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

Case No: 2019/21471

DELETE WHICHEVER IS NOT APPLICABLE
REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

11.03.2024

DATE

SIGNATURE

IN THE MATTER BETWEEN:

M[...] F[...] L[...] obo

PLAINTIFF

A[...] B[...] L[...]

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

SIWENDU J

Introduction

[1] This action was instituted by FML against the Road Accident Fund (RAF) in his capacity as the father of the minor child. ABL was born on 10 April 2013. On 12 July 2015, when she was 2 years old, the vehicle in which she was a passenger was involved in an accident with a taxi driven by an unidentified taxi driver. ABL was an unrestrained passenger.

[2] The serious injury assessment report prepared by Dr G.M Fredericks based on an examination conducted on 1 July 2019 reveals that ABL was taken to Chris Hani Baragwanath Academic Hospital. It is reported that she:

- i. lost consciousness for approximately five minutes after being propelled from the back seat of the vehicle.
- ii. sustained a left-sided forehead abrasion and had been experiencing persistent disabling left-sided headaches following blunt head trauma.
- iii. She has become dependent on oral analgesics on an ongoing basis to alleviate her persistent disabling headaches following the accident question,
- iv. In view of the disabling nature of the headaches, a minimum Class 4 allocation was reasonable which equates to a 5% WPI rating.

[3] Hospital records dated 3 August 2015, state that ABL returned to hospital for a review. She sustained:

- i. a "distal femur greenstick fracture approximately three weeks ago"
- ii. it was discovered that she "had a fracture around the knee" for which a back-slab was applied.
- iii. A control x-ray performed as part of this assessment confirms the absence of radiological abnormalities according to available radiologist's report.
- iv. An assessment translated to 3% WPI rating.

[4] Dr G.M Fredericks concluded that ABL sustained a Whole Person Impairment (WPI) of 8% and "it is reasonable that the claimant's injuries should be allowed to qualify "as Serious Injuries under 5.1 of the Narrative Test."

[5] It is noteworthy that a Folstein Extended Mental State Exam (EMSE) could not be performed as part of this assessment based on ABL's age and educational

background at the time of the accident. Dr Fredericks stated that “in view of the documented head injury which was sustained at the time of the accident and due to the disabling nature of the child's headaches following the accident” he would defer the assessment of ABL’s educational status and capacity to an Educational Psychologist.

[6] It is undisputed that ABL suffered a Mild head injury. Prof A Kelly, a specialist neurosurgeon who examined ABL when she was 6 years (approximately four years after the accident) confirmed that she was fully conscious on arrival at hospital, and a GCS of 15/15 was reported. No CT brain was done. It was reported she lost ABL lost consciousness for 5minutes. She was discharged approximately two days post admission. She was reviewed multiple times in the out-patient clinic at Chris Hani Baragwanath hospital but was never readmitted.

[7] Dr Kelly also noted that ABL had not experienced memory impairment- “patient has not experienced memory problems”, nor epilepsy- “patient has not experienced seizures” when he examined her. However, she experienced visual difficulties and persistent post-concussion headaches which were treated through over the counter medication. He observed that “the presence of a superficial injury on the head is evidence of direct impact on the head. It is however not a factor used in the diagnosis of a traumatic brain injury.” No neuropsychological complications were found. She has 2-3% chance of developing late onset post traumatic epilepsy. He stated that chance of the development of epilepsy have not increased.

[8] At the hearing, the RAF conceded the merits. The RAF rejected the claim for general damages, and it is to be referred to the HPCSA.

[9] The case rests solely on expert evidence produced by Mr FML. The applicant sought the court’s leave to present the evidence and that of his experts witnesses by way of affidavit in terms of Rule 38(2)¹ read with section 13 of Act 44 of 1988 for the

¹ “The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the

admission of evidence on affidavit. Ms Mhlanga, the State Attorney representing the RAF, acceded to the request but sought the attendance of the Educational Psychologist (Ms N du Plessis), and the Industrial Psychologist, (Mr Lewis Rosen) for cross-examination. The qualification of these experts is not disputed.

Issue for Determination

[10] The dispute stems from the sequelae of the injuries sustained by ABL. RAF challenges the postulation made by Ms du Plessis on which Mr Rosen's report is based. Mr FML contends the contrary, that she will attain an NQF6 qualification. The RAF on the other hand contends it is highly probable that ABL will attain NQF7.

[11] The premise for RAF's challenge is that ABL suffered a mild traumatic head injury (MBI) with a GCS of 15/15. Her past and current school reports demonstrate that ABL is "coping and passing" all her grades at primary school. There is no dispute that she will matriculate and will be employable.

[12] The dispute about the prospective loss of earnings thus turns on a narrow question of whether, ABL will attain an NQF6 or NQF7 qualification. A conclusion either way determines the calculation of ABL's loss of earnings capacity. Initially, a prayer for an amount of R4 770 055,00 was made but the plaintiff sought leave to amend paragraph 1 of the Prayers with the figure R5 512 159.00.

Evidence

[13] Ms du Plessis conducted her first assessment 31 October 2019 and a follow up assessment on 26 August 2024 when ABL was 11 years and 04 months. She agreed that ABL will matriculate. The point of departure is that she says ABL will obtain a lesser NQF6 qualification at a Technical Vocational and Educational Training (TVET) college. She would have matriculated and obtained an NQF7 level qualification had the accident not occurred.

attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit."

[14] The RAF was dissatisfied with the premise Ms du Plessis's conclusion and challenged this during cross examination. The RAF pointed to the orthopaedic surgeon's report, which indicates that ABL's symptoms will improve and will have no effect on her employability.

[15] In answer, Ms du Plessis conceded the findings in the orthopaedic report. However, she testified that physical injury cause discomfort, pain and irritability which affects the learning drive. Since not much has been done to treat ABL, sitting for long periods can aggravate the pain.

[16] Another basis for challenging Ms du Plessis' conclusion was ABL's school performance in Grades 1, 2, 4, 5 and 6 (term I and 2). ABL changed schools to New Model Private College in 2024, where she is currently in Grade Six. The RAF contended the reports reflect a performance which is either on par or above class average. As a Grade 6 learner, the conclusion to be drawn is that "she is not struggling."

[17] The response to this is that ABL's working memory is essential for learning, problem solving and mathematical skills. The headaches post-concussion reduces the ability to stay focused and slows down the learning process. The headaches are accompanied by nose bleeds. In addition, contrary to Dr Kelly's opinion ABLA, in 2023, she experienced her first epileptic seizures 2-3 times per month. They lead to frequent school absenteeism. Dr Mazabow is of the view that the seizures are neurological and post-traumatic in nature. The condition will need management and better control. Ms du Plessis found, ABL exhibited ADHD like features secondary to the mild traumatic brain injury.

[18] According to Ms du Plessis, as ABL moves out of the foundational phase, to the intermediate and senior school phases, there will be an increase in her academic workload. Her long-term Memory was found to be below average. indicating There will be most likely be a decline in her cognitive / executive functioning. ABL exhibited reading and writing difficulties. While she may get learning concessions, get

psychotherapy to deal with anxiety and depression, the current results indicate she would have been obtained an NQF7 pre- accident but not the post-accident. A degree will be more demanding. She was confident of her diagnosis given the “conglomeration of these factors.” She normally, and she expects a decline to occur.

[19] Pressed on when the decline will likely manifest, Ms du Plessis referred the Court to the report by Dr Mazabow a Clinical Neuropsychologist, which indicates that the salient symptoms will reveal in time because of the “sleeper effect.” Given a brain injury at an early age, ABL is more vulnerable to develop future mood and anxiety disturbances. She emphasised that her evidence is not that she will not pass matric.

[20] Ms du Plessis’s evidence must be considered in the light of Dr Kelly’s report and evidence, as well as Ms Beverley Van Zyl, a Clinical Neuropsychologist. Although Dr Kelly agreed that ABL would not be able to compete effectively in the open labour market due to the (a) Headaches (b) Visual problems and (c) Left leg pain, the young age at which the head injury occurred makes it difficult to give a prognosis since later neuro-cognitive and social implications are impossible to predict.

[21] Ms Beverley Van Zyl stated that given the young age at which the accident occurred, it is simply too early to exclude neuronal damage. The neuropsychological profile demonstrated performances within expected range, i.e. average to high average albeit with some mild variability and is inconsistent with the presence of a head injury of any significance. She “strongly recommended that ABL has a baseline educational assessment to serve as a *benchmark* and that she has *regular assessment updates* to assist in the way forward.” She estimated her pre- morbid intellectual potential to be in the average to high average range. She noted that, further deficits may become evident as the brain matures given the young age at which injuries were sustained. It is so that she deferred this to the Educational Psychologist. [emphasis added]

[22] Recently, a report dated 26 March 2024 was compiled by a different Clinical Neuropsychologist, Dr M Mazabow. Collateral information obtained from ABL’s

father is that she experiences frequent Epistaxis (nosebleeds), and this has been the case since she was 3 years old. Early in 2023, she began experiencing seizures, often occurring at the same time as the headaches, 2 or 3 times a month. Some months would be without the episodes. Her concentration fluctuated significantly.

[23] The test scores results conducted by Dr Mazabow were varied. Some indicate that ABL is a child of high- average to above-average cognitive-intellectual potential. Others indicate that poor scores on tests of working memory/ double-mental tracking, with poorer-than-expected forward- planning, variable concentration (impacting on her visuomotor tracking speed), and with poorer-than-expected self-monitoring, and relative fine motor speed/dexterity difficulty on the right side. Indicative of a subtle cognitive impairment.

[24] Although Dr Mazabow and Ms du Plessis reach a similar conclusion about the impact of the accident on ABL's future cognitive function, Dr Mazabow points out that the available information pertaining to the accident suggests that the concussion sustained was probably mild, following which significant and persisting neuropsychological deficits *would not typically be expected*. Significantly, he states that an evaluation by a neurologist is required to determine whether the epileptic episodes represent a post- traumatic epilepsy, and whether there is a nexus with the accident in question. [emphasis added]

[25] On 6th November 2024, Prof Daliwonga Magazi, a neurologist assessed ABL conducted the assessment and found that there were no physical neurological deficits uncovered during the examination. However, although her head injury would be categorised as mild, academic research shows that the recurrence of seizures indicates her head injury was more significant than a straightforward "mild." This answers the question of the nexus between the accident and ABL's difficulties. A close monitoring for the recurrence is crucial so that she should commence appropriate medication.

[26] Mr Rosen's, an Industrial Psychologist confirmed his report. He concluded that after graduation, ABL will likely take up a post in the open labour market at a

Paterson B4 level, with a straight-line progression to a C4 level at the age of about 45.

[27] His opinion was based on updated reports by Dr Jason Labuschagne, a neurosurgeon, Prof Daliwonga Magazi, a neurologist, Dr Mazabow, a neuropsychologist, and Nina du Plessis, the educational psychologist. The nett effect flowing from these reports is that ABL will be unlikely to earn up to her pre- morbid potential but will earn at a lower level and should be compensated accordingly. Mr Rosen concluded that she is likely to continue being employed until normal retirement age. At an entry level after graduation, the Total Annual Cost of Employment (2018) would be as follows:

Entry Level after Graduation		Post Held at About Age 45
Lower Quartile	R 239 344	R 516 504
Median	R 283 088	R 606 942
Upper Quartile	R 338 055	R 739 823
90th Percentile	R 400 471	R 882 086

[28] Questioned on the impact of parental and family background on the postulated educational outcomes, Mr Rosen conceded he did not take account of ABL's parental and family educational background. In his opinion, a family's educational background does not necessarily play a role in a person's academic path. He did not believe it material to the projected outcomes. While there may be a truism to this evidence, one can assume that parental and family educational background will have a degree of influence or encouragement even if the outcomes are not guaranteed. ABL's mother is reported to have a degree in Tourism Management (NQF7) although elsewhere it states that she is employed as a Sales Assistant. Her father completed Grade 12 and holds a Business Administration Certificate (NQF 5).

[29] Mr Rosen testified that he based his opinion on expert reports, and to conclude that ABL would attain NQF7 would require that he ignores the entire battery of expert reports. His conclusion was there would be a differential, ABL's potential has been curtailed, even though she is functioning. He conceded it was impossible to predict the outcome of her difficulties. The concession is correctly made.

[30] It is trite that ABL would be entitled to be compensated to the extent that her patrimony has been diminished."² In *Rudman v Road Accident Fund*, the court held that³:

"A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured. It may in some cases follow quite readily that it does, but not on the facts of this case. There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss."

[31] Given ABL's tender age at the time of the accident, there is no means to measure her pre-morbid capacity. The probabilities can only be gauged with reference to past school reports. The seizures which are reported to occur 2-3 times per month and lead to frequent absenteeism at school. Prof Daliwonga Magazi makes it clear that the seizures are indicative of not so insignificant head trauma. His report dispels the notion that there was no nexus between the headaches seizures and the accident. I accept Prof Daliwonga Magazi's opinion in this regard. There is in addition the "sleeper effect" and the likely deterioration of her performance as she progresses which was not disputed.

[32] Ms du Plessis was emphatic about ABL's decline. Although I agree that as ABL progresses to higher grades, there will be more demands on her, I hesitate to wholesale agree with Ms du Plessis' definite view that ABL 'will' decline. Ultimately, it is the exclusive duty of the court to make the final decision on the evaluation

² *President Insurance Co Ltd v Mathews*) Smallberger JA

³ [2002] 4 All SA 422 (SCA) at para

of expert opinion.⁴ The prognosis and the degree to which medical intervention and other treatments will ameliorate her symptoms is not yet clear. To be fair, Ms du Plessis stated the decline does not mean ABL will not get a qualification. But for the accident, she would have obtained a degree.

[33] Essentially, the diminished earning capacity is based on a range of income between a qualification for a Diploma and a Degree. The point made in *Southern Insurance Association v Bailey NO*⁵ is that:

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.”

[34] Mr Erasmus correctly submitted that the court’s concerns can be resolved by factoring an appropriate contingency deduction. One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life" as held in *Southern Insurance Association v Bailey NO*.⁶ The determination lies in the discretion of the Court.

[35] The actuarial calculations prepared by Ivan Kramer CC dated 26 November 2024 relied on the median Cost of Employment values prepared by Mr Rosen dated 2018. They postulate ABL would have commenced employment at age 23 on C1 Paterson band and reach a career ceiling by age 45 earning at the D2 level.

[36] They state having regard to the accident, that she will commence employment at age 21 at Paterson B4 level and reach a career ceiling by age 45 earning at the C4 level. Both scenarios contemplate she will retire at age 65. The calculations factor future salary inflation at the rate of 4.5% pa. The capital value of the prospective loss was reduced to account for after tax investment return of 7.11%pa on income. The tax rates applicable for 2022(2023) were applied. The accident has

⁴ *Frantzen v Road Accident Fund* [2022] 3 All SA 657

⁵

⁶ *Southern Insurance Association Ltd v Bailey NO*, 1984 (1) SA 98.

not affected her life expectancy. They applied a 15% contingency deduction for the prospective value of the income but for the accident and 30.0% value of income having regard to the accident.

[37] It has been repeatedly held that the calculation of the quantum of a future amount, such as loss of earning capacity, is not, a matter of exact mathematical calculation. The Supreme Court of Appeal in the *Road Accident Fund v Kerridge (Kerridge)*⁷ cautioned that courts should not readily accept “the assumptions and figures provided by expert witnesses in personal injury matters without demur.”

[38] As Mr Erasmus correctly pointed out, the actuarial calculation was not based on the principle set out in the *Road Accident Fund v Guedes*,⁸ namely that a “Sliding Scale: ½ per cent for year to retirement age, i.e. 25 per cent for a child applied.”

[39] Parties were called to make further submissions and provide supporting case law. Although Ms Mhlanga submitted that the court should base its determination on the “current reality”, which means the pre and post morbid scenarios are the same. She submitted a pre- accident calculation contingency deduction of 15% and 20% post-accident yielding a differential of 5%. should apply. On the other hand, Mr Erasmus contends that a 21 % pre-morbid contingency and a 31 % post- accident contingency deduction would be appropriate.

[40] What must be factored in determining contingencies is the following distinct feature of this case: there was no official diagnosis or assessment pre-accident since she was at creche. ABL’s prospects cannot be measured against known factors other than her current performance which make it inconclusive on where she will fall. The current assessments indicate she will likely struggle as she advances into more complex subject material. Questioned about, the degree to which treatment and professional support will ameliorate her symptoms and reduce these unfavourable outcomes, the Court was informed good outcomes are possible but are not a probable scenario.

⁷ 2019 (2) SA 233 (SCA) at para 50.

⁸ Also referring to *Goodall v President Insurance* 1978 (1) SA 389 (W)

[41] I accept that the above factors have a negative effect on her prospects. ABL will not be a “normal competitor.” She will be burdened by the need to manage additional compromising factors following the accident. However, I do not agree with the fatal opinion about the outcomes. It does not consider ABL’s innate drive to succeed or the extent to which medical, psychotherapeutic and remedial support required will ameliorate the outcomes as she progresses to higher grades. I nevertheless accept that assistance must commence sooner than later.

[42] Lastly, when the unemployment rate is considered, entry in the labour market is not a given, whether you have a degree or a Diploma. In the result, after applying the *Guedes* formula to the pre-morbid scenario, the prospective value of the income is R10 046 798. When the appropriate contingency deduction of 30% is applied to the future loss, it leads to an accrued loss of R 2 912 586. As will be evident below, the Court as the upper guardian of the minor child considers it prudent to order the attorneys to cause a Trust to be constituted with certain conditions in the order.

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

- a. The defendant is liable for 100% of the Plaintiff’s proven or agreed damages.
- b. The Defendant shall pay to the Plaintiff the total amount of R 2 912 586.00 (Two million, nine hundred and twelve thousand, five hundred and eighty-six rand only.) in respect of loss of earnings together with interest *ad tempore morae* to date of payment, calculated in accordance with the Prescribed Rate of Interest Act 55 of 1975.
- c. The amount in paragraph b is made up as follows:
 - a. Loss of earnings- R 2 912 586.00
 - b. Payment will be made directly to the trust account of the Plaintiff’s

attorneys within 180 (hundred and eighty) days from the date of the granting of this order, the details of such trust account being:

Holder	D[...] B[...] I[...]. A[...]
Account Number	1[...]
Bank & Branch	N[...] – N[...] G[...]
Code	1[...]
Ref	L[...]

d. De Broglio Inc. Attorneys are ordered to cause a trust document to be created in accordance with the provisions of the Trust Property Control Act, Act 57 of 1988 and to pay the capital amount received, after deductions of their fees and disbursements into the aforesaid Trust account.

e. The trust instrument shall make provision for the following:

- i. The appointment of a reputable Trust administrator
- ii. That ABL is the sole beneficiary of the trust
- iii. Three trustees will be appointed to administer the Trust one of whom must include ABL's parents, and in their absence the other parent to serve as his or her substitute.
- iv. The duty of the trustee(s) to disclose any personal interest in any transaction involving the trust property.
 - iv That the ownership of the trust property vests in the trustee(s) of the trust in their capacity as trustees.
 - v The Trust to endure until ABL is no longer a dependant.
 - vi That the trustee(s) be authorised to recover the remuneration of, and costs incurred by the trustee(s), in administering the undertaking in terms of Section 17(4)(a) of Act 56 of 1996 in accordance with the certificate of undertaking to be provided by the Defendant in paragraph f below.
 - vii Any other terms to safeguard the trust property and the interest of the minor child

f. The Defendant is ordered in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, to reimburse the Plaintiff 100% for the costs of any future accommodation of the minor in a hospital or nursing home, or treatment or rendering of service to her or supplying goods to her arising out of injuries sustained by her in the motor vehicle accident, after such costs have been incurred and upon proof thereof.

g. The Defendant is to pay the Plaintiff's agreed or taxed High Court costs as between party-and-party, such costs may include the following: Provided that same is subject to the discretion of the taxing master:

- i. the preparation, qualifying and reservation fees of the experts, consequent upon obtaining Plaintiff's reports, if any, including the costs of the compilation of such reports, addendum reports and confirmatory affidavits;
- ii. The costs of counsel on scale C, including costs incurred in respect of the settling of the heads of argument for trial.
- iii. The costs of 28 and 29 January 2025.

h. The Plaintiff shall, in the event that the costs are not agreed:

a. serve the Notice of Taxation on the Defendant and/or the Defendant's attorney of record; and

b. allow the Defendant one hundred and eighty (180) days to make payment of the taxed costs after service of the taxed bill of costs.

i. It is recorded that the Plaintiff did not enter into a contingency fee act agreement with her attorney of record.

j. The issue of general damages is separated and postponed *sine die*.

NTY SIWENDU

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION,
JOHANNESBURG**

This Judgment is handed down electronically by circulation to the Plaintiff's Legal Representative and the Defendant by email, publication on Case Lines. The date for the handing down is deemed 11 March 2025

Date of appearance: 28 and 29 January 2025

Further submissions: 10 March 2025

Date Judgment delivered: 11 March 2025

Appearances:

For the Plaintiff: Advocate Erasmus

Instructed by: De Broglio Attorneys

For the Defendant: Ms Mhlanga

Instructed by: The State Attorney