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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 3911/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 19/03/2025

SIGNATURE:

In the matter between:

M[...] M[...] R[...] obo
M[...] L[...] M[...]

APPLICANT

And

ROAD ACCIDENT FUND

RESPONDENT

JUDGEMENT

MASHAMBA AJ

INTRODUCTION

[1] This matter was on the default judgment roll on the 27th January 2025. M[...] M[...] R[...] (“the Applicant”), acting in her representative capacity as a biological mother of M[...] L[...] M[...], a female minor child born on the 20th July 2009 (“the minor child”), lodged a claim against the Road Accident Fund (“Respondent”) in terms of the provisions of the Road Accident Fund Act¹ (“the Act”) on the 05th August 2022, due to an accident which occurred on the 05th March 2022. The minor child was a pedestrian when hit by the insured motor vehicle with registration numbers and letters H[...], driven by Ntuli Mzombo.

[2] The Applicant issued summons before the above honourable court on the 02nd May 2023 and the Respondent did not enter his notice of intention to defend. On the 15th July 2014, the Applicant made a default application against the Respondent for the following reliefs;

2.1 Past hospital, medical and travelling costs	R 500 000.00
2.2 General damages	R 1 500 000.00
2.3 Future medical expenses	Undertaking
2.4 Future loss of earnings	R 3 000 000.00
TOTAL	R 5 000 000.00

[3] The Applicant amended her particulars of claim in terms of rule 28 of the Uniform Rules of Court. According to the Applicant’s amended particulars of claim, the total amount claimed is **R 15 000 000.00** calculated as follows;

3.1 Past medical, Hospital and traveling expenses	R 500 000.00
3.2 Past and future loss of income	R 13 000 000.00
3.3 General Damages	R 1 500 000.00

¹ Act 56 of 1996

[4] The Applicant proceeded to present her case in respect of all issues of liabilities and pleaded that the issues of general damages should be postponed sine die and the claim for past medical expenses were abandoned since the Applicant has failed to produce invoices. Subsequent to the submissions from the Applicant the judgment was reserved.

LIABILITY

[5] The Applicant bears the onus to prove that the Respondent is liable under the provisions of the Act, to compensate her for the damages suffered because of the injuries sustained in the collision. This includes the onus to prove that the driver of the insured motor vehicle negligently caused the collision.

[6] The application was made in terms of Rule 38(2) of the Uniform Rules of Court that the court should accept evidence on affidavits, as it would be expedient to do so. The affidavits deposed to by all the expert witnesses are filed of record.

[7] *Havenga v Parker*² confirmed by the Supreme Court of Appeal in *Madibeng Local Municipality v Public Investment Corporation*³, found that it is permissible to place expert evidence before the court by way of affidavits in terms of Rule 38(2) of the Uniform Rules of Court.

[8] The Applicant substantially complied with the requirements set out in the Practice Directives of this Court and the Uniform Rules of Court, entitling her to proceed on a default basis.

[9] The accident from which this claim arose occurred on the 05th March 2022 at approximately 17h00. According to the particulars of claim, section 19F Affidavit and the docket, the minor child was a pedestrian walking along Jerusalem next to Mzimyana, Mosnterius, in Limpopo Province. The minor child was knocked by a motor vehicle with registration numbers and letters H[...] driven by Ntuli Mzombo Margaret (“the insured driver”). The accident occurred in the absence of the

² 1993 (3) SA 724 (T).

³ 2018 (6) SA 55 (SCA)

Applicant but the Applicant's version of the how the accident occurred depended from the police docket.

[10] According to the statement from the suspect Ntuli Mzombo Margaret, the insured driver, she was traveling along Jerusalem Village when she noticed a minor child who suddenly crossed the road. The insured driver alleged that she abruptly applied breaks and tried to swerve her motor vehicle in an attempt to avoid the accident but unfortunately, she knocked the minor child at her left leg.

[11] The Applicant indicated that the minor child was 13 years old when the accident occurred, therefore, the Respondent should be 100% liable to compensate the minor child for her proven damages since the insured driver has failed to keep a proper lookout and that she drove her motor vehicle at an excessive speed. This court has considered the age of the minor child and had no difficulties to accept that the insured driver was negligent. The court is of the view that the Applicant must be compensated 100% of her proven damages.

QUANTUM

[12] According to the hospital records, the minor child was diagnosed of open tib-fib fracture of the left leg. The GCS was noted as 15/15 and other injuries noted were bruises on the left elbow, right shoulder and bleeding from the wound of left leg. According to Orthopaedic report, the minor child received left leg conservative treatment⁴. The Orthopaedic report further reported that the minor child loss consciousness at the scene⁵. According to neurosurgeon report, the claimant reported brief loss of consciousness and head injury-swelling on the occiput. The clinical psychologist mentioned that the Applicant and the minor child reported that the minor child loss consciousness and that she did not recall what happened after the accident. The minor child was informed by an acquaintance who has witnessed the accident that she was lying on the middle of the road unconsciously and that she became conscious after an estimated duration of 30 minutes⁶.

⁴ Index to motion, bundle B, page 4, par 3.3

⁵ Ibid.p.21, par 2

⁶ Ibid.p.40, par 4.1

[13] The minor child together with the Applicant lost consciousness to the neurosurgeon and that the minor child had head injury which were not mentioned in the medical records and injuries mention in the medical records are tibia-fibula fracture of the left leg, bruises of the shoulder and elbow. The Applicant was not present when the accident happened but depended from the information in the police docket⁷.

[14] The minor child was assessed on the 28th October 2024 by Dr Ntimbani, a Neurosurgeon (“the neuro”). The neuro noted the injuries as left leg fracture, as mentioned on the medical records and head injury-swelling on the occiput as reported by the Applicant. The neuro further noted bruises on the left elbow, right elbow, right shoulder, bleeding from wound of left leg. The neuro noted complaints by claimant as headache, left leg pain and poor memory. The Applicant and the minor child reported that the minor child can easily forget what is taught in class and when sent on errands⁸. The risk of post-traumatic epilepsy is nil. The neuro classified the injuries as mild concussive brain injury and tibia fibula fracture.

[15] The minor child was assessed on the 28th October by Dr Ngoben, an Orthopaedic Surgeon (“the ortho”). The ortho noted that the minor child was diagnosed with chronic left leg pain-malunited left tib fib⁹. The ortho noted that the minor child was involved in an accident on the 05 March 2022 and she was treated at St Rita’s Hospital from the date of the accident and discharged on the 14th March 2022. The ortho opined that there is no surgical treatment foreseen. The ortho opined that the minor child was disabled for a period of 8 weeks post injury and has left leg function impairment. The ortho calculated WPI=13% and qualified the minor child for narrative test¹⁰.

[16] The minor child was assessed on the 29th October 2024 by M Molemi, an Occupational Therapist (“the OT”). The OT noted that the minor child did not return to school during the year 2022 after the accident but she wrote her 2022 final

⁷ Index to motion, Bundle A, page, 36, par 3

⁸ Index to motion, Bundle B, page 23, par 6

⁹ Ibid,p 4, par 3.2

¹⁰ Ibid.p.8, par 9

examination which she passed. The OT opined that with regards to future occupation performance, this will directly link to the level of education she manages to achieve. The OT further opined that from a physical point of view, the minor child should be able to perform work within the sedentary, light and occasional medium strength demand and that should the reported pain to her left leg and headache persist, the minor child will find it difficult to perform work within the constant medium, heavy and very heavy strength demand. The OT indicated that the abovementioned challenges will thus limit the choices of work the minor child can do thus rendering her an unequal competitor in an open labour market when compared to her uninjured peers¹¹. The OT opined that from a physical point of view, the minor child should be able to continue with her schooling.

[17] The minor child was assessed on the 28th October 2024 by Dr Mphuthi, the clinical psychologist (“the clinical”). The clinical opined that the minor child’s mild traumatic brain injury has resulted in mild-moderate neurocognitive deficits due to the vulnerable age at which she sustained the mild TBI. These negatively impacted her ability to function both intellectually and socially. The clinical further opined that the minor child’s clinical psychological status characterised by symptoms of post-traumatic stress mood dysregulation associated with diminished neurocognitive capacity as well as persistent pain and changed social functioning and status.

[18] The minor child was assessed on the 28th October 2024 by Mr EK Mashaba, an Educational Psychologist (“the Educational”). The Educational opined that pre-morbid the minor child had chances of completing Grade 12 with bachelor endorsement and that she would likely achieve to obtain a degree level of education. The Educational mentioned that the minor child had no pre-accident cognitive or physical difficulties reported to have existed. The Educational further opined that post-morbid the minor child has difficulties with verbal reasoning concentration, mental alertness, abstract thought, and auditory processing. The above-mentioned skills are required for academic competencies which requires spelling, reading, writing and numeracy. The Educational in conclusion indicated that considering the opinions of respective specialists as well as the cognitive decline, it is evident that

¹¹ Ibid.p. 43, par 7.4

the reported motor vehicle accident has had a negative impact on the minor child's well-being. The Educational mentioned that the minor child's Grade 8 results, indicate a decline in cognitive functioning.

[19] The Educational indicated that the minor child requires learning support, adaptation, and accommodation in order to complete Grade 12. The minor child is going to find it difficult to complete a qualification with her current challenges. The Educational further indicated that noting the minor child low average and inconsistent cognitive abilities, decline in academic performance, and socio-emotional challenges it is practical to conclude that the minor's learning ability has deteriorated since the accident¹².

[20] The Educational opined that the minor child is likely to reach and pass her Grade 12 with a higher certificate endorsement and continue with a certificate course (NQF 5) at Technical Vocational Education and Training (TVET) College. This limits her employment and work opportunities. Deference is made to the Industrial Psychologist. The Educational further recommended that the minor child need remedial teaching and learning support in order to complete NQF Level 6 qualification.

[21] The minor child was assessed on the 28 October 2024 by T Tshieni, Industrial Psychologist ("The Industrial"). The Industrial made her opinion after the consideration of the conclusions made by the Neurosurgeon, Educational Psychologist, Occupational Therapist, Clinical psychologist and subsequent to that the Industrial postulated the loss of earnings incurred by the minor child as a result of the accident. The Industrial considered the opinion of the Educational who opined that pre-morbid the minor child would probably complete grade 12 with bachelor endorsement and that she would likely achieve to obtain a degree level of education. The Industrial made two scenarios, the first postulation is that post-morbid the minor child will probably fail to complete Grade 12 level of education and the second one is that post-morbid the minor child will complete Grade 12 with a higher certificate (NQF5) level of education.

¹² Ibid.p.78.

[22] On the 19th November 2024, the Applicant appointed Munro Actuaries, to calculate the future loss of income suffered by the minor child as a result of the accident in question. The actuaries calculated the minor child future loss of earnings based on the first and the second scenario. The actuaries applied the following contingencies, 15% uninjured on future earnings and 25% injured on future earnings. The future loss of earnings was calculated as follows;

[23] **Scenario 1: Without a Grade 12 level of education**

	Uninjured income (R)	Injured income (R)	Loss (R)
Future loss	14 245 200.00	906 600.00	
Future contingencies	(2 136 780) 15%	(226 650) 25%	
Net	12 108 420.00	679 950.00	11 428 470
Net Total			11 428 470

[24] **Scenario 2: With a Higher Certificate (NQF 5) level of education**

	Uninjured income (R)	Injured income (R)	Loss (R)
Future loss	14 245 200.00	6 284 600	
Future contingencies	(2 136 780) 15%	(1 571 150) 25%	
Net	12 108 420.00	4 713 450.00	7 394 970
Net Total			7 394 970

[25] The Applicant submitted that considering the conclusion of all medical experts discussed above, the minor child has been adversely affected by the accident. The Applicant further indicated that considering the seriousness of the head injury and neurological challenges experienced by the minor child, the amount of **R 11 428 470.00** in respect of the future loss of earnings after the contingency's deductions of 15 % uninjured on future earnings and 25% injured on future earnings, will be

reasonable. The plaintiff relied her submissions on the heads of argument which was handed over to this court before the hearing of this application.

THE CASE LAWS

[26] Regarding the evaluation of credibility and reliability of expert evidence, Wallis JA (Fourie and Koen AJJA concurring) in *Pricewaterhouse Coopers Incorporated and Others v National Potatoe Co-operative Ltd and Another*¹³ referred to *Wightman v Widdington*¹⁴ where it was remarked thus:

“Legal principles and tools to assess credibility and reliability

“Before any weight can be given to an expert’s opinion, the facts upon which the opinion is based must be found to exist. As long as there is some admissible evidence on which the expert’s testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish. An opinion based on facts not in evidence has no value for the Court. With respect to its probative value, the testimony of an expert is considered in the same manner as the testimony of an ordinary witness. The Court is not bound by the expert witness’s opinion. An expert witness’s objectivity and the credibility of his opinions may be called into question, namely, where he or she:

- *accepts to perform his or her mandate in a restricted manner;*
- *presents a product influenced as to form or content by the exigencies of litigation;*
- *shows a lack of independence or a bias;*
- *has an interest in the outcome of the litigation, either because of a relationship with the party that retained his or her services or otherwise;*

¹³ [2015] 2 All SA 403 (SCA), para 48.

¹⁴ (Succession de) 2013 QCCA 1187 CanLII, par 326-330

- *advocates the position of the party that retained his or her services; or*
- *selectively examines only the evidence that supports his or her conclusions or accepts to examine only the evidence provided by the party that retained his or her services.”*

[27] In *Ruto Flour Mills v Adelson (T)*¹⁵ Boshoff J stated that a party seeking to introduce expert evidence must satisfy the court that the witness not only has specialist knowledge, training, skill or experience but that he/she can, on account of these attributes or qualities, assist the court in deciding the issue, that he/she is an expert for the purpose for which he/she has been called upon to express an opinion,¹⁶ the witness does not or will not express an opinion on hypothetical facts that have no bearing on the case or which cannot be reconciled with all the other evidence in the case.¹⁷

[28] When deciding the minor child’s future loss of earnings, this court has considered a decision in *Southern Insurance Association Ltd v Bailey NO*¹⁸ Nicholas JA stated as follows:

“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” ... 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.”

COURT’S DISCUSSIONS AND FINDINGS

¹⁵ 1958(4) SA 325 At 237C-D.

¹⁶ *Goliath v Fedgen Insurance Company Ltd* 1994 (2) PH F 31 E at 83.

¹⁷ *S v Mkhohle* 1990 (1) SACR 95 (A) at 100d.

¹⁸ 1984 (1) SA 98, par 116-117

[29] In consideration of an actuarial calculations in paragraphs 23 and 24 *supra*, the court accepted that post accident the minor child has the potential to obtain a NQF 5, so scenario 2 is most probable. The court noted that the minor child's head injury and loss of consciousness was not mentioned in the medical records. The court finds that it is probable that the head injury was not recorded in the hospital records and that the sequelae of the head injury are confirmed by the minor child's declining school performance. The insured driver who took the minor child to the nearby clinic immediately after accident did not mention in her statement that the minor child lost consciousness for the duration of approximately 30 minutes as alleged by the Applicant and the minor child. The court after thorough consideration of the seriousness of the minor child's injuries, finds that it is probable that the minor child had brief loss of consciousness. The court noted tibia fibula fracture of the left leg. The court noted that the minor child's school performance declined in 2023 in Grade 8 and continued to decline in 2024 first term when doing Grade 9. The court further noted the minor child's intermittent pain in the left leg when she walks for long distance as reported by the OT. According to the various medical experts discussed above, the minor child has a mild traumatic brain injury which has had an adverse impact on her school performance.

[30] This court is of the view that the motor vehicle accident in question had an adverse impact on the minor child's school performance at school. The other discrepancies such as the period of the minor child's loss of consciousness and occipital head injury which are not documented in the medical records can be addressed by applying of high contingencies deduction.

[31] This court has discretion when it comes to the reasonable contingency deduction to be applied when determining reasonable compensation for the past and future loss of earnings. The court took note of the fact that actuarial calculations are an estimated loss postulated according to the earnings potential of an individual, but the actual loss of earnings will never be certain. However, the court has the discretion, after analysing all available evidence, to determine a reasonable compensation to be awarded to the claimant. The more the court doubts the

earnings potential of a claimant, the higher the contingency deductions may be applied.

[32] The court noted that contingencies are subjective; however, Robert Koch (Quantum yearbook 2020) has suggested the following well-followed approach to determine what the 'normal' contingency would be:

“...what is described as a “sliding scale” is used, under which it is allocated a “1/2% for year to retirement age, i.e 25% for a child, 20% for a youth and 10% in middle age”.

[33] The court is of the view that reasonable contingencies to be applied in this case are 30 % for uninjured future income and 25% for injured future income. The minor child's future loss of earnings after the deductions of the above contingencies is made out as follows;

[34] **Scenario 2: With a Higher Certificate (NQF 5) level of education**

	Uninjured income (R)	Injured income (R)	Loss (R)
Future loss	14 245 200	6 284 600	
Future contingencies	(4 273 560) 30%	(1 571 150) 25%	
Net	9 971 640	4 713 450	5 258 190
Net Total			5 258 190

[35] In the circumstances, this court finds that the appropriate amount to be awarded to the Applicant in respect of the future loss of earnings capacity should be in the sum of **R 5 258 190.00** (Five million, Two Hundred and Fifty-Eight Thousand, One Hundred and Ninety Rand).

COSTS

[36] The Court shall not deviate from the general rule that the cost shall follow the successful party. The Applicant succeeded in her claim against the Respondent for future loss of earnings and future medical expenses which will be covered by an undertaking in terms of section 17(4)(a) of the Act, therefore, the Respondent is liable for the costs in this matter.

ORDER

[37] In the circumstances, the following is the Order of this court that:

1. The Respondent shall pay the Applicant the sum of **R 5 258 190** (Five million, Two Hundred and Fifty-Eight Thousand, One Hundred and Ninety Rand).
2. The Respondent shall furnish the Applicant with an undertaking in terms of Section 17 (4) (a) of Act 56 of 1996 within 30 days from the date of delivery of the Court Order.
3. The amount in paragraph 1 above shall be paid into the Applicant's attorneys trust account.
4. The Respondent shall be liable to pay interest on the aforesaid amounts' *tempore morae* at the rate of 11,75% per annum from 180 days after the date of this order to date of the payment.
5. The Respondent 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.
6. The costs consequently in the preparation of and obtaining the medico legal and actuary reports that were served on or provided to the Respondent.
7. The reasonable taxable preparation, qualifying and reservation fees, if any of the Applicant's experts for trial of whom notice was given to the Respondent.

8. The reasonable taxable costs of necessary consultations with the said experts and the reasonable taxable traveling, subsistence and accommodation costs of the Applicant for attending the medico legal examination, subject to the discretion of the taxing master.
9. The reasonable taxable costs of traveling, subsistence, accommodation costs of the Applicant for attending court.
10. The Respondent shall be liable to pay interest on the amount of the Applicant'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.
11. The amount in paragraph 1 above shall be protected by opening of a trust on behalf of the minor child.
12. The issues of general damages are postponed sine die.

**E MASHAMBA
ACTING JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION**

APPEARANCES

**FOR THE PLAINTIFF: ADV K MAPENGO
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FOR THE DEFENDANT: NO APPEARANCE

DATE OF HEARING: 27th Januay 2025

DATE OF JUDGEMENT: 19th March 2025