

SOUTH AFRICA / JUDGMENT

T.P.R obo P.M.M v Road Accident Fund (9117/2019) [2024] ZAGPPHC 387 (18 April 2024) [2024] ZAGPPHC 387

COURT

North Gauteng High Court, Pretoria

BEFORE

N Davis

CASE / FILE NUMBER

9117/2019

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Policy

FLYNOTES:

RAF

– Defence struck out – Re-entering

fray –

Fund

still has right of appearance – Can cross-examine witnesses

and can argue merits of plaintiff's case including

quantum –

But can lead no evidence and cannot advance facts not put in

evidence by plaintiff – Substantive amendment

of plaintiff's

particulars of claim after defence had been struck out –

Pleadings reopened and Fund entitled

to “re-enter the fray”

but only in respect of those issues affected by the amendment.

HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 9117/2019

(1)

REPORTABLE: NO.

(2)

OF INTEREST TO OTHER JUDGES: YES

(3)

REVISED.

DATE: 18 APRIL 2024

SIGNATURE

In

the matter between: T[...]
P[...] R[...] obo
P[...]
M[...] M[...]
Plaintiff
and
ROAD
ACCIDENT FUND
Defendant

Summary: Procedure – Action for damages -Road Accident Fund (RAF)
litigation – clarity on the position where, as so often
happens,
the RAF's defence has been struck out. Until
such time as the RAF has successfully rescinded a striking out order,
it still has a right of appearance, can cross-examine witnesses and
can argue the merits of a plaintiff's case (including
the
quantum thereof) but can lead no evidence and cannot advance facts
not put in evidence by the plaintiff.
Procedure
– RAF litigation – substantive amendment of the
plaintiff's particulars of claim after the RAF's
defence
had been struck out – pleadings reopened and the RAF entitled
to "re-enter the fray" but only in respect
of those
issues affected by the amendment.

ORDER

1.

The Defendant shall be liable for 100% of the
Plaintiff's proven damages.

2.

The Defendant is ordered to pay the Plaintiff the
amount of R6 738 420,00 (Six
million seven hundred and thirty-eight thousand four hundred and
twenty Rand).

3.

This amount shall be paid into the following bank
account, on or before the expiry of 180 days from the date of this

order:

ACCOUNT HOLDER
J M
MODIBA ATTORNEYS
BANK NAME
STANDARD
BANK
BRANCH CODE
0[...]
ACCOUNT NUMBER
0[...]
TYPE OF ACCOUNT
TRUST
ACCOUNT
REF

REF:

M[...] M[...] /[...]
3.1.
The Defendant will not be liable for interest on the above-mentioned amount provided that it is paid on or before the expiry of 180 days from the date of this order, failing which interest at a rate of 8.75% per annum will be payable calculated from the 15th day from the date of this order.
4.
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 the reasonable costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service to her or supplying of goods to her resulting from the injuries sustained by the Plaintiff's and of administering and enforcement of this undertaking, as a result of the motor vehicle collision which occurred on 09th April 2017, after such costs have been incurred and upon proof thereof.
5.
The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on a High Court scale. In the event that the

costs are not agreed, it is ordered that:

5.1.

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

5.2.

The Plaintiff shall allow the Defendant Fourteen (14) court days to make the said payment of the taxed costs; and

5.3.

Should payment not be effected timeously, the Plaintiff will be entitled to recover interest a tempore morae on the taxed or agreed costs from the date of allocatur to the date of final payment.

6.

The costs in paragraph 5 above shall also be paid into the Plaintiff's attorneys' trust account referred to in paragraph 3 above, for the benefit of the Plaintiff.

7.

The issue of general damages is postponed sine die.

JUDGMENT

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

- [1] This is an action against the Road Accident Fund (the RAF) for compensation of damages suffered by one P[...] M[...] M[...] (who became the eventual plaintiff upon attaining majority) as a result of a motor vehicle accident which had occurred on 9 April 2017. At the time of the accident the plaintiff was 12 years old. He was, at the time when the matter came before court, 19 years old and had substituted his mother who had initiated the action on his behalf.
- [2] Apart from the issues of merits and quantum, which had been placed before the court by the plaintiff for purposes of obtaining a default judgment, two further issues featured in this matter. The first is what the position of a defendant is whose defence had been struck out and how far such a defendant may still participate in the proceedings. The second is what the procedural consequences are when a plaintiff substantially amends its particulars of claim after a defendant's defence has been struck out. Both these last two issues feature regularly in the numerous RAF matters which come before this court daily, both in the Pretoria and Johannesburg Division of this court.

Procedural history

[3] As can be gleaned from the above, an analysis of the procedural history of the matter is necessary and will provide context. The history of those procedural steps relevant to the issues can be summarized as follows:

11 February 2019 Summons was issued;

12 February 2019 Service took place;

27 February 2019 Notice of intention to defend was delivered;

27 February 2019 Notices in terms of Rules 36 (4) and 35 (14) were delivered by the RAF, calling for the production of medical records and ancillary documents.

6 March 2019

The plaintiff furnished the RAF1 Form and hospital records from Tembisa Hospital as well as claim documentation, proof of identity,

an affidavit in terms of section 19(f) of the Road Accident Fund Act[1] as well as the police docket pertaining to the motor vehicle accident.

11 March 2019

The RAF's plea (including special pleas) was delivered.

26 May 2023

Mogotsi AJ ordered the RAF to deliver its discovery affidavit and to indicate a time and date for a pre-trial conference within 10 days from the service of the order.

16 August 2023

Francis-Subbaiah J struck out the defendant's defence for want of compliance with the order of 26 May 2023 and the plaintiff was authorised to refer the matter to the Registrar for allocation of a date for purposes of seeking judgment by default.

23 August 2023 The striking out order was served on the RAF.

19 October 2023 The plaintiff served a notice in terms of Rule 28 to amend his particulars of claim. In particular, the amount of damages initially claimed in the amount of R6,4 million would be amended and increased to R11,4 million.

2 November 2023 The amended pages of the particulars of claim were delivered.

16 November 2023 The RAF delivered a new notice to defend as well as a new plea entitled a "Consequential Defence Amendment" (as well as a new notice in terms of Rule 35 (14) calling for copies of pre-accident school records).

17 November 2024 The matter came before court on the default judgment roll and was stood down for purposes of delivery of heads of argument regarding the RAF's position.

30 November 2024 The whole of the plaintiff's case and the defendant's opposition thereto were argued.

The consequences of a defendant's defence being struck out

[4] In simple terms, once a defendant's defence (contained in its plea) is struck out, it means that there is no defence before the court by which the defendant answers to or denies the plaintiff's cause of action. This is why the plaintiff in those circumstances is allowed to proceed to obtain judgment by default.

[5] In substantiation of the above position the plaintiff in this matter sought to have any further participation in the matter by the

defendant precluded by relying on old authorities in which the court had held that, once a defence is struck out, a defendant "...

shall be placed in the same position as if he had not defended".[2]

[6] In *Minister of Safety and Security v Burger*[3] Tlhapi J had been referred to these old authorities and, during the course of dealing with an application for rescission, rejected the argument that the striking of a defence "left room for the [defendant] to still participate in the trial as far as the determination of quantum is concerned".

[7] The plaintiff in this matter not only relied on the above but also on the following extract from *Herbstein and Van Winsen*[4]: "If a defence is struck out, the defendant cannot appear at the trial and cross-examine the plaintiff's witnesses".

[8] A contrary view was expressed by Twala J in *Stevens and Another v RAF*[5] as follows at [11]: "... the striking out of the defence of the defendant does not in itself bar the defendant from participating in these proceedings. The defendant is entitled to participate in these proceedings but his participation is restricted in the sense that it cannot raise the defence that has been struck out by an order of court. It is therefore not correct to say the defendant was not entitled to cross-examine the plaintiffs after giving evidence, furthermore, the cross-examination was on the evidence tendered by the plaintiffs and the defendant did not attempt to introduce its own case during the cross-examination".

[9] In a similar action against the RAF (*Motala*)[6] Hitchens AJ explained in a judgment handed down a mere two weeks before the present matter, why the State Attorney had been allowed to participate in the hearing despite the RAF's defence having been struck out as follows: "[17] The striking out of a defendant's defence constitutes no more than a bar to the defendant tendering evidence which had been pleaded in its plea. The defendant's position is conceptually analogous to that of a respondent who has filed a notice in terms of Rule 6(5)(d)(iii) that it intends to oppose the applicant's application on a question of law only. [18] The plaintiff remains liable to prove both an entitlement to damages (generally referred to as "the merits") and the quantum of such damages. [19] The defendant is not precluded, in order to test the validity of the plaintiff's version, from cross-examining any witness which

may be called by the plaintiff. The defendant may however not put a different factual version to any witness because it is barred from leading evidence to substantiate its alternative version...”.

- [10] In reaching the above conclusions, Hitchings AJ relied heavily on *Minister of Police v Michillies*,^[7] a judgment handed down on 22 June 2023. Therein, in similar fashion as in *Burger*, the court was faced with a rescission application. Having referred to the drastic nature of an order whereby a defendant’s

defence is struck out, the court found that it was in the interests of justice that the striking out order be rescinded and the plea being reinstated. The portion of the judgment on which reliance has been placed in *Motala* is the following statement: “[4] On my understanding, when a plea has been struck, it does not bar the defendant from proceeding to defend the action...The merits are not determined in favour of the plaintiff on the striking of the defendant’s plea. The plaintiff remains with the onus to prove its case on a balance of probabilities”. The learned judge then proceeded to express the view that these probabilities can be attacked during cross-examination of the plaintiff, on both the issues of merits and quantum.

- [11] Although the comments made in *Michillies* might in the context of that case have been obiter and therefore not direct authority for *Motala*, I by and large agree with the conclusions reached in *Motala*, for the reasons set out hereinafter. I however, respectfully disagree with the analogy that a defendant whose defence has been struck out is in a similar position as a respondent who has delivered a notice in terms of Rule 6(5)(d)(iii). Firstly, the position is different in actions and no such notice can be delivered there. Points of law not dealt with by way of exception proceedings are in actions dealt with by way of special pleas. If a defence is struck out, that would generally also include such special pleas. Were a court to allow a defendant to cross-examine the plaintiff’s witnesses or interrogate such evidence as the plaintiff may have been allowed to place before the court by way of affidavits in terms of Rule 38(2), then one would be dealing with factual issues and arguments relating to expert opinion evidence, and not pure points of law as contemplated in Rule 6(5)(d)(iii). The analogy can however safely be jettisoned, without detracting from the conclusion about the extent of a defendant’s further participation in a trial after the defence has been struck out.

- [12] In my view, the conflicting views regarding the consequences of the striking out of a defendant’s defence can be clarified as follows: as a starting point, the “old authorities” referred to by the plaintiffs in the matters referred to above and in also the present matter, all pre-date the Constitution.

- [13] Section 34 of the Constitution guarantees “everyone ... a right to have a dispute that can be resolved by the application of law decided in a fair hearing before a court”. Whilst the section guarantees the substantive right of a litigant, the Constitutional Court has confirmed that the manner in which a party may bring such a dispute before a court may be regulated, in this instance by the Superior Courts Act^[8] and the Uniform Rules^[9]. It should further follow that any application of such regulation should be interpreted in a manner which least

interferes with or limits the exercise of the substantive right of access to courts.[10]

[14] It is also trite that the striking of a defence is a drastic measure. It precludes a defendant from advancing legal defences raised as special pleas and from placing countervailing evidence to that of the plaintiff before a court. In RAF matters, this would then also prevent the RAF from relying on any expert evidence it may have obtained (although, given the RAF's well-known litigation delinquency, this is the exception rather than the rule).

[15] The seriousness of the remedy of striking a defence has been reiterated in numerous cases, sometimes even requiring proof of intentional

contempt of a court order[11] or a directive and at least requiring a "two-stage procedure", that is firstly a compelling order and secondly a consideration of the consequences of non-compliance therewith.[12] I need not revisit those cases as in the present instance, the striking out order has already been granted and there is no attack on that order. It is further trite that a defence can be struck out in terms of Rule 30A(1)(b) or 35(7) upon proven non-compliance with the respective Rules.

[16] The seriousness of the consequences of a striking out order (and hence the requirement for at least a two-step procedure before the exercise of judicial discretion) has raised judicial concern as can be seen from the following consideration of a practice directive dealing with such instances: "[19] Directive 9.8.2.12 clearly provides for the striking out of the defaulting party's claim or defence where he or she remains

non-compliant. The striking out of the defaulting party's claim would have the effect that there is no cause of action that requires an answer or defence from the complying party. In that event, the defaulting party's claim, including all facts in support of the claim, are struck out from the affidavit as if no such cause of action has been pleaded. In the case of a defence, the defence is struck out from an affidavit, with the consequence that there is no opposition to the relief sought. [20] It is improbable that the drafters intended such a drastic consequence to flow automatically ...".[13]

[17] I find that the solution to the issue of conflicting views is firstly that the old authorities, insofar as following them would lead to a denial of a defendant's Section 34 rights, should not be followed. The second point is that, when a plaintiff has become entitled to the procedural benefits consequent upon a court striking out a defendant's defence, those consequences should be limited to that formulated in *Motala*, not by reason of the analogy mentioned therein, but by reason that the striking of a defence merely removes the opposition to a plaintiff's action insofar as it has been pleaded. This means that any legal opposition contained in special pleas and any factual averments or denials of the factual averments advanced by the plaintiff, which have been contained in the defendant's plea, have been removed. The striking out goes no further and does not remove a defendant's Section 34 right of access to courts in its entirety. I therefore disagree with the notion that the striking out has removed all opposition as mentioned in *Hassim* and in the old authorities.

[18] To clarify: I find that when a defendant's defence has been struck out, a plaintiff still has to prove its entitlement to damages and the extent thereof and a defendant has the right to cross-examine the plaintiff's witnesses or to interrogate their affidavits (and reports) if they have been allowed by a court in terms of Rule 38(2) on condition further that the defendant may not put a different factual version to such witnesses, lead countervailing evidence or base any argument on facts not put in evidence by the plaintiff.

Does an amendment to a plaintiff's particulars of claim after a defence has been struck out "open the door" to a new plea?

[19] The first part of the answer is that in general the delivery of a substantial amendment to a plaintiff's particulars of claim,

even if only in respect of quantum, has the effect of "reopening" the pleadings and thereby has the result that *litis contestatio* falls away. This much has expressly been found in *Olivier*:^[14] "When due consideration is had to the amended particulars of claim, the amendments are substantial and material. There are new aspects that in my view would require some consideration. It may be so that this increase in quantum did not alter the cause of action, the identity of the parties and the scope of the issues in dispute ... Notwithstanding, the scope of damages has been increased significantly and it would without doubt require a pleading". I respectfully align myself with this view.

[20] Although doubt had been expressed whether an immaterial or minor amendment would have the same result of a "fresh *litis contestatio*",^[15] it must be beyond doubt that any substantial amendment would have the result that pleadings are reopened. That the Supreme Court of appeal has confirmed in *Endumeni*^[16]. By way of illustration, in *Olivier*, the amount of damages was increased from R6 105 000.00 to R7 155 500.00 and the court found that that would have entitled a defendant to plead thereto. In the present matter the amount of damages was even more significantly increased.

[21] The pertinent question is whether the "reopening of the pleadings" would also apply in instances where the defendant's defence had been struck out. In *Endumeni* the origin of the concept of *litis contestatio* has been explained by reference to Roman Law^[17] and by way of a reference to the following explanation thereof by Hollmes AJ in *Government of the Republic of South Africa v Ngubane*:^[18] "In modern practice *litis contestatio* is taken as being synonymous with close of pleadings, when the issue is closed and joined And in modern terminology, the effect of *litis contestatio* is to "freeze" the plaintiff's rights as at that moment".

[22] A defence which has been struck out by a court, would have been a response to a plaintiff's pre-amendment case and to the quantum which the plaintiff had then claimed he or she would be entitled to. Once that claim had been "frozen" by the close of pleadings and the plaintiff thereafter seeks to "unfreeze" its position, there can, in my view, be no objection to allow a defendant to plead to this "unfrozen" or reopened case. To allow a defendant to plead afresh, would also be consistent with the provisions of Rule 28(8) which expressly allows

“any party affected by an amendment... to make... any consequential adjustment to the documents filed by him”.

- [23] To argue that the “documents” filed by the defendant had been struck out and therefore that there was nothing left in respect of which “adjustment” should be allowed, would in my view again place an unduly prohibitive limitation on the defendant’s Section 34 rights.
- [24] Another reason for allowing the defendant to enter the fray afresh, is that to refuse a defendant to do so when the plaintiff had altered its case, would offend against one of the most basic premises of our law and procedure, namely the right to be heard or the *audi alterem partem* – principle. While the defendant may have been silenced in respect of the previously pleaded case of the plaintiff as a result of the defendant’s non-compliance with a procedural obligation (reinforced by an order of court or a directive), that “silencing”

should not operate in perpetuity or in respect of a “new” case. To do so be would so manifestly unfair and contrary to the spirit of the Constitution, that it should not be contemplated.

- [25] The question posed must therefore be answered in the affirmative, the only qualification being that the plea must be limited to the “consequential” aspect. Should the plaintiff, as he has done in this matter, only amend the nature or the extent of the relief sought, the consequential plea contemplated in Rule 28(8) will have to be limited to that aspect. It would be impermissible for the defendant to attempt, by way of an amended plea, to “reopen” the issues of the merits or its previously struck out special pleas.[19]

A word of caution consequent upon the above finding

- [26] Having regard to the virtual consistent propensity of plaintiffs in RAF matters to effect amendments to their particulars of claim at a late stage in the proceedings, whether that may be due to changed circumstances, the passage of time occasioned by this Division’s congested roll of RAF matters or for whatever other reason, such amendments should be effected timeously. If done too shortly prior to the date of hearing, particularly where the time for objection had not yet even run out, would result in the pleadings not yet having been “reopened” or, if the amendment has been effected but the 15 day period contemplated in Rule 28(8) for consequential amendments had not yet expired, it might result in the matter no longer being ripe for hearing.

The actual case itself

- [27] In the present matter the amendment in question had been affected by the delivery of amended pages and the RAF had thereafter delivered an amended plea. The RAF had however not delivered any expert reports but was duly represented at the hearing. Mr Makgoka on behalf of State Attorney presented helpful and vigorous argument, both oral and written, on behalf of the RAF in opposition to the plaintiff’s case.

Merits

- [28] The plaintiff was, at the time of the accident, a 12 year old pedestrian. He had been walking in uKhahlamba Street in Diepsloot on 4 April 2017 when a minibus taxi (a grey Siyaya with a specified registration number) ran him over. The allegations of the taxi having been driven at a high speed appear from the contents of a police docket, opened in relation to a case of reckless or negligent driving and from an accident report form. Photographs of the accident scene indicated the accident scene to be in a busy shopping area.
- [29] The plaintiff was taken by ambulance from the scene of the accident to Tembisa hospital where he remained until the 13th of September 2017. Extensive hospital admission and treatment records had been discovered by the plaintiff and various expert reports had been delivered in terms of Rules 36(9)(a) and (b). These included reports from an orthopedic surgeon, a neurosurgeon, a clinical psychologist, an occupational therapist, an industrial psychologist, an educational psychologist and an actuary. All the experts have also delivered confirmatory affidavits wherein their qualifications and expertise in their various fields as well as the contents of their reports had been confirmed. Their respective affidavit evidence have been admitted in terms of Rule 38 (2).
- [30] The plaintiff had sustained a number of injuries, the most significant being a head injury diagnosed as having resulted in a mild traumatic brain injury. According to the information reported to the clinical psychologist, the plaintiff's mother had found him sprawled on the ground on the side of the road at the accident scene, being unconscious and bleeding from his mouth, nose and ears and bleeding from a gash on his chin. It later appeared that he had also suffered a left clavicle fracture, a left shoulder injury, a right hip injury and various lacerations and abrasions.
- [31] The pre-accident intellectual potential of the plaintiff had been assessed by the experts as "high average". The post-accident assessment results suggested that the plaintiff's general IQ score now lies within the average range while his performance IQ remained in the high average range. The results revealed "... a balanced mental capacity ... minimizing pathology possibilities Thus the findings revealed no serious loss of competence ...". However the experts opined that the plaintiff manifested "... impairment in temporal orientation, all aspects of working memory and simple mental tracking and has developed slow verbal learning and poor verbal memory, poor verbal concept formation and poor processing speed". In particular, the educational psychologist's "... comprehensive psychometric and scholastic assessment reveal deficits that are consistent with a history of head trauma".
- [32] These "deficits" were described as being memory deficits, concentration deficits (including slow information processing and poor comprehension) and a number of psychological sequelae (including depression, "black spells", moodiness, hyper insomnia, visual and auditory hallucinations and phobias of being a pedestrian).
- [33] The experts concluded that the above deficits negatively impacted on the plaintiff's post-accident scholastic performance. The school records indicated that the plaintiff has passed grade 6 in the year that the accident had happened, thereafter passed grade 7 but failed

grade 8, was condoned on the repeat thereof the next year, was condoned for grade 9 due to his age and that he had thereafter failed grade 10 in 2022. He repeated grade 10 in the year of the hearing (2023) but his then most recent school reports presented to court, indicated that he had failed both the 1st and 2nd terms of that year.

[34] On the topic of earning capacity the experts were of the opinion that the plaintiff, but for the accident, would have passed matric and, had he done so with good grades, could have applied for bursaries or NFSAS assistance. The plaintiff could then, so the experts

postulated, have obtained a degree and have entered the labour market at a Patterson B3/4 level and would have reached a career ceiling at the B2 Upper Quartile level at age 45. He would then have enjoyed straight-line increases until his retirement at age 65. The actuarial calculations performed, relied on these premises. Applying a 15% contingency the actuary calculated a loss of R10 366 800.00 after applying the “cap” prescribed in the Road Accident Fund Amendment Act.

[20]

[35] Guided by the report of the occupational therapist, the industrial psychologist was of the view that the plaintiff, post-accident, “is unemployable due to his physical and mental state”. The actuarial calculations therefore provided for R0 as a post-accident earnings postulation. So far the plaintiff’s evidence.

[36] The RAF conceded the applicability of the rebuttable principle that minors between the age of 7 and puberty are presumed to be *doli et culpa* incapax, that is that they are presumed to be incapable of being held liable for their wrongful actions. The RAF argued that, from notes taken by the clinical psychologist, it appeared that the plaintiff and two friends were crossing the street and that the plaintiff, while warning his friends of oncoming traffic, was unaware of the speeding taxi which ran him over. Apart from referring to this hearsay evidence, the defendant was, in the circumstances of its defence having been struck out, precluded from leading further evidence on this point (even if it had any witnesses, of which there had been no indication). I find that the defendant has failed to rebut the aforementioned presumption[21], which could have opened the door to a possible argument regarding contributory negligence. I therefore find that the RAF is 100% liable for the damages suffered as a result of the speeding taxi’s conduct as an insured driver as contemplated in the RAF Act.

[37] In respect of general damages, the plaintiffs’ entitlement thereto and the assessment of his injuries as serious have been rejected by the RAF and this head of damages will have to be pursued at a later stage.

[38] In respect of the loss of earning capacity, the RAF pointed out that the orthopaedic injuries have, according to the plaintiff’s orthopaedic surgeon, healed to the extent that the plaintiff has little or no physical impairment as a result thereof.

[39] Regarding the post-accident scholastic performance, the RAF emphasised that the plaintiff had successfully passed grades 6, 7 and

8. The clinical psychologist report also contained references that the plaintiff was bullied at school and that there was a boy who took away his lunch box and money. These incidents were not reported at home and the suggestion was that these factors could also have influenced his scholastic performance negatively.
- [40] The RAF also submitted that the scholastic records contained some discrepancies as to dates and further indicated that the plaintiff had failed grade 4 in 2015 and had to repeat it in 2016. This had nothing to do with the accident. The plaintiff had only discovered his grade 5 report as the only pre-accident report, which indicated that he had failed term 3 of grade 5. The RAF argued that the plaintiff was not the star pupil that his mother or the plaintiff's experts had made him out to be.
- [41] On the other hand, the RAF argued that the fact that the plaintiff had passed grades 7 and 8 post-accident, indicated that his mental impairments were exaggerated.
- [42] I should mention that, due to the above and the reopening of the pleadings, Mr Makgoba's heads of argument concluded with the suggestion that the matter be postponed and that the RAF be allowed to further investigate the issue of quantum and, if needs be, obtain its own experts. The suggestion of a postponement was bolstered by the offer that an expert could be identified and that an invitation to the plaintiff to be examined could be done within 30 days. No particulars could however be furnished as to who the expert (or experts) would be. Mindful of the doubts about compliance with such a suggestion, given the past conduct of the RAF, Mr Makgoba was constrained to concede that the matter may then again have to be set down for default judgment upon failure of securing reports. This would mean that the parties (and the court) would be back in the same position as at the time of the hearing but with judicial resources having been wasted and with delays and costs also having been incurred. In view hereof and in the absence of a substantive application for postponement, the matter proceeded and was fully argued, based on the plaintiff's expert reports filed of record.
- [43] In respect of last-mentioned aspect, the RAF emphasised the following finding of the educational psychologist: "He is likely to exit formal school after completing grade 10 and proceed for vocational training at a Further Education and Training (FET) college and obtained a 2 year certificate. Should he manage up to grade 12, probably through condoned passes, he will probably pass with low marks and still proceed to an FET college as envisaged".
- [44] Based on the above, the RAF submitted that the industrial psychologist had no factual basis to conclude that the plaintiff would have no future income or earning capacity.

Evaluation

- [45] The RAF's criticism regarding the apparent lack of documentation of pre-accident scholastic performance is somewhat justified, but there is nothing to gainsay the collateral evidence obtained by the various experts or that of the plaintiffs' mother. In the report of the

occupational therapist numerous school reports with individual marks per subject had been dealt with extensively from grade 6 onwards. From this it appears that the RAF's criticism of the past-accident scholastic performance as being the same as or comparable to the pre-accident performance, is not justified. Apart from having passed grade 6 on a first attempt, all indications of the plaintiff's subsequent performance point to a downward educational spiral. The occupational therapist concluded that his performance "significantly deteriorated as his average was below the elementary achievement".

- [46] What was justified however, was the criticism of the plaintiff's experts' leap from the educational psychologist postulating the obtaining a FET qualification post-accident to the industrial psychologist's postulation of the plaintiff being completely unemployable. Bracketed in between these two extremes is the occupation therapist's conclusion that the plaintiff would only be suitable for sheltered employment. Both the last two conclusions are without solid foundation. On a conspectus of the reports, there are ample indications of a residual earning capacity. This has, however, not featured in the actuarial calculations.
- [47] It is trite that, rather than to non-suit a deserving plaintiff completely, a court must do the best it can with the evidence regarding the quantum of damages put before it.[22] The only way in which this can be achieved in the circumstances of this case, is to assume that the post-accident scenario would reflect a largely discounted amount of the pre-accident postulated earnings. This has been done in the heads of argument provided by the plaintiff's counsel, resulting in a calculated loss of R6 738 420.00. This was done utilizing an additional 35% contingency in respect of future earnings, above that already applied.
- [48] Regarding the issue of contingencies, many a remark has been made over the years in judgments of our courts, not least apposite of which is the following: "In the assessment of a proper allowance for contingencies, arbitrary considerations must play a part, for the art of foretelling the future, so confidently practiced by ancient prophets and soothsayers ... is not numbered among the qualifications for judicial office".[23] In the circumstances of this case, I find that the application of the increased contingency deduction referred to above is as best a reflection of the loss of earning capacity suffered by the plaintiff as could be determined on the presented evidence.

Relief

- [49] In my view, the plaintiff has made out a case for a finding of liability of the RAF for 100% of the damages suffered. All the experts refer to foreseen future medical expenses and the plaintiff is therefore entitled to an order for the furnishing of an undertaking as contemplated in section 17(4) of the RAF Act. The issue of general damages should be postponed and compensation for the plaintiff's loss of future earnings should be awarded as already referred to above. No claim was advanced for the payment of past medical expenses.
- [50] During the course of litigation the plaintiff's legal practitioners deemed it fit that the proceeds of the claim be protected by way of a trust. That was, however on the premise that he was then still a minor. Now that the plaintiff has reached the age of majority, it is notable

that none of the experts recommended protection of the funds. While it is so that the plaintiff is still young and the award is for a huge sum of money, the court is no longer his upper guardian and it would be improper for the legal practitioners to, in a patronizing (to use an archaic non-gender neutral term) or condescending fashion request the court to order the creation of a trust in the absence of input or instructions from a client who is a major and who has full decision-making power over his life. I will therefore not incorporate the creation of a trust in the court order.

[51] The plaintiff has shortly before the hearing also deposed to an affidavit regarding the merits of the matter wherein he had declared himself competent to do so. He has also not disavowed himself of the fee mandate agreement previously entered into by his mother when he was still a minor, which incorporated a contingency fee arrangement which, upon perusal, appeared to be statutorily compliant. This matter had been concluded before subsequent amendments to Rules 69 and 70 and no orders as contemplated in those amendments are necessary.

Order

[52] In the premises, the following order is made:

3. This amount shall be paid into the following bank account, on or before the expiry of 180 days from the date of this order:

ACCOUNT HOLDER J M MODIBA ATTORNEYS BANK NAME STANDARD BANK BRANCH CODE 0[...] ACCOUNT NUMBER 0[...] TYPE OF ACCOUNT TRUST ACCOUNT REF REF: M[...] M[...] /[...]

3.1 The Defendant will not be liable for interest on the above-mentioned amount provided that it is paid on or before the expiry of 180 days, after date of this Order, failing which interest at a rate of 8.75% per annum will be payable calculated from the 15th day from the date of this order.

5.1 The Plaintiff shall serve the notice of taxation on the Defendant's attorneys of record;

5.2 The Plaintiff shall allow the Defendant Fourteen

(14) court days to make the said payment of the taxed costs; and

5.3 Should payment not be effected timeously, Plaintiff will be entitled to recover interest a tempore morae on the taxed or agreed costs from the date of allocatur to the date of final payment.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 30 November 2023

Judgment

delivered: 18 April 2024

APPEARANCES:

For the Plaintiff: Advocate W Lusenga Attorney for the Plaintiff: JM Modiba Attorneys, Pretoria

For the Defendant: Mr Frank Phago Attorney for the Defendant: The State attorney, Pretoria

- [1] 56 of 1996
- [2] Langley v William 1907 TH 197, Leggat & Others v Forrester 1925 WLD and Mostert v Pinenaar 1930 WLD 151.
- [3] (59473)[2015] ZAGPPHC 346 (15 May 2015) (Burger)
- [4] Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa, 5th ed at par 824.
- [5] (26017/2016) [2022] ZAGPJHC 864 (31 October 2022)
- [6] Motala NO v RAF (42353/2019)
- [2023] ZAGPJHC 1323 (15 November 2023) (Motala)
- [7] Minister of Police v Michillies (1011/2022)[2023] ZANWHC 90 22 June 2023 (Michillies)
- [8] 10 of 2013.
- [9] See: Mukaddam v Pioneer Foods (Pty) Ltd 2013
- (5) SA 89 (CC) per Jafta J at par [31].
- [10] Section 34 has both a substantive provision, being access to courts and a procedural element –See: Stopforth, Swanepoel & Brevis Inc v Royal Anthem (Pty) Ltd 2015 (2) SA 539 (CC), Erasmus, Superior Court Practice, A-28 and Currie & De Waal, The Bill of Rights Handbook, Juta, 6th Edition at 31.3
- [11] Wilson v Die Afrikaanse Pers Publikasies (Edms) Bpk 1971
- (3) SA 455 (T) at 462H – 463B
- [12] See: MEC, Department of Public Works v Ikamva Architects & Others 2022 (6) SA 275 (ECB)- at [18] – [21] and Ikamva Architects v MEC, Public Works [2014] ZAECGHC 70.
- [13] Hassim v Bekker (Grace Heaven Industries (Pty) Ltd intervening) 2018 JDR 1007 (GJ) per Modiba J (Hassim).
- [14] Olivier v MEC for Health, Western Cape 2023
- (2) SA 551(WCC) at [21] (Olivier)
- [15] KS v MS 2016

- (1) SA 64 (KZD) par [16].
- [16] Natal Joint Municipal Pensiion Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at paras [13] and [15]. (Endumeni)
- [17] Endumeni at par [14].
- [18] 1972 (2) SA 601 (A) at 608D- E
- [19] See: Erasmus at D1 - 344
- [20] 19 of 2005
- [21] See for example Jones NO v Santum Ltd 1965(2) SA 542 (A) and Eskom Holdings Ltd v Hendricks 2005
- (5) SA 503 (SCA).
- [22] Esso Standard SA (Pty) Ltd v Katz 1981
- (1) SA 964 (A).
- [23] Goodall v President Insurance Co Ltd 1978
- (1) SA 389 (w) at 393.

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