



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

Case No: 76372/2016

In the matter between

**NTOMBIXOLILE WENDY SHUSHA**  
obo N T [REDACTED]

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHERS JUDGES: NO  
(3) REVISED

  
SIGNATURE

12/4/2023  
DATE

**Plaintiff**

and

**THE ROAD ACCIDENT FUND**

**Defendant**

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**JUDGMENT**

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**BHIKHA AJ:**

[1] The Plaintiff sued the Defendant in her representative capacity as the mother and natural guardian of her minor child, N [REDACTED] T [REDACTED] ("the minor"), for damages arising out of bodily injuries sustained by the minor in

a motor vehicle accident that occurred on the 29 October 2015, on the R61 National Road, at or near Mekweni Location, Bizana, Eastern Cape Province.

- [2] At the time of accident, the minor was a pedestrian when a motor vehicle with registration ND [REDACTED] (“the insured vehicle”), driven by **DUMISANE KHUMALO** (“the insured driver”), collided with the minor.
- [3] On the 2 May 2018, the Honourable Mr Justice Ledwaba DJP granted an order in terms of which the Defendant was found liable for the plaintiff’s proven damages to the extent of 100%, whilst the issue of quantum of damages suffered was postponed *sine die*.

#### **ISSUE BEFORE THIS COURT**

- [4] On the 6 March 2023, the defendant rejected the plaintiff’s claim for general damages, leaving the remaining issue to be determined by this Court, being the plaintiff’s future loss of earnings and/or earning capacity.

#### **MATERIAL BACKGROUND**

- [5] The minor child, who was 6 years old at the time of the accident, was in school doing Grade R. Presently, the minor is 14 years old and in Grade 8. The minor sustained multiple bodily injuries and initially received treatment

at St. Patrick Hospital, and was subsequently transferred to Bedford Hospital, where he was admitted for approximately three months whereafter he was transferred back to St. Patrick Hospital for rehabilitation. He was discharged from hospital after five months.

[6] Unfortunately, the parties did not submit any joint expert reports. Further, no oral testimony was adduced on behalf of the parties, as they had agreed to rely on expert medical reports whose contents were admitted by the parties. Accordingly, a review of the expert medical reports is necessary.

[7] I start with the review of **Dr J.A Ntimbani** (the Neurosurgeon) report. He notes that the hospital records of the minor dated 29 October 2015 recorded GCS 15/15, with no head injury, nor any loss of consciousness. Therefore, it appears to the expert that it is probable that the minor child sustained a minor head injury (mild concussion). However, on admission at St Patrick hospital, the Glasgow coma scale showed 15/15 with no record of direct injury. Therefore, the expert opined that there was no long-term effect from the minor head injury and that there is no risk of post traumatic epilepsy.

[8] For the Defendant it was argued that the referral letter from St Patrick Hospital to Bedford Orthopaedic Hospital in Bizana stated that there was

“no head injury” and that the injury was confined to the left thigh, with comminuted displaced proximal femur fracture, which was treated conservatively, and the minor was discharged.

- [9] Only the Plaintiff, realising that the 2015 medico-legal reports were largely outdated, obtained and presented more recent or updated medical expert reports for the minor, to justify the minor’s claim and assist the Court to quantify their claim.
- [10] Of these reports, Dr L.F. Oelofse (Orthopaedic Surgeon’s) noted, *inter alia*, that the minor suffered a pelvic injury resulting in a painful anterior and posterior pelvis, *symphysis pubis diastasis* (widening of the right SI joint) and a painful left SI joint. Furthermore, he found that the minor had a left femur fracture with residual pain, and multiple other orthopaedic injuries with activity related pain.
- [11] Therefore, Dr Oelofse opined that the minor must be placed in a permanent light duty working environment within his current scholastic abilities. He further stated that the pelvic injury has impacted the minor’s scholastic activities, other amenities of life including his future working and physical activities, as he will find it difficult to compete with healthy subjects for work.

[12] This opinion is somewhat supported by the Plaintiff's expert, **Amanda Peta** (Clinical Psychologist) who reports that being involved in an accident at age six, will compromise his learning potential leaving him with significant cognitive and learning problems. The expert further indicated that according to the IQ assessment the minor had an average IQ before the accident but post-accident, had a below average IQ and was "lagging behind compared to his peers".

[13] In this regard, for the Defendant, the Court was referred to the report of **Sunette van der Heerden** (Educational Psychologist). This expert collated the minor's family history, social functioning and circumstances into her consideration and recorded:-

- (a) That the minor child's mother has a Grade 10 level of education, his father's education level was unknown and that the minor child has older half-sister and half-brothers.
- (b) That at the time of the accident the minor child was in Grade R, however no school reports were submitted. It is noted that the minor child was out of school for a period of approximately two/five months whilst recuperating.

- (c) In 2013 post-accident when the minor returned to school, he was in Grade 1. According to his school report, he obtained an overall grade average of 64 which is slightly above average. In 2017 in Grade 2 his grade average increased to 69.

[14] Based on the above the expert opined that prior to the accident the minor child was probably an individual with average capabilities. However his test results after assessment show slowness in processing information which would compromise the minor's academic progression in higher grades. The expert further opined that the minor at pre-accident, probably had the potential to complete Grade 12 / NQF 4 level qualification and post-accident still presents with the learning potential to complete Grade 12 / NQF 4 qualification, but with interventions.

[15] According to **Michelle Ferreira-Teixeira** (Occupational Therapist) the implications of her occupational assessment on the minor's ability to work, the purpose of which was to predict the minor's vocational potential and the subsequent loss of earning capacity, she opined:

- (a) that the minor child is coping well at school;
- (b) Agreed with **S van der Heever** (the Defendant's Educational Psychologist) that the minor child sustained a minor/ mild head

injury and long- term cognitive sequelae is not expected of an injury of this nature, therefore, the expert concludes that the minor child would still be employable in the open labour market.

[16] It is submitted on behalf of the Defendant that based on the report of **CJ Nel** (Industrial psychologist) the pre-accident postulation and the probable assumption, taking into account the family educational background and the socio-economic impact the minor's pre-accident earning postulation but for the accident:-

- (a) that he would have completed Grade 12/NQ4 qualification;
- (c) entered the open labour market at median of A2/A3;
- (c) Progressing to B3/B4 by age 45.

[17] Therefore, according to the Defendant's Educational Psychologist, Clinical Psychologist and the Occupational Therapist the minor is likely to enter the open market and progress as per the pre-accident postulation – with no loss/change.

[18] At this juncture, its notable that the Plaintiff's expert, **Dr B A Okoli** (Neurosurgeon) in his report, after examining the minor, noted that although the available hospital records do not record any associated head

injuries or loss of consciousness, he confirms that this is a difficult statement to sustain when there is evidence of traumatic impact to the head because of subtle features of concussion, like dizziness and amnesia, that the Plaintiff reports that the minor currently suffers these symptoms. With the complaints of post-traumatic or post-accident headaches, laceration on the head and with noted behavioural changes, the expert is of the opinion that there is certainly a suggestion of cranial impact and likely that the minor sustained at least a concussion. Accordingly, Dr Okoli concluded that the minor's whole person impairment (WPI) is at 24%.

- [19] **Dr J F L Mureriwa** (Clinical Psychologist) also diagnosed the minor to have suffered a mild concussive head injury and opined that the minor's whole person impairment is at 20%. This level of impairment is supported by the Plaintiff's expert, **Dr Yvonne Matlala** (Educational Psychologist) who opined that the post-accident, the minor was considered to have an average intellectual ability. This opinion, as has been previously set out, is supported by the Defendant's expert, **Ms S van der Heever**, (Educational Psychologist) who, with **Michelle Ferreira-Teixeira** (an Occupational Therapist), acknowledges that notwithstanding that the minor sustained minor head injury, fortunately, long term cognitive sequelae is not expected from injury of this nature, and therefore the minor remains employable in the open labour market, even if his chosen career ought to



consist of light duty in nature (vide the report of **Ms Amanda Peters** (Physiotherapist)). This is echoed by **Ms Ncumisa Ndzungu** (Occupational Therapist) who also holds that the minor would be considered a highly vulnerable and compromised individual in most aspects of his life, making him a lessor competitor in the open labour market. For these reasons, **Mr Ben Moodie** (an Industrial Psychologist) is of the opinion that a higher post-accident contingency deduction must be applied.

[20] This leads me to the vexed issue of the award for the future loss of earnings capacity and the contingency to be applied, the only issue before this Court.

[21] Since the parties failed to submit any joint expert reports, I have had to consider various expert reports, and the basis of their conclusion, their findings and the submissions made by Counsel. Considering that the Defendant's expert reports are unfortunately dated by a few years, I considered the minors pre and post-accident medical sequelae, his environmental and his background circumstances, including the academic achievement of his mother and other half-siblings, as a guideline, in making my assessment.

[22] In this regard I am also guided by **Mngomezulu v RAF**<sup>1</sup>, where Kgomo J argued that:

*"[84] For the Plaintiff to succeed in a claim for loss of earnings, he is required to provide a factual basis for an actuarial calculation. This is a process designed to assess actuarial/mathematical calculations on the basis of the evidence as well as over-all assumptions vesting or depending on such evidence. This approach is known as the actuarial approach.*

*[85] The actuarial approach seeks to determine the loss of earnings as realistically as possible to what may be the Plaintiff's actual losses. The approach comprises of (a) providing a factual basis upon which the loss of earning is to be calculated and only then (b) by applying appropriate contingency deductions."*

[23] I have noted that the parties have differing views on the contingency deduction. For the Plaintiff, it was submitted that the appropriate contingency pre-accident was 20% whereas for the Defendant it was postulated it should be at 25%. With regard to the post-accident contingency deduction, for the Plaintiff, it was initially submitted that this should be set at 50% contingency, whereas for the Defendant it was argued that 35% contingency deduction should apply. Subsequently, for the Plaintiff, it was eventually conceded that between 35% and 40% is fair and reasonable contingency to apply.

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<sup>1</sup> (Case No. 04643/2010) [2011] ZAGPJHC 107 (8 September 2011)

[24] After considering the Plaintiff's Actuarial Reports (excluding the updated actuarial report – which was excluded after objections were lodged for the Defendant as it not properly before the Court), which reports are unfortunately dated, for the Defendant it was conceded that the calculations and contingencies set out as Scenario 1 of Plaintiff's calculations is acceptable as being fair and reasonable. I therefore use these values as the basis of calculating the future loss of earnings.

[25] I therefore find that the following should apply:

Pre-Accident Earnings potential	R 13 490 600.00
<u>Less</u> contingency – 25%	R 3 372 650.00
<b>Sub-Total A</b>	<b>R 10 117 950.00</b>
Post-Accident Earnings potential	R 7 086 000.00
<u>Less</u> contingency @ 40%	R 2 834 400.00
<b>Sub-Total B</b>	<b>R 4 251 600.00</b>

**THEREFORE, THE TOTAL LOSS OF EARNING CAPACITY IS:**

**R 10 117 950.00 – R 4 251 600.00 = R 5 866 350.00**

[26] In the circumstances, I find that the appropriate amount to be awarded to the Plaintiff in respect of the minor's future loss of earnings capacity is the sum of R5 866 350.00.

[27] On the question of costs the principle is that costs follow the successful party to the suit, accordingly, the Plaintiff is awarded the party and party costs of suit.

## **ORDER**

[28] In the circumstances, the following is the Order of this Court:

1

1.1 The Defendant shall pay the Plaintiff the sum of **R 5 866 350.00 (five million eight hundred and sixty-six thousand three hundred and fifty Rand)**, in respect of Loss of Earnings. (The Defendant shall pay the total Judgment amount within 30 days from the Date of Judgment).

1.2 Interest shall be charged on the Judgment amount at the current prescribed mora rate per annum, calculated from date of Judgment to date of payment.

1.3 The above amounts shall be paid into the attorney's trust account as follows: -

**Name of Bank: Standard Bank**

**Account Holder: Godi Attorneys**

**Account Number:** [REDACTED]

**Branch Number:** 010145

**Type of Account:** Trust Account

**Branch Name:** Van Der Walt Street (Pretoria)

1.4 The Defendant shall pay the taxed costs on a party and party scale, as well as, actual travelling costs incurred in the prosecution of this matter, necessary attendance for inspection in loco, cost of consultation with the below mentioned experts, preparation and research, which shall include the following: -

1.4.1 The costs of Counsel including attending Court on the 6th March 2023.

1.4.2 The actual costs of obtaining medico-legal reports, which include the travelling, accommodation and substance fees as well as for the reservation, qualifying fees and court attendance fees, for the 6th March 2023, for the following experts that the Plaintiff has attended to and the actual costs of the experts and witnesses, which include the travelling, accommodation and substance fees, interpreter's fees:

1.4.2.1 Dr Oelofse, Orthopaedic Surgeon

1.4.2.2 Dr Okoli, Specialist Neurosurgeon

1.4.2.3 Dr JFL Mureriwa, Clinical Psychologist

- 1.4.2.4 Amanda Peter, Physiotherapist
- 1.4.2.5 Ncumisa Ndzungu, Occupational Therapist
- 1.4.2.6 Burger Diagnostic Radiologists
- 1.4.2.7 Dr Leslie Berkowitz, Plastic and Reconstructive Surgeon
- 1.4.2.8 Dr Yvonne Matlala, Educational Psychologist
- 1.4.2.9 Dr Ben Moodie, Industrial Psychologist
- 1.4.2.10 Munro Forensic Actuaries
- 1.4.2.11 Dr J.J Schutte, General Practitioner.

1.5 The Plaintiff shall serve the notice of taxation on the Defendant's attorneys of record.

1.6 The Plaintiff shall allow the Defendant 20 (twenty) Court days to make payment of the taxed costs.

1.7 There is no contingency fee agreement signed between the Plaintiff and her Attorney.

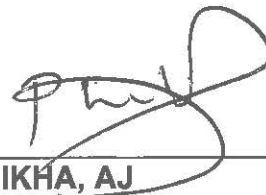
1.8 The issue of General Damages is postponed *sine die*.

2 The net proceeds of the payment referred in paragraph 1.1 above, after deduction of the Plaintiff's attorney's taxed legal fees ("the capital

amount"), shall be held in Trust, to be established for the benefit of the minor (N■■■■ T■■■■■■■■■■) represented by the Plaintiff, within 12 (twelve) months of the date of this Order, which Trust will:

- 2.1 Be created on the basis of the provisions as more fully set out in the draft Trust Deed, attached marked "A".
  - 2.2 Have as its main objective, the controlling and administering of the capital amount on behalf of the Plaintiff for the benefit of the minor, N■■■■ T■■■■■■■■■■.
  - 2.3 Have as its trustee a NOMINEE of Absa Trust Ltd, with powers and abilities as set out in the draft Trust Deed, marked "A".
- 3 Should the aforementioned Trust not be established within the 12 (twelve) months period of date of this Order, the Plaintiff is directed to approach this Court within one month thereafter in order to obtain further directives in respect of the manner in which the capital amount is to be utilized in favour of the minor, N■■■■ T■■■■■■■■■■.
- 4 Until such time as the Trustee is able to take control of the capital sum and to deal with same in terms of Trust Deed, the Plaintiff's attorneys:

- 4.1 Are authorised to invest the capital amount in an interest-bearing account in terms of Section 86(4) of the Legal Practice Act to benefit of the minor with a registered banking institution pending finalization of the directives referred Paragraph 2 above.
- 4.2 Are authorised and ordered to make any reasonable payments to satisfy any of the needs of the minor that may arise and that are required in order to satisfy any reasonable need for the treatment, care, aids, or equipment that may arise in the interim.
- 5 That the cost of establishing the aforementioned Trust, administration and remuneration costs of the Trustees shall be paid by the Defendant.



**BHIKHA, AJ**  
**Acting Judge of the High Court**

Date: 12/4/2023