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**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

Case no: **1371/2019**

In the matter between:

**MP L obo RI M**

PLAINTIFF

and

**ROAD ACCIDENT FUND**

DEFENDANT

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**JUDGMENT BY:**                      **MOLITSOANE, J**

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**HEARD ON:**                              **19 MAY 2023**

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**DELIVERED ON:**                      The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 02 AUGUST 2023. The date and time for hand-down is deemed to be 02 AUGUST 2023 at 11h30.

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- [1]     The Plaintiff's child, six years old at the time, was involved in a motor vehicle accident on 7 March 2016. The plaintiff, acting in a representative capacity, claims payment of damages arising from the injuries sustained by the said child in that collision. She has abandoned her own claim against the defendant.

- [2] On 10 March 2020, this Court ordered that the defendant was liable for 100% of the Plaintiff's proven or agreed damages. The Court also ordered that the defendant provide an undertaking in terms of s17(4)(a) of the Road Accident Fund, Act 56 of 1996 as well as payment of R950 000.00 in respect of general damages.
- [3] The only remaining issue is the adjudication of the amount payable for future loss of income.
- [4] During the hearing of this matter, the parties agreed that the expert reports of the plaintiff attached to their respective affidavits be handed in as evidence in terms of Rule 38(2). Counsel for the Defendant also admitted on behalf of her client the correctness of the contents of the reports aforesaid. No expert reports were handed into evidence on behalf of the Defendant.
- [5] According to the neurosurgeon, Dr Van Aswegen, the CT scan of the minor child showed a linear skull fracture and underlying extradural haematoma on the right side. There was also a diffused brain swelling. The upper thorax on the CT scan showed pulmonary contusions. On admission, the child's chest X-rays showed bilateral pneumothoraxes. According to the Dr, a follow-up CT scan initially showed a slight increase in the size of the extradural haematoma, but with the improvement of the brain oedema. A further CT scan after the child was discharged from the hospital, showed a complete resolution of the extradural haematoma. In brief, the child accordingly sustained the following injuries: head injury with extradural haematoma, linear skull fracture, and brain oedema. She also sustained lung contusions with bilateral pneumothoraxes. According to the Dr, she also sustained soft tissue injuries, and abrasions on the scalp, the back, and flanks.
- [6] Dr Van Aswegen opines that the child suffered a traumatic head injury that can be classified as moderate to severe based on the initial admission Glasgow Coma Scale of 8/15. According to the doctor, *'traumatic brain injuries do not always have to be associated with structural damage to the brain parenchyma as seen on the initial CT of the brain (only swelling of the*

*brain was seen), as the sequelae of traumatic brain injuries can become apparent years from the initial injury especially in the paediatric age group.'*

- [7] Me Elmarie Prinsloo, an educational psychologist opines, with reference to the pre-morbid scenario, that the child would have been able to complete Grade 12(NQF4) with diploma endorsement had the accident not occurred. According to her, passing grade 12 would have given her the opportunity to complete a three-year diploma thus enabling her to obtain an NQF6 qualification with which to function in the labour market. According to Me Prinsloo, having regard to her poor social economic standard, after attaining Grade 12, she would have entered the labour market and thereafter proceeded to study part-time towards qualifying for a diploma. She further opines that she may take longer to complete her tertiary studies and at least one further year should be added before she would have been able to function in the labour market with a diploma.
- [8] Following an injury, Me Prinsloo observed that the child presented with physical, cognitive, and psychological symptoms as well as personality and behavioural changes. She had an unsightly scarring on her face and experienced regular headaches, pain on her sides, and red and painful eyes. With regard to her behaviour, personality, and psycho-emotional functioning, she had become withdrawn, presented with poor interpersonal skills, was short-tempered, and displayed symptoms of post-traumatic stress disorder. She also experienced narrative memory, comprehension, and what the expert call higher-order reasoning. Me Prinsloo opines that the child's borderline language functioning will increasingly hinder her academic progress as the work becomes more complex and higher order reasoning and comprehension skills becomes more complex and higher order reasoning and comprehension skills are required.
- [9] The Occupational therapist, Ms Liebenberg, avers that the minor child presented with some concerns pertaining to cognition, perception, and attention. According to her, the child presented with regular headaches and psycho-social concerns (anger and mood swings). She opines that from the

emotional and cognitive perspective, as well as considering regular headaches, the child's school performance is compromised. She further noted that the child has not repeated a grade at school but there was a decline in her performance and that indicated that she was experiencing difficulty in meeting the requirements of each grade. She also opines that with the necessary intervention, the child is likely to cope in the main stream school and become an equal competitor for employment.

- [10] Dr Jacobs, an industrial psychologist also evaluated the child. Seeing that the child was about six years at the time of the accident and was still in school, he opines that there could be no talk of loss of income. I agree with the sentiments expressed and nothing more need be said about past loss of income. According to Dr Jacobs the following information gleaned from the accepted expert reports provides guidance in the determination of the child's loss of earning capacity: that the child sustained no orthopaedic injury; that she suffered a moderate to severe brain injury; was able to achieve a NQF6 uninjured but will only be able to obtain NQF3 level in her injured capacity; she presents cognitive, emotional and behavioural difficulties that affect her ability to participate in the labour market.
- [11] Dr Jacobs observes that with an NQF6 level Grade 12 and a diploma in the uninjured scenario, the minor would have earned R140 000.00 at the age of 25 and R262 000.00 at the age of 49 in the formal sector.
- [12] With reference to the injured scenario, Dr. Jacobs opines that the child will most likely remain unemployed for the majority of her life. According to him, the child would at best have been employed on rare occasions in sympathetic jobs. According to him, the accident had detrimentally affected her capacity to earn income. His forecast was that her income would probably not be more than R27 000.00 per month in 2020. He submits that this figure should be interpreted bearing in mind that the child cannot equally compete for unskilled work.

- [13] Instructed to calculate the child's loss of earnings, Munro Forensic Actuaries calculated the loss of earning at R3 056 280. They arrived at this figure by applying a 20% contingency deduction on the uninjured scenario and 50% contingency deduction on the injured scenario.
- [14] In the Heads of Argument, Counsel for the defendant attacks the process, findings and the conclusions made by the experts of the plaintiff and argues at the end that a pre-morbid contingency deduction of 40% is more realistic and appropriate. It is further argued on behalf of the defendant that ‘*Although Koch mentions the sliding scale for a child to be 25%<sup>1</sup>, it is ...submitted that the unmotivated pitching of the minor at the entry and peak levels and quartiles, combined with factors listed above, calls for a higher contingency deduction to be applied.<sup>2</sup>*’
- [15] It is submitted on behalf of the defendant that the application of 50% contingency deduction to be applied by the plaintiff's Actuary on the post morbid scenario is extremely high and without motivation. According to the defendant, normally the post morbid contingency deduction in this regard is 15%.
- [16] As a starting point, the first issue to deal with would be the status of the reports of the plaintiff as accepted by agreement into evidence. Rule 38(2) is instructive in this regard and provides as follows:

"38(2) 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 attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit."

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<sup>1</sup> Koch, The Quantum Yearbook, 2022, page 121.

<sup>2</sup> Defendant's Heads of Argument page 10 para 5.11.

[17] Mr Pohl SC referred this court to the unreported judgment of this court in ZVS obo SRM v Road Accident Fund<sup>3</sup>. In my view that case is on all fours with the case before me. I align myself with the reasoning in that case and I refer liberally to Van Zyl, J where she says:

What is of utmost importance is that if the parties agree that the deponent to the affidavit will not be cross-examined, like the parties did *in casu*, the factual allegations in the affidavit stand unchallenged and, accordingly, no dispute of fact in respect thereof, arises. In **Esorfranki (Pty) Ltd v Mopani District Municipality** 2022 (2) SA 355 (SCA) the Supreme Court of Appeal pronounced on this issue at paras [23], [27] and [28] of the judgment, the crux of which is contained at para [27]:

"The status of the affidavits before the High Court

[23] ... To the contrary, it is clearly recorded that the affidavits were received as evidence before the trial court. It was accepted by Mopani that the deponents need not be called since there was to be no cross- examination of them. It was on this basis that Esorfranki closed its case. It was accordingly simply wrong to suggest that Esorfranki did not present evidence to support its pleaded case. The evidence it presented in the trial was, by reason of the failure to cross-examine witnesses or to lead evidence in rebuttal, uncontested. As will be seen hereunder, this is of considerable significance in the outcome of the appeal.

[24] ...

[25] ...

[26] ...

[27] There is no procedural impediment to the reception of evidence, by a trial court, by way of affidavit. If the parties agree that facts may be placed before a court by way of affidavit and agree that the deponent will not be cross-examined, then the factual allegations contained in the affidavit stand unchallenged. Where that occurs, no dispute of fact arises.

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<sup>3</sup> (5489/2019) [2023] ZAFSHC 99(31 March 2023).

[28] It must be emphasised that Mopani was not obliged to accept the manner in which the evidence was placed before the trial court. It was entitled to challenge the evidence by subjecting the witnesses to cross-examination. Not only did it not do so, it also elected not to present any evidence at all, despite being possessed of affidavits which had been presented in the review application and in the numerous interlocutory applications. The upshot of this was that the only evidence before the trial court was the extensive allegations of fact presented by Esorfranki's witnesses." (Own emphasis)

[18] What is palpably clear in my view is that the defendant chose not to put in issue or cross-examine the experts on whose affidavits the plaintiff relied upon. The affidavits and the evidence contained therein were handed by agreement. Rule 38(2) does not oblige a party to accept the evidence by way of an affidavit. In this case, not only did the defendant allow for the admission of the expert reports in terms of Rule 38(2), but the correctness of the said reports was pertinently accepted.

[19] The only evidence before the court about the issue in dispute is the evidence as led by the plaintiff. Having this in mind, one has to remind oneself that once evidence has been led, it calls for a reply. If no evidence in rebuttal is adduced, such evidence becomes conclusive proof and the party giving it discharges the onus<sup>4</sup>.

[20] Visser and Potgieter, *Law of Damages*<sup>5</sup> authoritatively deal with the role played by expert opinion as follows:

“ An actuary is an expert- witness whose opinion is merely a part of all the other evidence before this court, to be given greater or lesser weight according to the circumstances of the case the calculation and evidence of an actuary often plays an important role.”

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<sup>4</sup> Ex parte Minister of Justice: In re R v Jacobson and Levy 1931 AD 466 at 478.

<sup>5</sup> Potgieter JN; Steynberg and Floyd (3<sup>rd</sup> ed) 2012 at 467.

- [21] In adjudicating the liability of the defendant towards the minor child in respect of the future loss of earning capacity, it is necessary for this Court to consider all the evidence as well as the fact that the defendant led no expert evidence in rebuttal.
- [22] It is undisputed that the child was at the time of the accident 6 years of age when she sustained, according to Dr Van Aswegen, a neurosurgeon, a traumatic brain injury that can be classified as moderate to severe. Ms Prinsloo, commenting on the pre-morbid education and training opines that the child would have been able to complete Grade 12(NQF4) with diploma endorsement. According to Ms Prinsloo this qualification would have provided the child with the opportunity to complete a three-year diploma course with success, resulting in an NQF 6 qualification with which to function in the labour market.
- [23] According to Ms Prinsloo, following the accident the child presented with physical, cognitive, and psychological symptoms as well as personality and behavioural changes. According to her, the child presented with post-cognitive skills and capabilities. She opines that the child's intellectual potential has been adversely affected. She further opines that the child will in all likelihood struggle to cope with the demands and workload in high school.
- [24] The industrial psychologist opines that the minor will be restricted to unskilled work. Much as she has not sustained an orthopaedic injury, she has a moderate to severe brain injury.
- [25] The report on the calculations by the actuary is based on the information supplied by the plaintiff's attorney as well as the report of the industrial psychologist Dr Jacobs in order to quantify the future uninjured earnings and the injured earnings taking into account that had the child is not expected to reach the suggested pre-accident career potential and might suffer losses that are not directly quantifiable and should be addressed via contingencies<sup>6</sup>.

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<sup>6</sup> Expert report by Munro Forensic Actuaries, paginated record page 150.



[26] It is contended on behalf of the defendant that the child had presented with type 1 diabetes and that *“it follows that these health condition(s), disregarding the accident, may have affected and/delayed her academic and career progression”*<sup>7</sup>. Clearly, this health issue is one of the vicissitudes of life. As indicated in the above paragraph, the actuary took it into account when assessing the loss of income. It follows that it cannot again be discounted after the final calculation.

### **XIII THE PRINCIPLES APPLICABLE TO SENTENCING**

[27] I am in agreement with the suggested contingency deductions by the plaintiff's actuary in discounting the loss of income of the child that in the uninjured scenario a contingency deduction of 20% should be applied and in the injured scenario a 50% deduction should be made. As there is no past loss of earnings the total loss of earnings should thus be:

	Uninjured earnings	Injured earning	Loss of earnings
Future	R4 232 100	R640 800	
Minus contingencies	20%	50%	
	R 385 680	R320 400	R3 065 280
		Total loss of earnings	R 3 065 280

[28] The costs will naturally follow the cause.

### **ORDER**

1. The defendant is liable for payment to the plaintiff in the sum of **R 4,015,280.00 (FOUR MILLION AND FIFTEEN THOUSAND TWO HUNDRED AND EIGHTY RAND)** [hereinafter referred to as “the capital amount”], which amount is compiled as follows:

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<sup>7</sup> Defendant's Heads of Argument, page 7.

1.1 **R 950 000.00** in respect of general damages; and

1.2 **R 3,065,280.00** in respect of loss of income

resulting from a motor vehicle collision that occurred on **7 March 2016**. The said amount is to be administered in trust as provided for in paragraph 6 hereunder.

2. The defendant shall furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for 100% of the costs of the future accommodation of the minor child in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to the plaintiff arising out of injuries sustained by her in the motor vehicle collision mentioned above, in terms of which undertaking the defendant will be obliged to compensate her in respect of the said costs after the costs have been incurred and on proof thereof.

3. The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale, until date of this order, including but not limited to the costs set out hereunder:

3.1 The reasonable qualifying and reservation fees of the following experts:

3.1.1 Dr A van Aswegen (neurosurgeon);

3.1.2 Mrs E Prinsloo (educational psychologist);

3.1.3 Mrs L Liebenberg (occupational therapist);

3.1.4 Dr EJ Jacobs (industrial psychologist);

3.1.5 Munro Forensic Actuaries.

3.2 The cost of senior counsel.

4. The payment provisions in respect of the foregoing are ordered as follows:

4.1 Payment of the capital amount shall be made without set-off or deduction,

within 180 (one hundred and eighty) calendar days from date of the granting of this order, directly into the trust account of the plaintiff's attorneys of record by means of electronic transfer, the details of which are the following:

Honey Attorneys	-	Trust Account
Bank	-	[...]
Branch Code	-	[...]
Account No.	-	[...]
Reference	-	[...]

(please quote the reference at all times)

4.2 Payment of the taxed or agreed costs shall be made within 180 (one hundred and eighty) days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney.

5 Interest shall accrue at 11.25% (the statutory rate per annum), compounded, in respect of:

5.1 the capital of the claim, calculated 14 (fourteen) days from date of this order.

5.2 the taxed or agreed costs, calculated 14 (fourteen) days from date of taxation, alternatively date of settlement of such costs.

6.

6.1 A trust to be known as the “**RI M TRUST**” (hereinafter referred to as “the trust”) for the purposes of administering the award herein for the benefit of R I M (identity number:[...]) [hereafter referred to as “the beneficiary”] as the sole capital and income beneficiary, shall be established to administer the award and undertaking made in paragraphs 1 and 2 above.

6.2 Celeste du Plooy in her capacity as representative of Standard Trust Limited (hereinafter referred to as “the corporate trustee”) is to be appointed trustee of the trust with the power of substitution.

6.3 The trustee(s) outlined in paragraph 6.2 above are to have the following powers:

- 6.3.1 to receive, take care of, control and administer all of the assets of the beneficiary;
- 6.3.2 to carry on or discontinue, subject to any law which may be applicable, any trade, business or undertaking of the beneficiary;
- 6.3.3 to acquire, whether by purchase or otherwise, any property, movable or immovable, for the benefit of the beneficiary;
- 6.3.4 to let, exchange, partition, alienate and for any lawful purpose to mortgage or pledge any property belonging to the beneficiary, or in which she has an interest;
- 6.3.5 to perform any contract relating to the property of the beneficiary entered into by her before the date referred to in paragraph 1 above;
- 6.3.6 to exercise any power to give any consent required for the exercise of such power, where the power is vested in the beneficiary for her own benefit or the improvement or the maintenance of her property;
- 6.3.7 to raise money by way of mortgage or pledge of any of the immovable property of the beneficiary for the payment of her debts or expenditure incurred or to be incurred for her maintenance or otherwise for her benefit or provision for the expenses of her future maintenance or the improvement or the maintenance of her property;
- 6.3.8 to apply any money for the maintenance, support or towards the benefit of the beneficiary;

- 6.3.9 to incur expenditure in respect of the improvement of any property of the beneficiary by means of building or otherwise;
- 6.3.10 to expend any monies belonging to the beneficiary on the maintenance, education or advancement of any relative of her or any other person wholly or partially dependant on her, to continue such other acts of bounty or charity exercised by the beneficiary as the Master of the High Court, having regard to the circumstances and the value of the estate of the beneficiary, considers proper and reasonable;
- 6.3.11 to institute proceedings which may be necessary for the interest of the beneficiary or for the due and proper administration of her estate;
- 6.3.12 to, as far as possible, ensure that the beneficiary is, by the payment of the capital amount awarded above and any other figures payable in terms of this order, and by the use to which the payment is put, protected from the consequences of the injuries sustained by her in and is as far as possible enabled thereby to obtain such financial well-being as he would, were it not for the injuries and sequelae thereof, have been able to obtain;
- 6.3.13 to incur expenditure in order to ensure that the beneficiary is properly cared for;
- 6.3.14 to administer the beneficiary's undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996.
- 6.4 The corporate trustee is to furnish security to the satisfaction of the Master of the High Court.
- 6.5 The costs of furnishing such security shall be borne and paid for by the trust; only in the event that these costs are not recovered or recoverable from the Road Accident Fund.

- 6.6 In the event that the corporate trustee resigns or passes away his/her position must be filled by a corporate trustee (who is properly qualified to administer the trust assets) who will be required to furnish security in accordance with paragraph 6.4 above.
- 6.7 In the event that the trustees cannot agree on any decision with regards to the administration of the trust then and in that event such dispute will be referred to the Master of the Free State High Court.
- 6.8 Any amendment of the approved trust deed will be subject to the leave of the Court.
- 6.9 The trustees shall not make any charge in relation to the receipt of the initial payment to the trust as a result of the proceeds of the litigation.
- 6.10 The trust property is excluded from any community of property or accrual in the event of marriage of the beneficiary.
- 6.11 The trust assets will be deemed to have vested in the beneficiary, who is the only beneficiary of the trust, one day before the death of the beneficiary.
7. The costs of establishment and administration of the trust, set up in terms of this order (referred to in paragraph 6) [including the costs of the furnishing of security], which costs will include the remuneration of the trustees, will be paid out of the undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, after such costs have been incurred and upon proof thereof, subject to those costs not exceeding the amount or amounts that would have been payable in the event that a *Curator Bonis* had been appointed to the plaintiff.

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**P. E. MOLITSOANE, J**

On behalf of the Plaintiff:

Adv. L. LE R. Pohl SC

Instructed by

Honey Attorneys

BLOEMFONTEIN

Ref

HL BUCHNER/Idm/J03899

On behalf of the Defendant:

Ms J. Gouws

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State Attorney

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