REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 48040/09

DATE: 22/10/2013

In the matter between:

DIPHOKO ALFRED RAMPANE
obo D N Appellant

and

ROAD ACCIDENT FUND Respondent

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] This is an appeal against the whole judgement of my sister, Her Ladyship Mayat J dated on 2 February 2012 in which she awarded, among others, R500 000,00 in respect of the appellant's claim for future loss of earnings and/or earning capacity and R400 000,00 in respect of the appellant's claim for general damages.

[2] The appellant contends that the court *a quo's* award of R400 000,00 in respect of general damages was an unreasonably conservative award when one has regard to the nature, extent and permanent *sequelae* of the appellant's injuries as canvassed in the variety of medico-legal reports as read together with the evidence produced by or on behalf of the appellant; as well as the nature of the awards made, particularly by or in this division, in more recent and comparable cases.

[3] The appellant submitted that an amount of R1 000 000,00 (before apportionment) should have been awarded.

[4] In respect of the claim for future loss of earnings and/or earning capacity the applicant contends that the amount of R3 404 129,60 should have been awarded.

COURT *A QUO'S* JUDGMENT

[5] After thoroughly evaluating the evidence led and interrogating the expert reports available and/or utilised during the course of the trial, the court *a quo* found as follows on general damages:

"*79. It appeared that for the most part on the basis of the cases referred to me by the defendant's counsel, that the amounts awarded by our courts for general damages in respect of mild, moderate and more severe head*

injuries, together with a variety of other injuries, ranged from the sum of R135 000,00 to the sum of R500 000,00, in present value terms, depending of course, on the severity of the case.

80 *Against this background, the plaintiff's counsel submitted that general damages in the sum of R800 00,00 was appropriate in these circumstances and the defendant's counsel submitted that the sum of R500 000,00 was more appropriate. It goes without saying in this respect that whilst the awards in other cases serve as a guideline, every case ultimately depends on its own facts and circumstances, as it seldom happens that any case is exactly comparable to another. My view, after taking into account all the above facts and circumstances, and on the basis of the agreed apportionment, that it is fair and equitable in these circumstances to award general damages equal to 80% of R500 000,00.*"

[6] As regards the appellant's loss of earnings or earning capacity the learned judge put it among others as follows:

"***Loss of earning capacity***

[68] As stated by the Nicholas JA in the well-known matter of Southern Insurance Association v Bailey NO 1984 (1) SA 98 (AD) at 113G to 114D, in relation to the loss of earning capacity of a young child:

> '*Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.'*

[69] It was undisputed that T's orthopaedic injuries would not interfere with her career path. It must, however, be accepted that the headaches which caused to stay absent from school, were triggered by her accident and caused her to fail Grade 10, thus causing her to delay her entry in the labour market by one year. Moreover, even though her mood disorders and related symptoms, described by many experts, cannot be elevated to intellectual deficits caused by the accident, it must also be accepted that, similar to her experience in Grade 10, certain psychological and related ailments rooted in her accident, may affect her future earning capacity. In these circumstances, it is my view, that even though the pre-accident scenario agreed upon by Messers van Huyssteen and Mr Marais, relating to T obtaining a Grade 12, and progressing from a Paterson A3 job grading level, to her career ceiling on the B3 or B4 level, also applies to the post-accident scenario, it must be accepted that her career progression in the post-accident scenario, will be delayed by at least a year.

[70] On the basis of the abovestated actuarial computations, I am of the view that it is fair and reasonable in the circumstances to postulate that, but for the accident, T would have entered the labour mrket in 2013 and the value of her earnings up to her career ceiling would have been the sum of R2 857 834,00. I am also of the view that it is fair and reasonable in the circumstances to postulate that, following her accident T will probably enter the labour market in 2014, and the value of her earnings up to her career ceiling will be the sum of R2 408 996,00.

[71] As regards allowances for contingencies in the context of both the injured and uninjured scenarios, as Trollope JA stated in the case of Shield Insurance Co Ltd v Booysens 1979 (3) SA 953 at 965G:

> '*the determination of allowances for such contingencies involves, by its very nature, a process of subjective impression of estimation rather than objective calculation.'*

Thus, allowances have to be made for unforeseen contingencies, unemployment, errors in the calculation of future earnings, early retirement and the general hazards of life. Obviously, such allowances depend on the circumstances of each case and the court's impression of the case at hand. It is trite in this regard that the court retains a large discretion with respect to appropriate allowances for contingencies in both the pre-accident and the post-accident scenarios.

[72] Allowances for the general contingencies referred to above must be made in both the pre-accident and the post-accident scenarios. Moreover, in the post-accident scenario, it is my view that allowances must be made for the possibility that Thando's future academic life as well as her working life may again be adversely affected by headaches, migraines and/or similar aliments. Similarly, it is also possible that Thando will in future have certain post-traumatic psychological and emotional sequelae, such as anxiety and depression in the post-accident scenario. As regards additional contingencies in the post-accident scenario, whilst Dr Earle reported there was no tendency to post-traumatic epilepsy, Dr Edeling reported that Thando's brain injury may have resulted in a marginally increased risk of post-traumatic epilepsy, estimated at no greater than a 5% risk during her lifetime. It is accordingly my view that a small contingency allowance for epilepsy is also appropriate, in the post-accident scenario.

[73] Taking all the above facts and circumstances into account, it is my view that a contingency allowance of 15% is appropriate in the pre-accident scenario and a contingency allowance of 25% is appropriate in the post-accident scenario. As such, after allowances for contingencies, the value of her earnings in the pre-accident scenario can be reasonably estimated to be the sum of R2 429 158,90, and the value of her earnings in the post-accident scenario can be reasonably estimated to be the sum of R1 806 747,00. In these circumstances, after contingency allowances, 80% of the difference between Thando's actuarially computed pre-accident and post-accident earnings can be reasonably estimated in these circumstances to constitute a round figure of R500 000,00."

THE PARTIES

[7] The appellant, Alfred Rampane Diphoko is an adult male person of Orlando East, Soweto. He is acting in his capacity as natural parent and guardian of his minor daughter, N P, D ("N") presently 17 years and 8 months age. Taking her birth date of 25 May 1995, she would have been 14 years 1 month on the date of the motor vehicle accident in which she was injured and which precipitated the action that led to this appeal.

[8] The respondent, the Road Accident Fund, is a juristic person and statutory body established in terms of section 2 of the Road Accident Fund Act, 1996 (Act 56 of 1996), as amended ("*the Act*"); which has as its principal place of business, alternatively its chosen *domicilium citandi et executandi*, 29th Floor, Marble Towers, 208-212 Jeppe Street, Johannesburg.

SHORT RESUMÉ OF RELEVANT FACTS

[9] N was crossing a street at Orlando East, Soweto, when she was hit by a BMW motor vehicle. It was around 13h30. The accident scene, according to her brother who was called to it together with their mother, is not far from her home, hence they (mother and brother) reached the accident scene within a few minutes of the collision.

[10] According to her brother, T, when they reached the accident scene, they found N crying – in fact screaming – with her eyes wide open. She was conscious and very pugnacious. The car that hit her transported her, the mother and T to hospital –

some 30 minutes away. Along the way T had to restrain her as she was agitated. She even bit him in her fight to free herself from his grip, all the time saying to him: "*Leave me! Leave me!*".

[11] At the hospital she was taken to the casualty ward where she was restrained and sedated to calm her down. Her father, who arrived latter at the hospital confirms this.

[12] The history regarding N's hospitalisation reveals the following:

[13] She was brought to Lesedi Private Clinic in Dobsonville, Soweto on 1 July 2008 after a motor vehicle accident. She was restless and crying. Her GCS was 14/15. She had a haematoma of the forehead and an abrasion of the right shoulder. X-rays of her cervical spine, chest and left clavicle were done. So was a CT brain scan. A doctor (Dr Bombil) identified a skull fracture.

[14] The primary survey revealed a self-maintained airway with adequate breathing and a stable haemodynamism. The secondary survey revealed the bruised forehead, racooned right eye and a GCS of 12/5 (i.e. M 5/6 V 3/5 E 4/4).

[15] She was admitted to the ICU on the same day at 16h30 in the sedated state. She was incubated and mechanically ventilated as a precaution for the head injury. The sedation used during her ventilation was Dormicum, Morphine and Etomine.

[16] Because of her initial restlessness when sedation was reduced, orders were given to continue the ventilation but gradually wean her out of the sedation. These were done under the supervision of a neurosurgeon, Dr Naidoo.

[17] Her sedation and ventilation were successfully withdrawn on the morning of 3 July 2008. Her endotracheal tube was removed at 11h00. During the assessment that followed she was found to be awake and alert and with a GCS of 15/15. She was then transferred to the High Care ward. The following day, i.e. 14 July 2008 she was transferred to the general ward. Her GCS was still normal, i.e. 15/15. Her shoulder was held or restrained in an arm sling. On 6 July 2008 she was discharged from hospital and she went home. Her GCS was still 15/15.

[18] In summary, she was in ICU for less than 48 hours, High Care for one (1) day and in a general ward for nearly two (2) days. She was taking Syndol, a compound analgesic, for the headaches she was experiencing.

DAMAGES AGREED UPON

[19] The parties hadagreed that the respondent would be liable for 80% of the proven damages of the appellant, i.e. in his personal and representative capacity on behalf of the minor child, N. They had also agreed that the respondent would issue an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 1996 (Act 56 of 1996) as amended ("*the Act*"), limited to liability for 80% of the costs for future medical and related treatment of the minor child arising out of the injuries she sustained in the accident.

THE EXPERT REPORTS

[20] The court *a quo* in my view, adequately and comprehensively dealt with the reports of the various experts called by either or both sides. It will serve no purpose

to reiterate or regurgitate what was so well and admirably set out. The learned judge did a splendid job in my view and finding when dealing with the different views and findings therein set out.

GROUNDS OF APPEAL

[21] I have closely scrutinised the court *a quo's* judgment *vis-à-vis* the appellant's grounds of appeal. It is my considered view and finding that these grounds needs to be fully set out herein if one is to comprehend their significance, and. whether there is justification to interfere with the findings of the court *a quo* in respect of general damages and loss of earning capacity.

re GENERAL DAMAGES

[22] The appellant contends that:

"*1.1 … the award of R400 000,00 was an unreasonably conservative award, more particularly taking into consideration:*

1 *the nature, extent and permanent sequelae of the appellant's injuries as canvassed in the variety of medico-legal reports read with the evidence produced by the appellant;*

2 *the nature of the award made, particularly in this division, in more recent and comparative cases.*

1.2 An amount of R1 000 000,00 (before apportionment) should have been awarded."

re LOSS OF EARNINGS/EARNING CAPACITY

[23] The appellant contends that:

"… *the trial Court … erred:*

1 *by having disregarded the agreement between the parties in respect of the appellant's pre-morbid career path and career earnings, which was placed on record during closing argument at the trial, more specifically having regard to –*

    1 *the uncontested evidence of Mr S van Huyssteen* [Industrial Psychologist of the appellant] *that the industrial psychologists were not in possession of the joint minute of the educational psychologists when they finalised their joint minute, and were therefore unaware of the conclusion of the educational psychologists in their joint minute that N D* ['*the minor*'] *had the accident not occurred, would have obtained some form of tertiary qualification;*

    2 *Mr Van Huyssteen's uncontested testimony that, premised on the conclusion of the educational psychologists aforesaid, who are expert witnesses better equipped than the industrial psychologists to determine the minor's predicted pre-accident educational progress, that the 'possible scenario'* ['*Scenario 2*'] *referred to in the industrial psychologist's joint minute became the more probable scenario;*

    3 *the fact that the evidence of Mr Van Huyssteen aforesaid was unchallenged in its entirety in cross-examination or in the testimony of the respondent's industrial psychologist, Mr L Marais;*

    4 *the industrial psychologist's pre-accident Scenario 2 in respect of the appellant's claim, namely that the minor would have obtained a post-school certificate or diploma and would then have progressed from a B2 to a career ceiling on a C4 – Mr Van Huyssteen's C4 career ceiling was uncontested in cross-examination and Mr Marais did not testify about the pre-accident scenario at all;*

    5 *Basis B in the actuarial report of Mr G Jacobson dated 28 October 2011 to the minor's prospective earnings, but for the accident;*

    6 *the minor's pre-accident profile and mental and cognitive abilities premised on speculative and untested matter and/or evidence, and on the perceptions of lay witnesses (as reported to medical experts) which are directly in conflict with the findings and conclusions of a wide range of expert witnesses;*

2 *having found that the minor's pre- and post-accident career progressions, apart from a one year delay in her post-accident scenario, would be the same, as it directly conflicts with the overwhelming evidence produced in Court and the concessions made by Mr Marais;*

3 *having relied upon 'anecdotal evidence' of the Court in respect of an alleged frontal lobe brain injured friend of the Court's, which 'anecdotal evidence' fell completely outside the ambit of the appellant's knowledge and the facts and circumstances exposed and tested in the trial;*

4 *having relied* [and/or referred] *to a number of alleged similar examples of 'anecdotal evidence' within the knowledge of the Honourable Court's Registrar;*

5 *in her evaluation of the overall evidence, and in particular in relation to the evidence of Dr J Earle* [neurosurgeon]*, more specifically –*

1 *to rely on evidence produced by Dr Earle which fell predominantly outside his field of expertise;*

2 *to find that, according to Dr Earle, that the fact that no psychometric testing was conducted on the minor pre-accident disables one to do a comparative study between the minor's pre- and post-accident profiles, despite the uncontested evidence to the contrary of a variety of other expert witnesses in this regard;*

3 *to rely on untested hearsay evidence reported to certain expert witnesses in respect of the minor's pre- and post-accident profiles and abilities;*

4 *to disregard the concessions made by Dr Earle in cross-examination, inter alia, in respect of the extracts in the medical literature he was referred to, the fact that a mild brain injury can result in permanent sequelae, the possible impact of the Bell principle on the facts in the present case and that neuropsychological testing falls outside Dr Earle's field of expertise;*

6 *to find that Dr Earle's testimony in respect of the minor's brain injury and its sequelae was more probable than the testimony of Dr H Edeling* [neurosurgeon employed by the appellant];

7 *in relying on certain extracts in the minor's pre-accident school reports (which constituted hearsay matter and was untested in evidence) to arrive at definite conclusions about the minor's pre-accident profile;*

8 *in concluding that the appellant's counsel suggested to Mr Marais in cross-examination that the Raven's test performed by Mr Marais 'is of no value', whereas it was suggested to Mr Marais in cross-examination that his attempt to water down the minor's bad results on the Raven's test, attempting to steer away from his initial evidence that this test is of significant importance, would suggest that Mr Marais elects to use tests 'which are of no value';*

9 *by having disregarded the recorded conclusion in Mr Marais' report that the Raven's test was designed to cover the widest possible range*

of mental ability and to be equally useful with persons of all ages, whatever their education, nationality or physical condition;

10 *by having disregarded that the minor obtained a poor score on the Raven's test which is indicative of poor ability, and that the minor should find it difficult when required to lean additional and new tasks, will have a poor success rate in this regard and that her future performance could be limited even though she may have the desire and motivation to succeed;*

11 *not to conclude that the results in respect of psychometric testing performed by Dr C Angus* [neuropsychologist], *Ms I M Hattingh* [speed therapist], *Ms A Crosbie* [occupational therapist] *and by the educational psychologists coincide with Mr Marais' findings and conclusions in respect of the minor's post-accident ability premised on the Raven's test results;*

12 *by having disregarded the uncontested (and agreed) expert evidence and opinion that the minor will not be able to live independently in future or handle her own money;*

13 *by having disregarded Mr Marais' evidence in cross-examination that if a person cannot live independently or handle money that such a person '**cannot work**';*

14 *by having disregarded the agreed conclusions reached by the speech therapists and audiologists in their joint minute that –*

2.14.1 the minor is socially isolated and is a vulnerable individual;

2 *social difficulties will continue into adulthood;*

2 *the minor is not coping on an educational level;*

2 *during the assessments the minor struggled to consolidate new learning which will have a negative effect on her ability to effectively deal with the large volume of work required for Grade 12;*

2 *in consequence of the minor's communication difficulties she will struggle to impress an employer during the first interview;*

2 *the minor should be able to cope with low level clerical work but an employer would need to allow additional time for her to manage new learning, to provide continued assistance to her and allow for a slower work pace;*

2 *the minor will not be able to compete on an equal level with her peer group on the open labour market;*

2 *the minor will struggle to live independently as an adult and will require supervision and assistance with the more complex tasks in her world;*

2 *the minor will not be able to enter into contracts and all monies awarded would have to be protected for her own and exclusive use;*

2.15 by having disregarded the agreements of the industrial psychologists recorded in their joint minute that –

2.15.1 the minor has difficulties on a cognitive and an emotional level which would impact negatively on her ability to perform academically;

2 *the minor is not functioning on a Grade 10 level;*

2 *the minor is in need of placement in a FET institution where she can pursue some vocational training as opposed to academic learning;*

2.16 by having disregarded the uncontested evidence of Ms Crosbie, particularly in respect of the variety of areas of deficit found by her during testing and on examination, more particularly that:

1 *the minor has a variety of delays in her gross motor skills;*

2 *the minor has slightly poor static balance;*

3 *the minor has slightly deficient dynamic balance;*

4 *the minor has poor grading and control of movements;*

5 *the minor has poor integration of movements;*

6 *the minor tends to fatigue fairly quickly, resulting in her already poor grading and control of movements worsening;*

7 *the minor's fatigue will negatively influence her gross motor skills in that she will tire easily, and is unlikely to cope with sustained gross motor demands such as any work where she would be on her feet all day, such as a shop assistant, packer or on some factory assembly lines;*

8 *the minor should do structured, simple routine tasks more physical in nature, and this will limit the minor in the type of tasks she would need to carry out in any potential employment;*

9 *the minor's slow work speed and fatigue may exclude her from any task in the future that require agile eye-hand co-ordination;*

10 *the minor will battle in an office environment should she have to work on a computer, especially with time demands, or have to write quickly having to take notes;*

11 *the minor will require a case manager who will inter alia liaise with the trust for any financial needs and other situations that may arise with the minor;*

12 *the minor would be better suited for a lower level office administrative type of work and will need an understanding employer and employees;*

13 *ideally the minor's work environment should be a quiet one without an open plan office so that she is not in continual contact with lots of people;*

14 *due to the minor's fatigue time limits should be a minimum and she will need to use compensation techniques for her memory difficulties;*

2.17 by having failed to find, with reference to the report of Ms Hattingh and her uncontested evidence, that -

1 *the minor's communication profile as set out in her report is compatible with a head injury;*

2 *the minor's head injury is significant in nature with symptoms of an organic brain dysfunction;*

2.18 in failing to find that, on an overall conspectus of the evidence, in particular also Mr Marais' final conclusion that a person who cannot live independently and who cannot handle his or her own money cannot work, renders the minor functionally unemployable in the South African open labour market;

2.19 by having disregarded the findings and conclusions of expert witnesses in unopposed expert reports admitted by the respondent;

20 *by failing to find that the uncontested evidence of Ms Crosbie –*

2.20.1 established that purely on the minor's psychosocial and emotional development, it would appear that the minor has significant difficulties with functions that are often controlled by the frontal lobes of the brain, which is likely to be detrimental for the minor in any future work prospect;

2 *further revealed that the minor's lack of motivation and drive, poor impulse control and lack of overall social graces, lack of tact and social isolation, will result in her having to be in a work situation that has an understanding employer, is fairly structured*

and not to rely on any good interpersonal relationship skills or having to deal with the public more than on a one to one basis;

2.21 upon a consideration of the minor's post-accident deficits, not to find that the following factors will hamper the minor in obtaining and/or maintaining employment -

1 *she will have to compete with healthy equal peers;*

2 *the high unemployability rate in South Africa;*

3 *the minor's mood and behavioural problems;*

4 *the difficulty in a competitive labour market to find an understanding and patient employer;*

5 *the difficulty in the employment market to find an employer who is prepared to provide the structure to employees as will be required by the minor;*

6 *the difficulties in the labour market to find an employer who is prepared to cater for a position of limited interaction with other employees and to ensure a 'one on one' job position;*

7 *Ms Crosbie's testimony that it is 'very very difficult to get job' of this nature in the South African Labour market consequent upon her own experience in respect of past attempts to place such persons in the labour market;*

8 *Ms Crosbie's evidence that such individuals are at best, if such positions are available, accommodated by family members or the Church;*

9 *Legislation that provides for applicants for employment to disclose their full medical history, which will hamper the minor's prospect to obtain employment;*

2.22 in failing to find that the minor has been rendered functionally unemployable in the open labour market, alternatively, that a contingency deduction in respect of the post-accident scenario of at least 70% should be applied;

2.23 by failing to find that the minor, post-accident, as per the testimony of Mr Van Huyssteen, should she be able to obtain employment, will work in the non-corporate work sector in a semi-skilled capacity progressing from the lower quartile value for semi-skilled workers to her career ceiling on the average between the medium and upper quartile values for semi-skilled workers around the age of 45 years, with periods of unemployment;

2.24 in applying a 25% contingency deduction in respect of the post-accident scenario having regard to the admitted, uncontested and agreed expert evidence referred to hereinbefore, and in particular Mr Marais'

> *testimony that one cannot work if you cannot live independently and handle your own money.*"

VALUE OF EXPERTS' REPORTS TO COURT

[24] It is so that the appellant and the respondent called a number of expert witnesses and referred to numerous other expert reports whose authors were not called as well as several witnesses to prove or disprove that the appellant child had undergone a personality charge by among others becoming irrational, irritable, depressed and/or negative after the accident and the injuries she sustained. It is also so that the trial court is enjoined to take all the above into account in determining the general damages and damages *in lieu* of loss of earnings and/or earning capacity to be awarded. The specific personal circumstances of child N are on record herein.

[25] An unfortunate situation has recently come to the fore where certain expert witnesses have over-stepped the mark of what is expected of them by attempting to usurp the function of the courts by expressing certain "*opinions*" based on certain facts as to the future employability of claimants and to express views on probabilities. As Wepener J put it in *Nicholson Charlene v RAF*[1]*:*

> "[I]*t is the function of the court to base its inferences and conclusions on all the facts placed before it.*"

1 Unreported Case No 07/11453 handed down in the South Gauteng High Court on 30 March 2012 at p 3 thereof.

[26] In *S v Harris*[2] the court held as follows at 365B-C:

> "*In the ultimate analysis, the crucial issue of the appellant's criminal responsibility for his actions at the relevant time is a matter to be determined, not by the psychologists but by the court itself. In determining that issue the court – initially, the trial court; and, on appeal, this Court – must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, including the reliability of the appellant as a witness and the nature of his proved actions throughout the relevant period.*"

[27] Kotze J (as he was then) put it as follows in *S v Gouws*[3]*:*

> "*The prime function of an expert seems to me to be to guide the court to a correct decision on questions found within his specified field. His own decision should not, however, displace that of the tribunal which has to determine the issue to be tried.*"

[28] I agree with Wepener J in *Nicholson Charlene v RAF*[4] that the tendency to lead expert witnesses to attempt to influence a court with their "*opinions*" of the very issue which is to be determined, makes it difficult for courts to distinguish facts from inferences and opinions. The court should be allowed to evaluate all expert opinions and *viva voce* evidence in the light of all the circumstances and probabilities and ultimately arrive at its own decision or findings.

[29] Experts should have sound factual bases for the opinions they give, which unfortunately have lately not been the case. This is what Meyer AJ (as he was then) warned against in *Mathebula v RAF*[5] at para [13] where he stated the following:

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2 1965(2) SA 340 (A).

3 1967 (4) SA 527 (EC).

4 *Supra* at p 3.

5 (05967/05) [2006] ZAGPHC 261 delivered on 8 November 2006.

"*An expert is not entitled, any more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert witness relies must ordinarily be established during the trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence.*"[6]

[30] After assessing the expert evidence led in this matter, I can state, that most of the experts and/or reports compiled for this case fell into the category *Mathebula v RAF*[7] complained about.

[31] The duties of an expert witness were clearly set out in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd*[8] as follows:

"*1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.*

2 *An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise … An expert witness should never assume the role of an advocate.*

2 *An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.*

2 *An expert witness should make it clear when a particular question or issue falls outside his expertise.*

2 *If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert*

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6 See also *Coopers SA (Pty) Ltd v Deutsche Gesellschaft fur Schädingsbekampfung MBH* 1976 (3) SA 352 (A) at 371G; *Reckitt & Colman SA (Pty) Ltd v S C Johnson & Son SA (Pty) Ltd* 1993 (2) SA 307 (A) at 315E; *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 772I.

7 *Supra.*

8 1993 (2) Lloyds Reports 68 81.

witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report."

[32] Davis J adopted the above remarks in *Schreider NO & Others v AA & Another*[9] when he stated as follows at 211J-212B:

"*In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess.*"

[33] It is unfortunate to note in this matter also that some of the experts do exactly what should not be done, especially falling foul of clause 4 of the *National Justice V Prudential Assurance*[10] case.

[34] It is common cause that the expert witnesses of the respondent mostly tendered evidence that contradicted that of the appellant. The approach to be followed in such cases where there is conflicting expert evidence was set out in *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another*[11] as follows at paras [36] and [37]:

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9 2010 (5) SA 203 (WCC).

10 *Supra.*

11 2001 (3) SA 1188 (SCA).

"*[36] That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority [1998] AC 232 (HL(E)). With the relevant dicta in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised, they are to the following effect.*

[37] The court is not bound to absolve a defendant from liability for alleged negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The court must be satisfied that such opinion has logical basis, in other words that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion'."

[35] Presiding officers in cases such as the present case are also warned not to follow certain expert witnesses' accounts blindly, disregarding others without much ado. This danger was alluded to in *Lourens v Oldwage*[12] where the learned judge put it as follows at para [27]:

"*[27] Confronted with the battery of experts on either side, presenting, competing and contrasting evidence, the learned Judge preferred the evidence of the plaintiff's experts to that of the defendant without advancing any basis for doing so. All that he said was that the opinions of Professor De Villiers and Dr Parker are based on logical reasoning but he failed to give any demonstration of this. The learned Judge did not give equal credit to Drs de Kock and Stein and Professor Immelman whose views he harshly dismissed as being incapable of logical analysis and support. I do not share these views. The conclusion reached was clearly wrong. It is an approach which this Court has recently decried in Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another where it was said:*

> '[I]*t would be wrong to decide a case by simple preference where there are conflicting views on either side, both capable of logical support. Only where expert opinion cannot be logically supported at all will it fail to provide:*
>
> > "*the benchmark by reference to which the defendant's conduct falls to be assessed.'"*

The uncritical acceptance of the evidence of Professor de Villiers and the plaintiff's other expert evidence falls short of the requisite standard and the approach laid down by this Court in Michael v Linksfield Park Clinic. What was required of the trial Judge was to determine to what extent the opinions

12 2006 (2) SA 161 (SCA).

advanced by the experts were founded on logical reasoning and how the competing sets of evidence stood in relation to one another, viewed in the light of the probabilities. I have already indicated why I found the evidence adduced on behalf of the defendant to be more acceptable than that of the plaintiff's witnesses and why the conclusion of the trial Court I cannot stand."

[36] In this case, I persuaded that Mayat J clearly warned herself against falling into any of the pitfalls raised by the courts in the decisions set out above. It is my further finding that the learned judge assessed all the expert evidence adduced and took into account the precedents set by our courts in line with the *stare decisis* principle or doctrine. Her judgment points to someone who logically and methodically evaluated the facts and probabilities relevant to or in this matter. Her dealing with actuarial computations of probable damages suffered was also objective, fair and reasonable, She even ordered that another actuarial calculation be made, taking into account the fact that N failed Grade 10 post-accident. The basis for this new calculation was that she would consequently enter the labour market one year later in 2014, unlike the already computed loss which assumed her entering the labour market in 2013. Both scenarios were based on the same career progression.

LOSS OF EARNINGS/EARNING CAPACITY

[37] For example, it was contended by Dr Edeling, the appellant's neurosurgeon that N's traumatic brain injury was at least moderate. Dr Earle on behalf of the respondent testified that N suffered a mild head injury after a very brief period of unconsciousness[13]. The court *a quo* correctly identified the vast differences of opinion between Dr Edeling for the appellant and Dr Earle, the respondent's neurosurgeon.

13 Mayat J's judgment, paras [59] to [66].

[38] For instance, Dr Edeling opined that Noluthando's initial PTA (unconsciousness) lasted for three hours or more prior to her sedation and incubation in the ICU. On the other hand, the report given to Dr Earle, as supported by oral evidence, Lesedi Hospital records and all the probabilities or surrounding circumstances, was that N was certainly conscious when her father saw her within half an hour of her accident. Furthermore, Dr Edeling further indicated in his report that it was possible that No's non-contiguous PTA persisted for an indeterminable number of days after sedation. However, hospital records as well as records given to both Drs Edeling and Earle indicate that she herself remembers being in hospital, specifically, being tied to her hospital bed with one of her parents there near her. As such, I cannot find that the court *a quo* erred in finding that:

> "*Thus, contrary to the suggestion by Dr Edeling relating to the possibilities in this respect, it is my view that it was more probable than not that the initial dense phase of T's PTA was more than 23 hours, and her non-contiguous PTA did not persist for more than 7 days. In these circumstances, the suggestion that T possibly sustained a severe brain injury was justifiably not pursued by Dr Edeling.*"[14]

[39] The aspect relating to N's behavioural traits is also in my view one of the aspects that are definitive of issues raised in this appeal.

[40] In his testimony in court Dr Edeling indicated that certain behavioural traits manifested by N after the accident, were consistent with a brain injury. He was referring to the reports by the appellant's experts relating to her personality, mood, behaviour and her mental status as well as her ability and reliability to plan,

14 Para [59] of judgment of Mayat J at p 370 of paginated papers.

organise, initiate and complete tasks, as having been affected and impaired by her brain injury. This opinion was contradicted by that of his counterpart on the respondent's side, Dr Earle, who stated that all of the above were as a result of N's loss of interest in her work and typical of all teenagers.

[41] After evaluating all the available circumstances and considering the matter, the court *a quo* among others concluded that:

"*[61] It is my view that Dr Earle plausibly testified that the opinions and observations of all the experts on record pertaining to the averred intellectual deficits suffered by T as a result of her accident were obviously neutralised by the fact that none of these experts previously had the opportunity to assess T in their respective fields prior to the accident. In addition, there was nothing to gainsay the very plausible and probable suggestion by Dr Earle that any averred changes in T's personality, mood, behaviour and her mental status were attributable in large part to changes in mental and behavioural patterns brought about by adolescence.*[15]

[42] The facts and circumstances herein justify the trial judge's above findings. There is evidence on record that the irritable and moody teenager she was, N defied her mother's objections to her having a boyfriend at her age and that she indeed acted or conducted herself in the manner described post-accident even before the accident. Those are character traits peculiarly known to mothers of teenagers who have not suffered brain damage. It is also revealing that Ms Crosbie, the appellant's occupational therapist, justifiably in my view also, conceded during cross-examination that symptoms such as irritability, fatigue and poor self-confidence could also feature in a normal teenager or indeed in young people generally.

15 Page 23 of judgment, para [61] at folio 371 of paginated record.

[43] I thus cannot disagree with the court *a quo's* finding that in the peculiar circumstances of this case, the elevation of familiar and common behavioural traits in the post-accident scenario by especially both Ms Crosbie and Dr Edeling to intellectual deficits was improbable. This was particularly so because these experts admitted that they had not reviewed and assessed T's pre-accident academic reports, which incorporated a number of comments relating to her pre-accident psyche and emotions.

[44] It is thus difficult to criticise and/or disagree with the court *a quo's* findings that:

> "*Thus, it cannot be ignored that T's teachers reported at various stages in the pre-accident scenario that she did not get on well with her peers, caused conflict, was aggressive and immature, over-reacted and had a complicated nature, and that she day-dreamed frequently and caused disruptions in class, lacked critical analysis, and failed to apply and grasp concepts. She also did not apply herself, her achievements were poor, and that she seldom met the outcomes in her learning areas. Significantly, both Ms Crosbie and other experts described T on the basis of similar terms in the post-accident scenario. It is also significant in this context that T's mother reported to Mr Van Huyssteen (appellant's industrial psychologist) that her parents did not perceive her differently some three years after the accident in relation to her aspirations for her and their expectations of her.*"[16]

The above are some of the aspects which the appellants sought to base their monetary claims in this matter.

[45] Another aspect that the court *a quo* had problems with and on which I agree with her, is the fact that certain experts, especially Dr Edeling, whose experience and knowledge in his field as a neurosurgeon cannot be disputed, had certain material aspects of projections too generalised. The educated doctor stated his projections in absolute terms without any exceptions. For example, he testified that almost without exception, brain injured children would be miserable and lonely as

16 Para [62] of judgment.

adults, as no relationship would survive a brain injury, apart from that of a mother and child relationship. These views were negated as the child herself reported to the experts who saw her post-accident, such as Ms Crosbie and Mr Van Huyssteen that she was generally sociable and related well with her peers and friends from before and after her accident. There is also evidence, uncontroverted, that as in October 2011 she had a boyfriend of some three years at that stage – some more than 3 years after the accident.

[46] As regard N's career path as informed by her scholastic record, her prospects were not that bright. On all accounts, she was not a high achiever before the accident. Even though she had generally passed in every grade prior to her accident, her academic achievements were for the categorised in her past reports as "*inadequate*" or "*less than adequate*", and even "*poor*" in many instances. For instance, in Term 1 of 2008, prior to her accident in July 2008, comments in her report indicated that her results were poor and that she had an apathetic attitude to her work results, which reflected in the low symbols she had achieved. Her results prior to her accident were also described as "*disappointing*" by her teacher at the time. Her previous reports further reflected adverse comments relating among others, to her lack of critical analytical skills and her failure to grasp and apply concepts; her concentration levels in class and her attitude, inclusive of the period during 2007.

[47] It is so that she passed two grades following her accident. However, it appears that her reports in these two grades merely continued the pattern of average or below average performance or results as in the years before the accident. There were no marked differences in her school performances in the years preceding her

accident and the period spanning 1½ years after the accident. I thus agree with the court *a quo's* summation that:

> "*In the circumstances, it is my view that there was no evidence to suggest that T's capacity to be educated was somehow impaired by her accident, as suggested by Dr Edeling. Therefore, contrary to Dr Edeling's report, it appeared that Ts scholastic difficulties were not linked to her accident. It also appeared that Dr Edeling's suggestion during cross-examination that T's teachers might have passed her in Grade 9, one year after* [the] *accident, on sympathetic grounds, was speculative in the circumstances.*"[17]

[48] As regards the psychological and related *sequelae* of the accident, it is significant to note that Dr Grinaker, the appellant's psychiatrist, reported that in the absence of testing, N's responses to most questions were appropriate, and that no major clinical difficulties were apparent to him when he interviewed her. At a superficial level, his finding in this respect appears to be more in line with Dr Earle's testimony than with Dr Edeling's evidence.

[49] The probabilities the accident was traumatic to N and has resulted in heightened emotions such as anxiety, panic attacks, a change in sleep patterns and other *sequelae* that would invariably or possibly compromise her adult life. Evidence herein also pointed to the accident having obviously triggered her headaches, which in turn resulted in her being absent from school for 40 days in 2010 – some two years after her accident. The above regardless, it is my view and finding that Dr Earle logically explained this : He stated that a high absenteeism rate from school would invariably have impacted adversely on the performance of any scholar, more especially a scholar of N's ilk and/or capabilities, who had always performed at an average or below average level. All parties are agreed that the headaches are

17 Para [64] of judgment at p 24 of judgment (folio 372 of paginated record).

treatable and once they have been treated, the situation would normalise, leaving no lasting *sequelae*.

[50] It is so that Dr Earle opined that N's ability to complete her education and her capacity to continue in her chosen field were unimpeded by her accident. Nevertheless sight should not be lost that despite her headaches being capable of being treated, the nature of the headaches accompanied by similar ailments may on all the probabilities have a knack of constituting a handicap to her educability and consequent employability from time to time in the future.

[51] I have perused the court ***a quo's*** judgment and factored in the arguments and submissions made before this court. I am satisfied that the trial judge logically, systematically and convincingly took into account and gave effect to the findings as justified by the evidence and expert reports. As Nicholas JA aptly put it in *Southern Insurance Association v Bailey NO*[18] at 114D:

> "*Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, of the present value of the loss.*"

[52] When I went through the appellant's grounds of appeal and the heads of argument filed in respect of this appeal I could not help but come to the conclusion that the issues raised in this appeal were indeed also raised in the court *a quo*. I come to this conclusion because the judgment in the court *a quo* comprehensively dealt with most, if not all the issues now being raised. The manner in which the

18 1984 (1) SA 98 (AD).

points were dealt with by the trial judge and the reasoning accompanying the findings of fact and law thereat leads me to the conclusion that that court did not err in its findings. The court *a quo's* treatment of issues relating to the actuarial calculations as well as the postulations it arrived at, are in my view and finding fair and reasonable.

[53] As regards allowances for contingencies in the context of both the injured and uninjured scenarios, I also see no misdirection that may have been made by the court *a quo*.

[54] As Trollope JA put it in *Shield Insurance Co Ltd v Booysens*[19]:

> "… *the determination of allowances for such contingencies involves, by its very nature, a process of subjective impression of estimation rather than objective calculation.*"

[55] I am convinced that the court *a quo* was alive to the cautions inherent in the exercise of its discretion in the above regard. This is apparent when one have regard, among others to what it says in its judgment[20]:

> "*Thus, allowances have to be made for unforeseen contingencies, unemployment, errors in the calculation of future earnings, early retirement and general hazards of life. Obviously, such allowances depend on the circumstances of each case and the court's impression of the case at hand. It is trite in this regard that the court retains a large discretion with respect to appropriate allowances for contingencies in both the pre-accident and the post-accident scenarios.*"

19 1979 (3) SA 953 (A) at 965G.

20 Para [71] on paginated page 375 of record.

[56] I am also satisfied that the court *a quo* was also alive to the fact that in the post-accident scenario, allowances had to be made, and were indeed made for the possibility that N's future academic life as well as her working life may again be adversely affected by headaches, migraines and/or similar ailments. The court *a quo* also demonstrated in its judgment that the possibility existed and did take same into account, that N will in future have certain post-traumatic psychological and emotional *sequelae*, such as anxiety and depression in the post-accident scenario.

[57] In allowing for an additional contingency for post-traumatic epilepsy, the trial judge took into account the different opinions from both sides – Dr Edeling for the appellant and Dr Earle for the respondent – Dr Edeling had reported that N's brain injury may have resulted in a marginally increased risk of post-traumatic epilepsy of no more than 5% during her lifetime whereas Dr Earle reported that there was no such risk.

[58] I consequently find no misdirection on the part of the court *a quo* in allowing a contingency of 15% for the pre-accident scenario and 25% in the post-accident scenario. The above I believe is in line with what was stated in *Southern Insurance Association v Bailey NO*[21] where at 117C-D the learned justice stated the following:

> "*The generalisation that there must be a 'scaling down' for contingencies seems mistaken. All contingencies are not adverse and all vicissitudes are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets, and ignore the rewards of fortune.*"

GENERAL DAMAGES

21 1984 (1) SA 98 (A).

[59] I agree with the court *a quo's* finding on general damages that N's injuries included a mild head injury, soft tissue injuries, a fracture of the right clavicle as well as facial and other scarring. She was hospitalised for a week, not two weeks as she testified. This included two days in ICU, one day in High Care and two days in a general ward. She then spent another two weeks convalescing at home before returning to school. It is so that such an accident as she was involved in was a traumatic experience for her. Whilst she has reported mood swings, fatigue and low energy levels following her accident, coupled with difficulties with remembering and concentrating, she nevertheless passed two grades following her accident, performing at similar levels to her pre-accident scholastic performance. She has headaches which resulted in her losing 40 days of schooling in 2010, resulting in her failing Grade 10. Her right clavicle is sometimes painful, especially when it is cold and she has stopped playing hockey since her accident. She also has a visible, transverse scar, measuring 2 to 3 cm towards the upper centre portion of her forehead as well as a faint scarring under her right eye, which is less visible. She has verbalised no longer enjoying life and it appears as if she has lost interest in certain pursuits such as reading since the accident.

[60] From the above it is apparent that N's accident has caused emotional, physical and psychological *sequelae*.

[61] The amount to be awarded as general damages:

> "… *can only be determined by the broadest considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances.*"[22]

22 Watermeyer JA in *Sandler v Wholesale Coal Supplies Ltd* 1941 AD.

[62] Both sides have referred to several reported and unreported cases in support of their respective submissions. Unfortunately, most of them are distinguishable from the present case as they relate to severe brain injuries and serious orthopaedic injuries, i.e. amputation, quadriplegia and permanent loss of vital functions. Furthermore, many of those cases related to adults whose working lives were irreversibly curtailed in tragic circumstances. However, there were those that were helpful in that they were age and injury appropriate or there about.

[63] The general trend gleaned from those cases that the court *a quo* compared, the amounts awarded by the courts for general damages in respect of severe brain injuries together with a range of other serious injuries ranged between R400 000,00 and R1 250 000,00 in present value terms. The severity of the individual injuries informed the individual awards.

[64] It deserves to be mentioned that the respondent's counsel referred the court *a quo* to a number of relatively older cases relating to mild and moderate brain injuries where the awards in present value terms were substantially less than the amounts awarded in the cases of severe brain injuries quoted by the appellant's counsel. For example, a 2003 case relating to one *Matthews* where a 14 year old girl who had sustained a mild diffuse brain injury and also suffered from frontal lobe symptoms as well as behavioural and personality changes, which included difficulties with speech, was awarded general damages in the sum of R100 000,00, the equivalent whereof in present values is R156 000,00. Another case involving *Mautla*, a 4 year old child who had suffered mild brain damage with severe psychological *sequelae* despite never having lost consciousness, was awarded general damages in the sum

of R135 000,00 in present value terms. In a more recent case of *Hurter* a 20 year old woman who had sustained serious injuries, including a baso-frontal brain injury which altered her personality, was awarded general damages in the sum of R500 000,00 during 2010.

[65] On the average, according to the cases referred to the court *a quo* by the respondent's counsel, general damages in respect of mild, moderate and more severe head injuries ranged from the sum of R135 000,00 to the sum of R500 000,00 in present value terms, depending of course on the severity of each case.

[66] The appellants decries the amount awarded as general damages herein, i.e. R400 000,00 especially in the light of:

> "… *the nature, extent and permanent sequelae of the appellant's injuries as canvassed in the variety of medico-legal reports …, and … the nature of the award made, particularly in this division, in more recent and comparative cases.*"

They submitted R1 000 000,00 was an appropriate amount. This amount was downgraded to R800 000,00 during closing argument.

[67] In short, the appellants are saying that of late, this division of the High Court has tended to grant amounts for higher than R400 000,00 in comparable cases as the one we are dealing with now.

[68] A number of such cases were relied upon by counsel for the appellant, notably:

1 *Dibakoane obo Mkhonto v RAF* (per Matojane AJ) (as he was then) delivered on 24 August 2009, where a 3 year old boy with serious

brain injury with devastating *sequelae* was awarded the sum of R900 000,00.

2 *Minnie obo Nhlapo v RAF* (per Bhika AJ) and delivered on 24 August 2010) where a 5 year 11 month girl who had sustained a significant trauma of the head resulting in among others, various cognitive deficits, was awarded the sum of R800 000,00.

3 *Ramatsebe obo Ramatsebe v RAF* (per Victor J), delivered on 2 September 2011, where a 3 year, 9 month old boy with mild to moderate brain injury plus tibial fracture and post-traumatic stress was awarded R800 000,00 in general damages.

4 *Smith & Ngobeni v RAF* (per C J Claassen J), delivered on 29 April 2009, where a 27 year old woman with a moderate to severe brain injury coupled with right and left hemisphere deficits and a wide range of executive deficits affecting working memory, problem solving, abstract reasoning and having depression, was awarded R1 000 000,00 in general damages.

5 *Gaxo v RAF* (per Saldulker J), delivered on 16 March 2012, where a 26 year old male with severe brain injury, chest and upper limb injuries as well as fractures of the right humerus, pneumothorax and corneal laceration, was awarded R900 000,00 general damages.

6 The *stare decisis* principle decrees that a lower court is bound by the decision of a higher court. It is common cause that the Supreme Court

> of Appeal, to which judgments in the ordinary High Courts are supposed to be subservient, for want of a better term, has pronounced itself on the general direction that quantums for general damages should be or approximate. It is so, that High Courts have of late, as alluded to or illustrated above, have been on a jaunt of their own, awarding general damages that by far outstrip the kind of template the Supreme Court of Appeal has laid down. While I concede that exceptional circumstances found in individual cases may justify such awards that are not in synch with those handed down by the Supreme Court of Appeal, I find it very difficult to find such circumstances in this case.

[70] The court in *De Jongh v Du Pisane*[23], when awarding general damages in the amount of R400 000,00, the SCA stated among others that the tendency towards higher awards for general damages in the more recent past can hardly be justified. In *De Jongh*, the court awarded R250 000,00 general damages in 2005 which equates R429 000,00 in 2012. I find that in the peculiar circumstances of this case, there may be similarities with the case we are dealing with. *De Jongh* was followed in *Road Accident Fund v Delport NO*[24].

[71] I agree with Wepener J when he stated as follows in the unreported case, *Nicholson, Charlene v RAF*[25] at para [42] thereof:

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23 2005 (5) SA 434 (SCA).

24 2006 (3) SA 172 (SCA).

25 *Supra* at p 25 of judgment.

> "… *judges in this division have given more liberal awards and some have given conservative awards. I prefer to apply the stare decisis principle, i.e. that a lower court is bound by the decision of a higher court and that I am bound by the decision(s) of the Supreme Court of Appeal regarding the putting* [of] [sic] *an end to the tendency by courts to award higher amounts. The liberality or conservatism of a judge should not play a roll. The award in previous comparable cases is but one of the considerations which a court should take into account when considering the amount of damages to be awarded.*"

[72] In any event, it is my view and finding that the award of damages in respect of both general damages and for loss of earnings or earning capacity as assessed by the court *a quo* in this appeal is beyond reproach. I see no misdirection in the way in which Mayat J went about her duties that culminated in the findings and order she made at the end. Nothing in my considered view also, points to the learned judge in the court *a quo* having erred as alleged in the notice of appeal or heads of argument or during argument in this Court.

[73] The appeal thus stands to be dismissed.

COSTS

[74] There are no extraordinary circumstances that may dictate that this Court consider a different costs order than the normal one, which is, that costs should follow the result.

ORDER

[75] In the circumstances I would make the following order:

The appeal is dismissed with costs.

NF KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree: It is so ordered.

TM MASIPA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

L.WEPENER
JUDGE OF THE SOUTH GAUTENG
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