary education. The pattern of his cognitive and neuropsychological profile will probably cause him to struggle to complete a bachelor's degree to its abstract nature. This will constrain him to a completion of a National Diploma resulting in an NQF Level 6 qualification.

[11] **Relebogile Khwela - Occupational Therapist**

11.1. Ms Khwela prepared an addendum report in respect hereof following her second interview with A[...] held on 18 September 2024. In preparing her report she relied primarily on the following expert' reports: Dr T. Moja (Specialist Neurosurgeon); Mr O Modiba (the Clinical Psychologist) and Ms Z Kubheka's (Educational Psychologist).

11.2 Of importance and more relevance gleaned in her report, she opines on A[...]'s loss of earning potential and residual work capacity.

11.3 In her opinion she states A[...] as being 17 years old at the time of his assessment who presented limitation due to pain on the left lower limb, which becomes weak, numb and experiencing cramps at times. He complained of pain on the left lower limb when balancing on the left lower limb, walking on heel and toes as well as squatting, stooping, crouching and climbing with regard to mobility and agility skills. The assessor also found that A[...] presented with significant cognitive deficits in the areas of visio-spatial, attention, abstraction and memory. She was found to have below normal basic cognitive functioning.

11.4 Furthermore, Ms Khwela agreed with Z Khubeka's opinion above that A[...]'s mild to moderate cognitive challenges would inevitably cause him to struggle to complete a bachelor's degree, thus constraining him to a completion of a National Diploma resulting in an NQF Level 6 qualification. Ms Khwela emphasizes the fact that A[...]'s occupational prospects are dependent on the highest level of education he will be able to achieve.

11.5 She further stated that A[...] further presented with the physical capacity to do light physical demand. He will have difficulty in performing jobs that require medium, heavy and very heavy physical demand due to his back pain, left lower limb pain and unequal weight bearing. He is suited for light type of physical occupation with reasonable accommodation. His limitations and pain would compromise his ability to function at the same level as his uninjured co-workers, even in a situation with the physical demand category matching his physical abilities. He is thus considered a vulnerable job seeker in the open labour market when compared to his non-injured counterparts.

[12] **Dr Peter Kumbirai - Specialist Neurosurgeon**

12.1. Dr Peter Kumbirai stated A[...]'s injuries as:

- Deep laceration parietal left scalp;

- Injury left leg (according to his mother);
- Head injury? (opinion deferred to neurosurgeon).

[13] **Dr AJ Oosthuysen – Radiologist**

13.1 Dr Oosthhuysen stated A[...]'s injuries as:

- Skull:

The bony calvarium, suture lines and vascular markings appear normal.

No fracture is noted.

An undisplaced fracture that has healed or intracranial pathology cannot be excluded.

- **Left femur**

- The femur is intact.
- An undisplaced fracture that has healed cannot be excluded

[14] **PONESO Consulting ("PONESO") - Actuaries**

14.1. PONESO reported and posited the following:

14.1.1 That they did the calculations to determine the capitalised value of A[...]'s loss of future earnings and capacity. They based their calculations and assumptions for pre-morbidity and post-morbidity income/ earnings on the summary of the information of Dr L. Badenhorst (the Industrial Psychologist)'s two reports produced in 2021 and 2024 respectively. The extracts from the said reports which contain pre-morbidity vocational scenarios and relevant earnings figures form the basis of Poneso's assumptions re A[...]'s income. The following are the assumed earnings of A[...] by Poneso:

14.1.1.1 **<u>Assumed Pre-morbidity earnings:</u>**

Poneso states that the information provided indicates that the claimant's career and income would have progressed as follows had the accident not occurred (CORPORATE SURVEY EARNINGS, RJ KOCH, QUANTUM YEARBOOK, 2024:

- From date of accident: Nil.
- December 2024: Matric.

- December 2027: Degree.
- January 2028: R69 600 per annum (60% of Paterson A1/A2, basic, lower quartile).
- January 2030 (2 years' experience): R261 000 per annum (Paterson B4/B5, basic, lower quartile).
- January 20578 (age 45/55): R1 114 000 per annum (Paterson D1, total package, median quartile).
- Thereafter increase by inflation till age 65 years.

14.1.1.2 **<u>Assumed Post-Morbidity Earnings:</u>**

Based on the assessment in the Industrial psychologist's report and the information provided, Poneso stated that it assumed the following regarding A[...]:

- From date of accident: Nil.
- December 2024: Matric.
- December 2027: Diploma.
- January 2028: R69 600 per annum (60% of Paterson A1/A2, basic, lower quartile).
- January 2030 (2 years' experience): R261 per annum (Paterson B4/B5, basic, lower quartile).
- January 2057 (age 45/55): R722 500 per annum (Paterson C3/C4, total package, median quartile).
- Thereafter increase by inflation till age 65 years.

14.2. Poneso states that that the RAF Amendment Act cap does not apply to A[...]'s capital loss of income/ future earnings. Regarding how Poneso reached both its pre and post morbidity earnings set of results, its states that this was achieved by discounting the net projected earnings as discussed in paragraph 32.1 and 32.2 above, allowing for interest, inflation, taxation of the income (income tax) and A[...]'s probability of survival, and more pertinently, A[...]'s loss of earnings having been taken as the difference between the two scenario's present values.

14.3 Poneso bases its calculations on the fact of A[...] being 5 years 11 months old at the time of the accident. An uninjured contingency deduction for past loss of income was provided for at 5% and a 15% contingency deduction for future loss of income.

14.4 From the information provided, together with the calculation basis and assumptions, Poneso calculated the value of the capitalised loss of earnings The following is the final result of the calculation Poneso has factored in in the applicable limited loss to each year's loss from the date of A[...]'s first employment until retirement:

Pre-accident income:

Past loss of income = NIL

Future income R10,982,246

Less 10% contingency - R1,098,225

Total Earnings R9,884,021

Post-accident income:

Past loss of income = NIL

Future income R8,662,712

Less 15% contingency R1,299,407

Total R7,363,305

TOTAL NET LOSS OF INCOME: R2,520,716

SUBMISSIONS ON BEHALF OF THE PLAINTIFF

[15] Plaintiff's counsel did not cite any case law upon which he bases his arguments.

[16] Plaintiff's counsel submits the common cause fact that A[...] was a pedestrian in grade R and aged 5 years 11 months old at the time of collision. He further submits that A[...] suffered injuries in the collision the sequalae of which could only be linked to the accident if regard is had to the hospital records and expert reports, including also the fact that he had never been in a collision before and only having enjoyed good health. He submitted that the totality of the evidence before court there is no

basis upon which the court interfere with the contingency calculations as applied by the actuary and that an award be made in line therewith.

<u>LEGAL FRAMEWORK AND EVALUATION / ANALYSIS</u>

[17] It is trite that in order to succeed in a delictual claim, a claimant would have to prove the following requirements:

1. Causation;
2. Wrongfulness;
3. Fault; and
4. Harm.

[18] A successful delictual claim entails proof of a causal link between a defendant's actions or omissions on the one hand, and the harm suffered by the plaintiff on the other. Legal causation must be established on a balance of probabilities, that the conduct of the defendant caused the harm. This is consonant with the "but-for' test.

[19] The merits were settled on 100% in favour of the plaintiff, with the RAF admitting 100% liability that the collision occurred as a result of the negligence of the insured driver.

[20] The nature and extent of A[...]'s injuries in the undisputed collision is found in the expert reports that explain such injuries suffered by A[...] as recorded in the hospital records and their experts opinions.

[21] It is trite that the court has the discretion to determine the percentage in regard to the contingency deduction to be applied. Concerning the past loss of earnings claim, I find that the plaintiff has failed to establish a case therefor. In regard to the future loss of earnings, it is my view that a 5% *re* past and 15% *re* future contingency deductions applied, having regard to the sequelae of the injuries sustained by A[...] in the accident and the unchallenged expert reports, are just and fair. It is on this basis that I do not find any reason to interfere with the actuarial calculations applied by Poneso.

[22] In the result I make the following order:

IT IS ORDERED THAT:-

1. Defendant shall be liable 100% of the plaintiff proven or agreed damages;

2. The Defendant shall pay the Plaintiff the amount of **R 2 520 716.00 (TWO MILLION FIVE HUNDRED AND TWENTY THOUSAND SEVEN HUNDRED AND SISXTEEN RAND)** in her representative capacity as the biological mother and guardian of A[...] M[...] ("Minor") in respect of loss of earning capacity arising from a pedestrian motor vehicle accident and injuries sustained by the minor on the 26th day of November 2012, The aforesaid amount shall be deposited into the Plaintiff's attorneys of record Trust account with the following details:

Name	:	M[…] A[…]
Bank	:	S[…] B[…]
Branch	:	J[…]
Account number	:	0[…]

3. The Defendant shall furnish the plaintiff with an undertaking in terms of the provisions of Section 17(14)(a) of Act No. 56 of 1996, 100% in respect of costs of the future accommodation of M[...] A[...] in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the minor after such costs have been incurred and on proof thereof resulting from the accident which occurred on 26th day of November 2012.

4. The payments made by the defendant in respect of the plaintiff on behalf of the minor in terms of this order shall be made into a trust account of the plaintiff's attorneys, Mosungwa Attorneys, for the sole benefit of the minor pending the establishment of the Trust contemplated in paragraph 4 and 5 hereinunder.

5. The attorneys for the plaintiff Mosungwa Attorneys are ordered:

5.1 to cause a Trust ("The trust") to be established in accordance with the Trust Property Control Act no. 57 of 1988 within a period of 6 (six) months from the date hereof with any banking institution of the Republic of south Africa.

5.2 To tax their bill of costs before they shall recover their fees.

6. The trust instrument contemplated in paragraph 5. above shall make provision for the following:

6.1 That A[...] shall at all times be the sole beneficiary of the Trust;

6.2 That the powers of the trustee(s) shall specifically include the power to make payment from the capital and income for the reasonable maintenance of A[...], or any other purpose which the trustee(s) may decide to be in A[...]'s interest, and if the income is not sufficient for the aforesaid purpose, that the trustee(s) may utilize capital.

6.3 The ownership of the trust property vests in the trustee(s) of the Trust in their official capacity as Trustee(s).

6.4 Procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Honourable court.

6.5 The exclusion of any benefits accruing to A[...] as beneficiary of the Trust from any community of property and/ or accrual system in any marital regime.

6.6 The suspension of A[...]'s contingent rights in the event of cession, attachments or insolvency, prior to the distribution or payment thereof by the trustee(s) to A[...].

6.7 That any amendment of the trust instrument be subject to the leave of this Honourable Court.

7. The trustee(s) shall ensure that payment of the fees of the plaintiff's attorneys shall be strictly in accordance with this order, and the Master of the High Court and/ or the trustee(s) may insist on the taxation of the agreed bill of costs.

8. The Defendant shall pay the Plaintiffs' party and party costs in the high court scale B, up to and including the 24th day of October 2024, either as taxed or agreed, including costs attendant upon the obtaining of payment of the amount referred to in paragraph 1.

9. The above shall be subject to the following conditions:

9.1 The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorney of record; and

9.2 The Plaintiff shall allow the Defendant 14 (Fourteen) court days tomake payment of the taxed costs;

10. The Defendant shall further pay the following costs:

10.1 The reasonable costs of the creation of the Trust referred to below and the appointment of a trustee(s) subject to the proviso that such costs do not exceed the reasonable costs of the appointment of a curator *bonis*.

11. The trust shall terminate upon the minor attaining the age of 21 years;

13. It is recorded that the plaintiff and her attorney entered in to a contingency fee agreement which intitles the plaintiff’s attorneys to charge 25% of the claim inclusive of VAT.

LIVHUWANI VUMA
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES:

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Date of Hearing:	24 October 2024
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