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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 2023-034070
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE 28 May 2026
SIGNATURE

In the matter between:

SN N[...] OBO MM M[...]

Applicant

and

THE ROAD ACCIDENT FUND

Respondent

JUDGMENT

PILLAY, AJ

INTRODUCTION

[1] This is an application, in terms of rule 31(2)(a) of the uniform rules of court, in which the applicant seeks judgment by default against the respondent.

SALIENT FACTS

- [2] The parties shall be referred to as they are cited in the action proceedings.
- [3] The plaintiff is S[...] N[...] (*“the plaintiff”*), an adult female, acting on behalf of the minor child, M[...] M[...] M[...], a boy born on 11 November 2012 (*“the minor child”*).
- [4] On or about 11 August 2020, at approximately 06h00, between Jamestown and Queenstown a motor vehicle collision occurred (*“the motor vehicle collision”*) involving a white Toyota Quantum motor vehicle (*“the insured vehicle”*).
- [5] At the time that the motor vehicle collision occurred, the minor child was a passenger in the insured vehicle driven by Mr. MM Ciliwe (*“the insured driver”*).
- [6] On 8 November 2022, the plaintiff instituted action proceedings against the Road Accident Fund (*“the defendant”*), on behalf of the minor child, seeking damages arising from the motor vehicle collision.
- [7] The plaintiff alleged that the motor vehicle collision was caused by the sole negligence of the insured driver. The plaintiff alleged further that the minor child suffered serious injuries as a direct consequence of being involved in the motor vehicle collision.
- [8] In the amended particulars of claim, the plaintiff claimed damages of R 5,650,000, which is constituted as follows:
- 8.1 R 150,000.00 for past hospital and medical expenses;
 - 8.2 R 4,000,000.00 for future loss of income and/or earning capacity; and
 - 8.3 R 1,500,000.00 for general damages.
- [9] On 13 June 2023, the defendant delivered a notice of intention to oppose.
- [10] While various steps were taken in preparation for trial, the following are significant:

- 10.1 On 23 and 25 July 2025, the plaintiff's legal representatives delivered a Notice of Invitation to Mediate in terms Rule 41A, and in terms of the Mediation Protocol (*"the Mediation Protocol"*). The Notice invited the defendant to indicate whether it agreed to, or opposed, mediation. It is common cause that no response was received.
- 10.2 On 12 August 2025, the plaintiff's legal representatives delivered a notice in terms of Rule 30A of the uniform rules of court, placing the defendant on terms to indicate whether it agreed to or opposed mediation.
- 10.3 On 1 October 2025, the plaintiff's legal representatives delivered a notice of application in terms of Rule 30A of the uniform rules of Court. No response was received to the notice or the application.
- 10.4 On 29 October 2025, Acting Justice Skibi granted an order in the Special Interlocutory Court, in the following terms:
1. *The defendant is declared a delinquent party/litigant as contemplated in paragraph 4.9.1 of the Revised Mediation Protocol.*
 2. *The defendant be ordered to respond to the plaintiff's amplified Rule 41A Notice, dated 25 July 2025 within ten (10) days of the service of this order and thereafter meaningfully engage in the mediation process in accordance with the Protocol.*
 3. *Should the defendant fail to comply to such compelling order as contained in paragraph 2 above:*
 - 3.1 *The plaintiff shall be excused from not having subjected the matter to mediation in terms of paragraph 4.9.3.1 of the Protocol.*
 - 3.2 *The Registrar shall enrol the matter for hearing on the prioritised default judgment roll in the last term of 2025, alternatively the first term of 2026, and at such hearing the plaintiff may seek an order declaring the defendant in contempt, an order striking out the defendant's defence and an order granting substantive relief as contemplated in paragraph 4.9.3.2 of the Protocol.*

4. *The defendant is ordered to pay the costs of this application on the attorney and client scale.”*

10.5 On 3 November 2025, the Order granted by Acting Judge Skibi was served on the defendant. Despite this, the defendant did not respond to the mediation Notice.

10.6 On 9 December 2025, the plaintiff’s legal representatives served the final notice of set down of the matter on the default trial roll, which clearly indicated that the matter is set down for hearing on 6 February 2026 at 10h00.

[11] On the day of the hearing, the defendant’s legal representatives did not appear. The matter was stood down, and I issued an order directing the defendant to appear at court at 14h00 to make representations as to why the defendant’s defence should not be struck out and why the matter should not proceed in default.

[12] Upon the matter resuming, counsel for the plaintiff, Adv. Bekker SC, advised the court that the defendant’s attorney had been contacted and indicated that no instructions were received in light of the pending matter of *RAF v Mudawo and Others*, scheduled for hearing on 17 February 2026, in the Supreme Court of Appeal. He advised further that the defendant’s attorney indicated that she would not be attending court.

[13] The emails exchanged between the parties on 6 February 2026, dealing with this issue, appear at Caselines 010-6 010-7.

[14] I then granted an order in terms of paragraphs 1 to 3 of the Notice of Motion, dated 3 February 2026, striking out the defendant’s defence, directing that the founding affidavit deposed to by Mr. Zandre Smit be accepted and admitted into evidence, and ordering that the matter proceeds in default.

THE ISSUES FOR DETERMINATION

[15] The issues for determination are:

- (1) Whether the reports of the plaintiff's medico-legal experts should be admitted into evidence;
- (2) Whether the defendant is liable to compensate the plaintiff for the proved or agreed damages sustained by the minor child arising from the motor vehicle collision;
- (3) Whether the defendant should be directed to provide an undertaking in favour of the plaintiff in terms of section 17(4)(a) of the Road Accident Fund Act;
- (4) Whether the defendant should be directed to pay the plaintiff the capital amount of R 2,166,488.50 for future loss of income and/or earning capacity;
- (5) Whether issue of general damages and past medical expenses should be separated and be postponed *sine die*;
- (6) Whether the defendant should be directed to pay the plaintiff's taxed party and party costs of the action to date, with costs of Counsel on Scale C, inclusive of the party and party costs of this application.

THE LAW AND APPLICATION

Judgment in terms of rule 38(2) of the uniform rules of court

[16] As stated above, an order was granted on 6 February 2026, striking out the defendant's defence.

[17] Despite being served with the notice of set down on 9 December 2025, the defendant's legal representative declined to appear at court. Although the matter was stood down and the defendant's legal representative was afforded an opportunity to attend court and make representations as to why its defence should not be struck out, she declined to do so.

[18] On 6 February 2026, judgment was granted in terms of prayers 1 - 3 of the Notice of Motion, dated 3 February 2026, by default.

[19] Accordingly, this is an application for judgment in terms of rule 38(2) of the uniform rules of court, which provides as follows:

“Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or a liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.”

Liability for damages sustained by the minor child

[20] The plaintiff alleged that on 11 August 2020, at approximately 06h00, and at or between Jamestown and Queenstown, a motor vehicle collision occurred when a white Toyota Quantum motor vehicle with registration number J[...] (*“the insured vehicle”*) driven by Mr. MM Chiliwe (*“the insured driver”*) was involved in a collision (*“the motor vehicle collision”*). This is confirmed in the SAPS incident report.

[21] At the time of the motor vehicle collision, the minor child was a passenger in the insured vehicle.

[22] The plaintiff alleged that the motor vehicle collision was caused by the sole negligence of the insured driver. The plaintiff alleged further that the insured driver, drove at an excessive speed, failed to keep a proper look-out and failed to exercise reasonable care to avoid the motor vehicle collision, when he could have done so.

[23] The plaintiff seeks an order declaring that the defendant is liable for 100% of the proved or agreed damages sustained by the minor child. The SAPS accident report confirms the plaintiff’s version regarding the manner in which the motor vehicle collision occurred. The section 19F affidavit by the applicant also contains the plaintiff’s version of the collision.

[24] The consequence of the defence being struck out is that the plaintiff’s claim is not opposed. Because the claim is not opposed, it may be accepted that the

plaintiff's allegations regarding the motor vehicle collision are admitted or not disputed by the defendant.¹

[25] I am satisfied that the plaintiff has discharged the burden of proving the motor vehicle collision occurred as a result of the sole negligence of the insured driver, and that the minor child suffered damages arising from the motor vehicle collision. In the circumstances, the defendant is liable for 100% of the damages suffered by the minor child as a result of the motor vehicle collision.

The admission of the medico-legal reports in terms of rule 38(2) of the uniform rules of court

[26] The plaintiff delivered reports of an orthopaedic surgeon, a clinical psychologist, an educational psychologist, an occupational therapist, an industrial psychologist and an actuary.

[27] On 3 February 2026, I granted an order confirming that the affidavit of Mr. Smit is admitted into evidence. In so far as it is necessary, I confirm that the medico-legal reports by the plaintiff's experts are admitted into evidence.

[28] In the particulars of claim, the plaintiff alleged that the minor child suffered a fracture of the femur. Upon consideration of the reports from the medico-legal experts, I am satisfied that the plaintiff has proved the orthopaedic injury of a fractured femur and the *sequelae* of the injury.

Undertaking in terms of section 17(4)(a) of the Act

[29] The plaintiff seeks an undertaking in terms of section 17(4)(a)(i) of the Act, in terms of which the defendant is directed to compensate the plaintiff for future medical expenses, after they have been incurred.

[30] The section provides as follows:

“Where a claim for compensation under subsection (1) –

(a) Includes a claim for the costs of the future accommodation of any in a hospital or nursing home or treatment of or rendering of

¹ Baliso v First Rand Bank Limited t/a Wesbank 2017 (1) SA 292 (CC)

a service or supplying of goods to him or her, the Fund shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such an undertaking, to compensate

- (i) The third party in respect of the said costs after the costs have been incurred and on proof thereof; or*
- (ii) The provider of such service or treatment directly, notwithstanding section 19(1)(c) and (d).*

[31] It is now well settled that once a plaintiff proves its claim as contemplated in section 17(4)(a), it is entitled to claim an order catering for a direction to the defendant to furnish such an undertaking and a court is entitled to grant such an order.²

[32] Having found that the defendant is liable to compensate the plaintiff for damages and having considered the reports of the experts, I am satisfied that the plaintiff is entitled to an undertaking in terms of section 17(4)(a) of the Act.

Future loss of income/earning capacity

[33] I have considered the medico-legal reports of the various experts.

[34] The actuary, Mr. Willem Loots of Wim Loots Actuarial Consulting, provided an expert report dated 14 January 2023 and an updated report, dated 30 January 2026.

[35] It is evident from the reports by Mr. Loots that he based his actuarial calculation for future loss of income and earning capacity on the reports by the industrial psychologist, Ms. Rennie, dated 6 April 2023 and the addendum, dated 30 January 2026.

[36] According to the report by Mr. Loots, the pre-morbid calculation for loss of earnings was R 6,137,603.00 and the post-morbid loss or earnings was R 3,481,020.00. Mr. Loots did not apply any contingencies to the minor child's pre-morbid future loss of earnings.

² K obo M and Another v Road Accident Fund 2023 (3) SA 125 (GP) at para 26

[37] Mr. Bekker stated that the minor child is presently 11 years old and that while the “normal contingencies” that should be applied for a child is 25%, the circumstances of the present matter warrants a contingency of 30% being applied. The future loss of earnings amounts to R 2,166,488,50.

[38] Mr. Bekker submitted that any funds that are awarded to the plaintiff on behalf of the minor child should be adequately protected and held in a trust to be created for the benefit of the minor child. The plaintiff has consented to this. A copy of the deed of trust and the consent of Mr. Hercules Alexander Sandenbergh appear at CaseLines 028-04 and 028-18, respectively.

[39] Accordingly, I am in agreement that any funds awarded to the minor child should be paid to the M[...] M[...] M[...] Trust.

General damages and past medical expenses

[40] The applicant has sought an order that the issues of general damages and past medical expenses be separated and postponed *sine die*.

[41] In terms of regulation 3(3)(c) of the Act, a serious injury threshold has been established as a minimum requirement before general damages may be claimed from the defendant. The defendant is only liable to pay general damages if it is satisfied that the injury has been correctly assessed.³

[42] As the RAF4 Form has not been accepted or rejected by the defendant, I am satisfied that the issue of general damages should be separated and postponed *sine die*.

[43] Furthermore, I am satisfied that the issue of past medical expenses should be separated and postponed *sine die*.

³ Road Accident Fund v Duma, Road Accident Fund v Kubeka, Road Accident Fund v Meyer, Road Accident Fund v Mokoena 2013 (6) SA 9 (SCA)

Costs

[44] The plaintiff seeks an order directing the defendant to pay the taxed party and party costs of the action, to date of this order, with costs of Counsel on Scale C, inclusive of the party and party costs of this application.

[45] Party and party costs are governed by the provisions of rule 67A of the uniform rules of court. In *Mashava v Eanex Africa (Pty) Ltd*, Justice Wilson stated the following:

*“Costs orders in civil proceedings are made on one of two scales: the “party and party” scale, or the “attorney and client” scale. A costs award on the party and party scale allows the person in favour of whom it is made to recover the costs they had to incur in bringing or defending a civil suit, but only to the extent allowed by a set of tariffs designed to keep recoverable costs within reasonable limits. Those tariffs rarely keep pace with the actual cost of legal services, meaning that a party and party costs order seldom permits the recovery of the legal costs really incurred by the party in favour of whom it is made.”*⁴

[46] In respect of the applicable Scale of costs that should be awarded, Justice Wilson stated further:

*“Likewise, the default position set under the rule is that, in the absence of contrary indication, counsel’s costs will be recovered on scale “A”. Scale “A”, it seems to me, is the appropriate scale on which to make an award unless the application of a higher scale has been justified by careful reference to clearly identified features of the case that mark it out as unusually complex, important or valuable. Run-of-the-mill cases, which must be the vast majority of cases in the High Court, should not attract an order on the B or C scales.”*⁵

[47] The conduct of the defendant in failing to timeously provide instructions to its legal representative since the inception of the litigation has resulted in much of the issues arising in this matter. The defendant’s conduct in refusing to indicate whether it is opposed to mediation or not, has delayed the matter and has prejudiced the minor child in material respects.

⁴ *Mashava v Eanex Africa (Pty) Ltd* 2025 (1) SA 466 (GJ) at para 3

⁵ *Mashava v Eanex Africa (Pty) Ltd* 2025 (1) SA 466 (GJ) at para 16

[48] Accordingly, the plaintiff is entitled to the payment of party and party costs on Scale C, to date, including the costs of the present application.

ORDER

[49] The reports of the following experts, who examined M[...] M[...] M[...], a boy born on 11 November 2012 (*“the minor child”*), are admitted into evidence:

- a. Dr. J Preddy (Orthopaedic Surgeon) date of examination 15 August 2022;
- b. Ms. M Lautenbach (Educational Psychologist) dated 7 November 2022 and an addendum report dated 22 January 2026;
- c. Ms. N Rughoo (Clinicals Psychologist) dated 25 October 2022 and the addendum report dated 26 January 2026;
- d. Ms. N Hassim (Occupational Therapist) dated 5 March 2023 and an addendum report dated 29 January 2026;
- e. Ms. M Rennie (Industrial Psychologist) dated 6 April 2023 and an addendum report dated 30 January 2026; and
- f. Mr. W Loots (Actuary) dated 14 July 2023 and the addendum report dated 30 January 2026.

[50] The defendant is liable to pay 100% of the proved or agreed damages sustained by the minor child in the motor vehicle collision that occurred on 11 August 2020, involving a white Toyota Quantum motor vehicle with registration letters and numbers J[...], and in which the minor child was a passenger.

[51] The defendant shall provide the plaintiff with an undertaking in terms of section 17(1)(a) of the Road Accident Fund Act 56 of 1996, within fourteen (14) days from the date of this order.

[52] The defendant shall pay the plaintiff the amount of R 2,166,488.50, in respect of future loss of earnings.

[53] Any funds awarded to the plaintiff, on behalf of the minor child, shall be paid to the M[...] M[...] M[...] Trust.

[54] The issues of general damages and past medical expenses are separated from the remainder of the action proceedings and are postponed *sine die*.

[55] The defendant shall pay the plaintiff's taxed party and party costs of the action, to date of this order, with costs of Counsel on Scale C, inclusive of the party and party costs of this application.

K PILLAY
ACTING JUDGE OF THE HIGH COURT
PRETORIA

For the Applicant:

Adv. WP Bekker SC instructed by Z
Smit Attorneys

For the Respondent:

Ms. Elaine Engels instructed by the
Office of the State Attorney, Pretoria
(No appearance)