IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 1884/2006

DATE: 19-06-2023

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| **DELETE WHICHEVER IS NOT APPLICABLE** |
| **(1) REPORTABLE: YES / NO.** |
| **(2) OF INTEREST TO OTHER JUDGES: YES / NO.** |
| **(3) REVISED.** |
| **DATE** |
| **SIGNATURE** |

In the matter between

SMIT: CATHERINE RACHEL Plaintiff

and

ROAD ACCIDENT FUND Plaintiff

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

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**KHAN, AJ**:

The Plaintiff claims for special and general damages in respect of a motor vehicle collision that occurred on 28 October 2001. The Plaintiff was a 4 months old baby at the date of the accident. She was restrained in a car seat but the restraints of the baby chair came loose. The Plaintiff was transported to hospital and treated for a head injury arising from intracranial pressure. Plaintiff was discharged from hospital after 4 days in High Care for observation.

The Plaintiff, who is now 22 years of age, alleges that she suffered a soft tissue injury, a head injury, bruising to the forehead and bleeding of the mouth. A traumatic brain injury of moderate severity is also alleged.

The defence of the Road Accident Fund was struck off by way of order of court dated 24 February 2022. The Plaintiffs initial Particulars of Claim sought a prayer for payment of R206 821.80 (inclusive of R 80 000 for future loss of income and R 100 000 for General Damages). A further amended particulars of claim visited a claim of R3million for loss of income and R900 000 for general damages. By 15 August 2023, being a week before this default judgment application, a further amendment was affected. The claim is now presented as R 10 369 255.80

(comprising R 9062 434.00 for Loss of Income and R1 300 000 for General Damages).

It is unclear what effect such an amendment would have on a Defendants rights before court, under circumstances where the defence (sometimes formulated in court orders as the plea) was struck off. It is unclear if such a Defendant would be entitled to again enter the fray. I speculate that a defendant could have taken a financial view not to oppose a lesser claimed quantum on the basis of a variety of considerations, including a prohibitive costs of litigation. Once the complexion of a matter changes, a Defendant might very well to be allowed to enter the litigation once more. This is however moot as the Defendant in this matter sought no such prayer.

The Plaintiff presented documentary evidence in support of the application for default judgment by way of expert reports and academic results of the Plaintiff. Noteworthy is that the Plaintiff achieved 5 “A” symbols (with her highest achieved mark being 89%) in her matric final examination. The Plaintiff went on to enrol at UNISA for a Bachelor of Arts Degree with a major in law, which she completed and is now busy with her LLB degree. Plaintiff excelled with a number of distinctions throughout her tertiary studies. The Plaintiffs July 2023 results (with various course result still outstanding) reflect varying

results from distinctions to a fail in one subject.

A battery of medico legal reports (inclusive of various updated reports filed as late as July 2023) have been made available for purposes of default judgment. This again invites a consideration of whether the order striking off the Defendants defence remains of effect, in light of the ever-evolving case being presented by the Plaintiff. Once a Plaintiff alleges further injuries and sequalae in support of a higher amended quantum, then this is essentially a new case and the Plaintiff is on the horns of a dilemma of either abandoning such new version that is before the court, postponing the matter to allow the Defendant to adequately consider its position, particularly when addendum reports are being filed a month before the matter is before court, alternatively the order of the dismissal of the defence becomes superceded and the Defendant is once again allowed to place a version before the court. This is further complicated in Road Accident Fund litigation where the proof of the matter is heavily reliant on medico-legal reports and such reports are not in pursuance of any party's interests but for the benefit of the court. In such circumstances the Road Accident Fund would have been hamstrung in calling on the Plaintiff to attend medico legal examinations in terms of the Uniform Rules of Court.

The report of Dr Herman Edeling (a registered

Neurosurgeon whose current practical in-theatre neurosurgery experience is undocumented in the papers before me) surmises that the Plaintiff suffers from, inter alia, right ear hearing loss, an unsteady gait, depression, anxiety, pain as well as an organic primary diffuse brain injury (an academically documented term used to infer a brain injury from surrounding circumstances such as delusions and hallucinations). His finding is bolstered by his description of the Plaintiffs mothers injuries, who is reported by the neurosurgeon to have sustained fractured ribs, fractured hands and a fractured pelvis in the same collision. He goes on to find a subtle cognitive mental impairment and thus surmises this will result in impaired learning capacity (despite her scholastic and university results indicating otherwise). His finding concludes that the Plaintiffs injuries will result in what he describes as ‘significant life changing sequelae’. Dr Barlan (an orthopedic surgeon) found no orthopedic injuries that warranted a medico legal report and declined to furnish a full medico legal report. An eye specialist similarly could not identify any signs of post traumatic visual impairment.

CPRD and Associates, a firm of psychologists who report themselves as having an interest in Psychomotor research, report the Plaintiff as having difficulties concentrating. They also record Plaintiff as denying having a problems with her

temper, concentration or getting headaches, contrary to the findings of other medico legal experts in this matter. Plaintiff does report depression, anxiety and dizzyness when she stands up from a seated position. Despite concerns about the Plaintiffs slower than normal auditory and visual processing, she obtained her drivers licence some 14 months ago. The expert concludes that Plaintiff may not be a safe driver.

The ENT Surgeon, Dr Bouwer found the Plaintiff to have a possible ear infection in the middle ear which is affecting the Plaintiffs hearing with no handicap arising from the motor vehicle collision.

The Psychiatrist (in a report dated 7 July 2023 in respect of an assessment on 21 June 2021) finds generalised anxiety, obsessive compulsive disorder, and bipolar disorder. The conclusion is that the Plaintiff will suffer long term emotional and behavioural sequelae as a result of the accident.

The Occupational Therapist records receiving an instruction letter from the Plaintiffs attorneys recording a “severe brain injury” (as opposed to the mild injury recorded by the experts). She finds that the plaintiff will not cope in high stress environments (including that of a lawyer as she aspires to be).

Elanor Bubb (a clinical and educational

psychologist) who records herself as having an interest in Neuropsychology finds that despite the Plaintiff achieving academically, she would have to be accommodated in an employment environment and that a sympathetic employer being required. Plaintiff would also require psychiatric intervention.

The Industrial Psychologist, Dr Bosman, having regard to the alleged brain injury and the emotional issues being experienced by the Plaintiff, concludes that the Plaintiff would not be able to achieve her pre-accident career potential and recorded that the Plaintiff was undecided at an earlier juncture as to whether she would practice law or enter academia. He finds that the Plaintiff would have entered the labour market with a Masters degree and would probably have achieved her PhD at some point in her career. Now that the accident intervened, the Plaintiff would take an extra year to complete her qualification and suffer in her earning path by not achieving her true potential.

On the morning of the application for default judgment, I was asked to stand the matter down on the basis that the Road Accident Fund had now become keen to settle the matter. During the morning, I was furnished with a draft settlement order in terms whereof the Plaintiff would be paid an amount of R 3 194 191. This against a backdrop

of a pleaded claim for loss of earning of R 9 062 434. I refused to make this agreement an order of court in light of certain concerns that I had earlier raised regarding the veracity of the sequelae now being alleged some 22 years later. I was then requested by Counsel for Plaintiff to remove the matter from the roll. I refused as I had read the papers and was ready to attend to this matter on the default judgment roll.

In the face of the medico legal reports presented by Plaintiff, it might very well be that Plaintiff is not fit and proper to be admitted as a legal practitioner, which would have an impact on her claim. Plaintiff might also not qualify to hold a drivers licence or be a safe driver on public roads. This would again impact her claim. I also raised questions regarding the assessment and finding of the brain injury some 22 years later (based on the reports furnished and in the absence of Plaintiff calling any of the experts to testify before court).

Despite not being referred to any authority, I am alive to the recent Supreme Court of Appeal decision of Road Accident Fund v Taylor and other matters [2023] ZASCA 64 (8 May 2023). The court held at [31] as follows ‘Where the misappropriation of public funds is properly raised before a court, it must, of course, deal with it decisively and without fear, favour or prejudice. But a court has no general duty or power to

exercise oversight over the expenditure of public funds. This is so for three main reasons. The first is the constitutional principle of separation of powers. The second is that the exercise of such a duty or power would infringe the constitutional rights of ordinary citizens to equality and to a fair public hearing. The third is the principle that the law constrains a court to decide only the issues that the parties have raised for decision. See *Magistrates Commission and Others v Lawrence* **[2021] ZASCA 165**; **2022 (4) SA 107** SCA para 78-79. A perception that a system of state administration is broken, is not a licence to disregard fundamental principles of procedural or substantive law.'

The court went on to state (at 51) that a court has no power or jurisdiction to embark upon an enquiry into the merits of the matter. This would have been the final word on the matter but the Constitutional Court is currently seized with the matter of Mafisa v Road Accident Fund, which matter has been argued and is awaiting a judgment. This matter turns on whether a Presiding Officer is entitled to unilaterally reduce a sum agreed in respect of loss of future earning capacity. Such a finding will no doubt have a profound effect on this field of law and the manner in which courts are able to attend to settlements concluded by Organs of State. No doubt, Taylor will be implicated in such a judgment as well as the present matter.

In the circumstances, I make the following order:

1. This application for default judgment is postponed *sine die*;

2. This application may not be re-enrolled prior to the decision of the Constitutional Court in the matter of *Mafisa v Road Accident Fund CCT 156 / 2022*

3. The costs of this application for default judgment are reserved.

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**Z KHAN AJ**

**JUDGE OF THE HIGH COURT**

**DATE: 23 August 2023**

For Plaintiff

Attorney: Erasmus De Klerk Inc
Counsel: Adv Danie Combrink

For Defendant

State Attorney – Johannesburg
Ms Talenta Tivana

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This judgment is uploaded and notified to the parties electronically and is deemed to be delivered on 24 August 2023.