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**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT, PRETORIA)**

**CASE NO: 14915/2012**

**DATE: 7 FEBRUARY 2014**

**REPORTABLE**

In the matter between:

M[...]

M[...]

F[...]

Plaintiff

**obo M[...]** M[...]

and

**ROAD  
FUND**

**ACCIDENT**  
Defendant

**J U D G M E N T**

**MAKHAFOLA, J:**

[1] The plaintiff issued summons in her representative capacity as a mother of her minor child M[...], a male of 17 years of age claiming damages from the defendant. The claim arises from the injuries M[...] had sustained after having been knocked down by motor

vehicle driven by Nakampe Isaac Moshole (the insured driver). The collision occurred on 15 June 2011 when M[...] was 13 years of age and was doing grade 9 at school.

[2] The merits of this matter have been disposed of and liability on the part of the defendant has been resolved on the basis of 100%. Future medical expenses have been resolved by being catered for by S17(4)(a) of Act 56 of 1996 certificate. All other claims have been settled except the loss of future earnings. The settled claims form part of the agreements between the parties.

### **THE DISPUTE**

[3] The only dispute remaining is the loss of earning capacity of M[...] the last- born child, a son of the plaintiff. This is the dispute I must decide upon. As it will emerge hereinafter and in the bundle of the joint minute of the experts the core of the dispute is between two educational psychologists.

### **CASE FOR THE PLAINTIFF**

[4] M[...] F[...] M[...] is the mother of M[...] who was involved in a collision with a motor vehicle on 15 June 2011. On account of this collision M[...]’s right leg was amputated above the knee. She thinks that had it not been for the accident her son would have gone far in his schooling.

[5] Inclusive of M[...], the plaintiff has four children namely: D[...] the first-born male who

was born in 1[...], V[...] L[...] the second-born f[...] who was born in 1[...], Refilwe, the third-born female who was born in 1[...]; and M[...], the last- born male who is currently 17 years old.

[6] D[...] attended school until grade 10. He had to leave school because his father was not working well and as a result there were no funds to finance his further studies. He is presently a driver of a combi which transports pre-school children. L[...] who they normally call V[...] is the person referred to in exhibit “A” which embodies a senior certificate, National Introductory Certificate (N4), the National Certificate (N5) and the Pick and Pay payslip no: 2,646 which depicts her position as that of a Cashier as at 25 July 2013. This stands as a proof that her daughter did attend school.

[7] She further confirmed that R[...] did attend school beyond grade 12. She confirmed that exhibit “B” refers to R[...] and that the Exhibit embodies 1= a senior certificate, 2= Diploma in police and Traffic Law Management and 3=Abridged birth certificate. R[...] has since become a mother and her child is N[...] whose father is no longer with R[...].

[8] The plaintiff testified that she did attend school until standard 5. She left school because her father had passed away and her mother was a domestic worker who did not afford to finance her schooling. His father was employed by the South African Railways and he passed away in 1965.

[9] She (the plaintiff) was employed at the age of 20 years doing temporary jobs at NTS. When she left school she still had the desire to continue with her studies. Because she failed to

continue with her schooling she decided to send her children to school so that they may later have good life and also support her.

[10] When D[...] could not continue with his studies this hurt her. It reminded her of her own situation after her father had died.

[11] She and M[...] consulted doctors about 11 times. They also consulted with Rencken-Wentzel in Roodepoort. She remembers her precisely because during the consultation she (the plaintiff) emphasised the fact that M[...] needs to be given a proper artificial leg.

[12] Her mother tongue is Sepedi. During her interview with Recken-Wentzel a lady who works as a tea-lady in her office acted as an interpreter. This lady was talking in Venda whilst she was talking Sepedi and these languages are two different languages. She (plaintiff) does understand Venda here and there.

[13] She testified that what Recken-Wentzel wrote in her report that her children D[...], V[...] and R[...] are illiterate is not true. The report saying that D[...] is unemployed is also not true and she disagrees with her report relating to V[...] not being employed. She denied that the academic picture of the family is bleak as recorded in the report because her children had attended school. M[...] was getting somewhere in his education.

[14] M[...] went to school at the age of 5 years and has never failed except after the accident. Before the accident he liked attending school and playing soccer. He has never failed any class before the accident even grade 8. After the accident he was condoned to grade 10. After the accident M[...], became withdrawn and he forgets easily. He does not talk about the accident. He was very close to his father John who passed away in 2009. M[...] was deeply disturbed by his father's death because he saw him when he was very ill for three months.

[15] She and her family live in a brick house which has 3 bedrooms, a kitchen, and a dining room which was built by her late husband. He was employed at the Municipality in the plumbing section since 1982 until his death. The house is fitted with electricity and running water.

[16] When her husband passed away his pension was split into two between herself and the other wife because he had two wives. She does not receive any government grant. She makes a living from selling cold drinks which she has been selling for the past 3 years. Her children still reside with her and do assist her by buying groceries only. She was told by M[...] that after completing matric he wanted to do Personal Management and do business. He still wanted to be a soccer player. Had he not been involved in an accident and had been able to complete matric, his after-matric studies would have been cared for by V[...] who was going to take a loan for his studies.

## **NTOMBIZETHU GUMEDE**

[17] She is an educational psychologist and her qualifications were not disputed by the defendant. She has had access to other reports of the psychologists relating to M[...].

[18] She has dealt with the qualifications of M[...]'s siblings. She communicated with M[...] in English but they could not understand each other. She had to robe in an interpreter. The assessment she made indicated that prior to the accident M[...] would have been able to go through matric and proceed to a tertiary institution. Pre-morbidly, his condition was normal and he would have coped scholastically with post-matric studies.

[19] M[...] started school at the age of 5 years and has progressed without failing until grade 9. He was a child above average to superior. She then summarised the premorbid school functioning level of M[...]. His intellectuality was premorbidly assessed as follows:

He would have probably managed to function at a 'further-up' within the above average to superior range of intelligence based on the grounds that:

- (i) He scored below average on the vocabulary subtest of ISNS-SP;
- (ii) His highest subtest scores on the protocol are for mazes (20), Blocks (15), and Pattern Completion (15). His highest scores range are above average to very superior;
- (iii) There is a significant difference of 50 points between his scores on the verbal and non-verbal scales of the iSNP-SP. And this is consistent with a history of traumatic head injury.
- (iv) He reportedly passed every school grade prior to his accident at the first attempt;

and

- (v) He suffered a minor head injury. He was young (15 years 3 months old) at the time of his accident and this is likely to have had repercussions in the form of costing his ability as he grew.

[20] According to the report of this witness as sketched above educationally, M[...]’s pre-morbid estimate of superior intellectual ability (and his current above average ability) is consistent with functioning at a level where he could have progressed through the mainstream school system, matriculated and proceeded to obtain a tertiary qualification, at least a degree.

### **SONET VOS**

[21] She compiled a joint minute with Moipone Kheswa as Industrial Psychologists. She has indicated the difference between basic salary and total package. The basic salary does not contain added benefits whereas the total package includes all benefits: medical and pension. A person employed after passing matric would qualify for benefits and the total package will also be relevant.

[22] In the joint report they stated that a basic salary should be considered because at that stage of compiling the report the educational psychologist’s report was not available. They considered the basic package only.

## **CASE FOR THE DEFENDANT**

[23] Anne-Marie RENCKEN-ENTZEL is an educational psychologist whose report relating to M[...] M[...] is part of the bundle of the defendant's expert reports. Her qualifications are not in dispute and are admitted by the plaintiff. She consulted M[...] and her mother separately and both are sotho speaking. She made use of a facilitator and translator who is duly qualified and registered. His home language is Sesotho.

[24] During consultation M[...]’s mother gave her information about her other children and their ages. She further testified one teacher gave information that M[...] was lazy before being involved in the accident.

[25] According to her the psychological impact on M[...] was his loss of limb. Trauma *per se* does not inhibit people to progress. It is not a disability *per se* because there is need for support and mentorship. Other people cannot accept a loss of limb.

[26] In evaluating M[...] she stated that he has a low verbal intellect and that he struggles psychologically. Considering grade 8 results, it will be impossible for him to attain grade 12 and proceed to tertiary level. This is based on what a teacher told her that M[...] was lazy.

## **THE LAW**

[27] 1. In *Sgaty v Road Accident Fund 2001 (5A2) QOD 1 (E)* where a 29 year old teacher was involved in a collision and became permanently unemployable 20% contingency was applied.

2. In *Road Accident Fund v William Travers Reynolds 2005 (5D3) QOD 1 (W)* the court left in

tact the exercise of discretion by the trial court relating to the award.

3. In *Bartlett v Mutual & Federal Versekeringsmaatskappy* 1989 (4A4) QOD 20 (T) the court applied 15% of general contingency deduction where the claimant was 17 years old at the time but was 23 years old at the time of the trial.

4. In *Wright v Road Accident Fund* 2011 (6A3) QOD 19 (ECP) a 21 years old was paralysed in a motor accident whilst doing Grade 11 at school. His injuries reduced him to be permanently unemployable. He also wished to return to school to complete Grade 12. The court applied a 15% pre-morbid contingency deduction.

### **EVALUATION AND ANALYSIS**

[28] The facts before court are undisputed that M[...] was involved in a motor collision and was rendered a casualty.

[29] The evidence of M[...]’s mother-M[...] F[...] is clear that all her children had gone to school. She went as far as standard 5.

[30] I have no reason to reject the joint minute of the industrial psychologists. Their report is objective and is consistent with the facts at the disposal of the authors. The court accepts this in terms of the authors’ expertise.

[31] Ms Gumede is an educational psychologist whose assessment of facts relating to M[...] is objective. She has relied on her findings on documented facts regarding M [...], his sisters and a brother. She described M[...]’s pre-morbid condition as normal and that had he not been involved in the accident, he would have scholastically coped with post-matric studies.

[32] She had assessed M[...] as a child who began school at the age of 5 years who had

progressed without failure until Grade 9. He was a child who was above average to superior.

[33] Her findings were in stark contrast to those of her colleague Anne-Marie Renken-Wentzel. Renken-Wentzel's findings were reached without full facts and are also inaccurate. She concluded that D[...], V[...] and R[...] were illiterate without having been told that by their mother, the plaintiff. Where she had obtained this information from is unknown. Moreover, she had unprofessionally used her tea-servant as her interpreter during her consultation with M[...]’s mother.

[34] The same tea-servant did not speak the same language as M[...]’s mother. The plaintiff speaks the Sepedi dialect of (Selobedu) whereas the interpreter was speaking in Venda. The plaintiff testified she could hear and understand venda here and there. This evidence was not controverted.

[35] This is clearly a damning factor against the report of Dr Rencken-Wentzel. If there had been a communication breakdown between the interpreter who did not speak Sepedi or Selobedu how could she have interpreted accurately, into English?

[36] Dr. Rencken-Wentzel was very evasive during a lengthy cross-examination. She testified, in general terms literally failing to stick to specifics. She was asked if she would have changed her opinion about M[...]’s family members being illiterate if she had more reports. She said no. She was asked if she required more time to consider the documents that rendered her report to found negative findings. She said: no.

[37] This cannot be professional, if Dr. Renken-Wentze! had made findings on insufficient information and documentation one would expect her to concede that she required more time to consider new information in order to make an informed finding in her report. She was adamant that her findings were correct despite having lacked documents proving that the M[...] family

was literate.

[38] I find this absurd and disturbing for an expert to give negative and obstructive reports to the court relying on insufficient documentation and false or inaccurate facts, as here.

[39] The report by Dr. Renken-Wentzel is not helpful to the court for its lack of objectivity. It is, therefore, rejected as obstructive to the findings this court strives to arrive at. The shortcomings of the report could have been cured by her own testimony by conceding to salient facts that cannot be denied. Her report is biased for the defendant and biased against the plaintiff.

### **APPLICATION OF THE LAW**

[40] The actuarial report by G.A Whittaker dated 3 September 2013 reflects an objective and fair capitalised value of loss of income of M[...] M[...]. It is also in line with the findings of the above-cited cases as far as contingency deductions apply. The contingency calculations differ according to the facts of each case.

### **FINDINGS**

[41] The above having been said I find as follows:

1. That the defendant has failed to put up a defence to disprove the plaintiff's quantum of any scenario suggested by the actuarial report of and by GA Wittaker.
2. That the plaintiff has succeeded to prove the quantum as summarised in scenario 2 of the actuarial report on a balance of probabilities.

**ORDER:**

[42] Draft Order marked “RAF” is made an order of court reflecting the amount payable to the plaintiff on or before 28<sup>th</sup> February 2014.

**KHAMI MAKHAFOLA**

**JUDGE OF THE HIGH COURT**

**JUDGMENT DELIVERED : 07 FEBRUARY 2014**

**FOR THE PLAINTIFF : M Hugo**

**INSTRUCTED BY : Mushwana INC**

**FOR THE DEFENDANT : D Westebaar**

**INSTRUCTED BY : A.P Ledwaba INC**

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**IN THE NORTH GAUTENG HIGH COURT, PRETORIA  
(REPUBLIC OF SOUTH AFRICA)**

**On 5 September 2013 before the Honourable Justice Makhafola, Court 6C**

CASE NUMBER: 14915/2012

In the matter between:

**M[...] M F[...] obo M[...] M[...]**

**PLAINTIFF**

And

**THE ROAD ACCIDENT FUND**

**DEFENDANT**

**DRAFT ORDER**

Having heard counsel on behalf of the parties and having considered the evidence to this matter, an order in the following terms is issued:

1. The Defendant is ordered to pay the Plaintiff the amount of R5,526,988.00 less 20% Contingency deduction of R1,165,397.00 the total is R4,661,559.00 on or before 28 September 2013;
2. The capital amount shall be paid to the Plaintiffs attorney of record,

MUSHWANA INCORPORATED, and into the following trust account:

Mushwana Inc, Attorneys

Branch Code: 260,349

Bank: First National Bank

3. The Defendant shall issue an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, to the benefit of M[...] M[...], with date of birth 2[...] February 1[...], for the costs of the future accommodation of M[...] M[...] in a hospital or nursing home or treatment or rendering of a service to M[...] M[...], or supply of goods to M[...] M[...], and for the costs of the establishment of a trust and costs of the trustees thereto as set out in paragraph 8 here below, arising out of the injuries sustained by M[...] M[...] in the motor vehicle accident on **15 JUNE 2011**, after such costs have been incurred and upon proof thereof;
  
4. The Defendant is ordered to pay Plaintiff's taxed or agreed party to party costs on High Court scale, until date of this order, including but not limited to:
  - 4.1 The reasonable taxable preparation and reservation fees, if any, of all the experts that Plaintiff has given notice of, including:
    - a. Dr V Close (orthopedic surgeon):
    - b. Dr Theo Enslin (medical practitioner):
    - c. Mrs Zethu Gumede (educational psychologist)

- d. Mrs T Sodi (clinical psychologist);
- e. Mrs S Sebapu (occupational therapist);
- f. Mrs S Vos (industrial psychologist);
- g. Mrs G Whittaker (actuary).

4.2 The costs of obtaining such reports from the above and / or other experts;

4.3 The reasonable travelling and accommodation costs of the Plaintiff and M[...] M[...] attending to the expert medico-legal examinations of the Plaintiffs and the Defendant's experts;

4.4 The costs of counsel;

4.5 The reasonable travelling and accommodation costs of the Plaintiff and M[...] M[...] and V[...] M[...]; who are declared necessary witnesses, in attending the trial at Pretoria on 30 August 2013 to 5 September 2013:

4.6 The reasonable traveling and accommodation costs of MRS Z GUMEDE and MRS S VOS and / or any other expert of who the Plaintiff gave notice of, in order to attend the trial at Pretoria on 30 August 2013 to 5 September 2013;

5. The Plaintiff shall, if the costs are not agreed, serve a notice of taxation on Defendant's attorneys of record; and



5.1 the Plaintiff shall allow Defendant 7 (seven) court days, after the *allocator* has been made available to Defendant, to make payment of the agreed or taxed costs.

6. The Plaintiffs attorney is ordered to cause a trust to be established and is authorized to sign all documents necessary for the formation for the trust for the benefit of M[...] M[...], with Identity Number 9[...], such trust to be held by ABSA TRUST in accordance with the written undertaking, dated 28 August 2013; hereto attached as ANNEXURE "A."
7. The Defendant is ordered to pay. for so long as the trust remains in existence;
  - 7.1 The costs of the appointment of the trustee;
  - 7.2 The costs, remuneration and disbursements of the trustee in the administering of the trust; and
  - 7.3 The costs of furnishing annual security.
8. The Defendant's liability for such costs as stipulated in Paragraph [7] here above shall not exceed the costs of the appointment and remuneration of a *curator ad bonis*.
9. The trustee is to pay the Plaintiff's attorney costs in terms of the contingency fee agreement entered into between the Plaintiff and the Plaintiffs attorneys.

10. The trustee shall be entitled to call for an appropriate taxation of the Plaintiff's attorney's (attorney-and-own-client) costs disbursements if deemed necessary.
  
11. The trust instrument contemplated in Paragraph [6] *supra* shall make provision for *inter alia*, the following:
  - 11.1 That M[...] M[...] be the sole beneficiary of the trust;
  - 11.2 The trustee(s) of the trust to be formed shall take all the requisite steps to secure an appropriate bond of security to the satisfaction of the Master of the High Court for the due fulfilment of his/her obligations and to ensure that the bond of security is submitted to the Master of the High Court at the appropriate time as well as to ail other interested parties of so required by the Master of the High Court;
  - 11.3 The duty of the trustee(s) to disclose any personal interest in any transaction involving the trust property;
  - 11.4 The termination of the trust shall occur when M[...] M[...] reaches the age of 23 (twenty three) years; and
    - 11.4.1 subject to the leave of the High Court upon application, for purposes of which the appointed trustees shall cause the appointment of a *curator ad litem*, the costs of which shall be costs herein, and for which purposes notice of such application is to be given to the Defendant;
    - 11.4.2 The trustees and / or the *curator ad litem* to be so appointed shall be

entitled to appoint the relevant experts for purposes of preparing a report on the appropriateness of the termination of the trust when M[...] M[...] reaches the age of 23 (twenty three) years:

- 11.4.3 The costs of so appointing the required *curator ad litem* and experts shall be costs awarded in this action.
- 11.5 The trustee(s) shall be entitled, if he/she deems it necessary, to utilize the income of the trust for the maintenance of M[...] M[...];
- 11.6 That the trustee(s) to be appointed to provide security to the satisfaction of the Master of the High Court;
- 11.7 That ownership of the trust property shall vest in the trustee(s) of the trust in their capacity as trustee(s):
- 11.8 Procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by the Honourable Court; That amendment of the trust instrument be subject to the approval and leave of this Honourable Court;
- 11.9 In the event of the death of M[...] M[...], such trust shall terminate and the trust assets shall pass to the estate of M[...] M[...];
- 11.10 That the trust property and the administration thereof be subject to an annual

audit.

12. The provisions referred to in Paragraphs [11.1] to [11.10] here above shall in accordance with the provisions of the Trust Property Control Act, Act 57 of 1988, be subject to the approval of the Master of the High Court.
  
13. This order is to be served by the Plaintiffs attorney on the Master of the High Court, Pretoria, and the nominated trustee(s), within 15 (fifteen) days of the granting of this order.

**BY ORDER:**  
**REGISTRAR**

