IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVI STON. PRETORIA

DATE: 29/4/16

CASE NO: 29762/2010

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

29 APRIL 2016 **……..**
DATE **SIGNATURE**

In the matter between:

ADV APJ BOUWER OBO N. M. Plaintiff

and

ROAD ACCIDENT FUND Defendant

DATE OF HEARING **24 FEBRUARY 201 6**

DATE OF JUDGMENT **29 APRIL 201 6**

JUDGMENT

MANAMELA AJ

Introduction

[1] The plaintiff cited above is an appointed *curator ad litem* for N. I. M, a minor born in 2003.[1] The minor was injured in a motor vehicle accident on 27 May 2009. She was hit by the motor vehicle driven by an insured driver after she ran into the road from behind a bus parked in the middle of the road. She was 7 years old and in grade 2 at the time of the accident.

[2] Summons was issued on her behalf on 19 August 2010 against the defendant in terms of the provisions of the Road Accident Fund Act 56 of 1996 (the RAF Act). The defendant conceded merits in this matter on the eve of the trial and is therefore liable to pay 100% of the proven or agreed damages suffered by the minor. The matter was argued by counsel on 24 February 2016 and I reserved this judgment. I also directed that the defendant and its attorneys furnish reasons on some aspect of this matter, on which more will be heard later.[2] by not later than 03 March 2016. I deal with the injuries and complaints of the minor next.

Injuries and complaints (i.e. sequelae)

[3] The minor sustained injuries, among others, to the head or brain (i.e. moderate concussive brain injury[3]); discus; both hip joints and lumbosacral spine.[4] She also had cervical soft tissue injury and spinal cord related injuries, other than bruises and abrasions on the face, right hip, right lower leg and thigh.

[1] An order substituting the current plaintiff for the minor's late mother was granted at the beginning of the hearing on 24 February 2016. The mother tragically passed on in 2014. See par 21 below.

[2] See par 14 below.

[3] Also described as *moderate diffuse rotational axonal shear head injury* by the neuropsychologist B van Zyl at pp 12-13 of expert reports bundle “B”. This expert defers to the opinions of the neurosurgeons regarding the nature, mechanism and severity of head injury.

[4] See reports by orthopaedic surgeons Drs C Edelstein and FA Booyse on indexed pp 1-68 of expert reports bundle "A".

[4] Due to her injuries or their *sequelae*, the minor reportedly has, among others, the following complaints since the accident. Neuro-cognitive and neuro-psychological deficits: frequent headaches; loss of memory and concentration problems: hurting eyes and inability to see well; walks with difficulty and a limp: has pain in her right groin area: has pain to her chest. She also experiences pain and discomfort; is depressed (i.e. post-traumatic stress) and has a depressive disorder. She is not doing well at school and is failing her grades. Her grandmother reported some of the aforesaid problems, including that the minor has difficulties in making decisions; needs encouragement to complete tasks; is easily agitated and irritated, and isolate herself when she is angry; has violent mood-swings, and is easily fatigued.

[5] The contending parties herein agreed or accepted the contents of the expert reports filed on behalf of the plaintiff.[5] No expert reports were filed on behalf of the defendant. However, there is disagreement as to whether the agreement include the assessment report required in terms of section 17(1A) of the RAF Act.[6] read together with regulation 3(3)(d(ii) of the Road Accident Fund Amendment Regulations. 2013 (RAF Act Regulations).[7] I deal with this issue next.

[5] See pre-trial conference minutes at indexed pp 21 -28 of the pleadings bundle; par 12 on pp 5-6 of plaintiff's heads of argument.

[6] Section 17(1A) reads in the material part: *"(a)* Assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party. (*b*) The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act. 1 974 (Act No. 56 of 1 974)."

[7] Regulation 3(3)(d)(ii) of the Road Accident Fund Amendment Regulations 2013 which were published on 15 May 2013 reads in the material part: "The Fund or an agent must. within 90 days from the date on which the serious injury assessment report was sent by registered post or delivered by hand to the Fund or to the agent who in terms of section 8 must handle the claim, accept or reject the serious injury assessment report or direct that the third party submit himself or herself to a further assessment

Rejection of RAF 4 form and general damages

[6] In terms of the RAF Act Regulations, a third party intending to claim general damages, referred to in this provision as “non-pecuniary damages”, “shall submit himself or herself to an assessment by a medical practitioner”. The third party thereafter ought to lodge with the fund, being the defendant herein, a duly completed RAF4 form, referred to as a "serious injury assessment report". The medical practitioner who assessed the third party's injury has to determine whether the injury is "serious" in accordance with three sets of criteria.[8]

[7] The minor was assessed by not less than four practitioners in this regard. Duly completed RAF4 forms were delivered on defendant's attorneys on 05 October 2011: 23 July 2014: 22 April 2014 and 07 December 2015.[9] Three of the aforesaid RA F forms or assessment reports did not qualify the minor to claim general damages. The fourth report by Dr FA Booyse, an orthopaedic surgeon, delivered on 07 December 2015 did qualify the minor for general damages by classifying her injury as serious. Therefore, only this report is material for current purposes. More on this later below.

[8] Acting through its attorneys, the defendant rejected the assessment report on 22 February 2016, literally a couple of days before date of trial, as indicated above. The defendant argues that it is entitled to do so in terms of the RAF Act Regulations. It points out that, the material or rejected assessment report was delivered on 07 December 2015 and

therefore rejection thereof on 22 February 2016 was within 90 days stipulated by the *RAF*
Act Regulations. The plaintiff disputes the competence of the defendant i n doing this.

[9] It is submitted on behalf of the plaintiff that, although it is a statutory prerogative or right of the

[8] See generally *Road Accident Fund v Duma and three related cases (Health Professions Council of South Africa as amicus curiae)* [2013] 1 Al l SA 543 (SCA) for how the claims regimen in terms of the RAF Amendment Act Regulations applies in this regard.
[9] See pars 2-5 of the explanatory affidavit filed on 03 March 20 1 6 as per directions of the court.

defendant to accept or reject the assessment report, even on the eve of a court trial, the defendant is only entitled to do so, when there is still a dispute between the parties on general damages. The plaintiff submits that through an agreement reached at the pre-trial conference held on 16 February 2016 on behalf of the parties, the defendant has acquiesced to the plaintiff's right to claim damages before the purported rejection. As such there is complete acceptance of the plaintiff s expert reports and therefore rejection of the assessment report by the defendant is incompetent.

[10] As indicated above, the parties agreed that the views or op1mons of the expert witnesses on behalf of the plaintiff be accepted for what they purport to be. The material part of the minutes of the pre-trial conference reads:

> "Does the Defendant admit that the minor child suffered the injuries as set out in the respective medico legal reports filed by the Plaintiff? If not, full details are required of any injuries recorded in the aforesaid reports, which the Defendant denies that the Plaintiff has suffered in the collision [sic].
>
> Defendant's answer: The Defendant will revert in writing by the 18th of February 2016 failing which this is deemed to be admitted."[10]

[10] See paragraph 7.1 of the minutes of the pre-trial conference on indexed p25 of the pleadings bundle.

[11] It is common cause that the defendant did not revert as agreed by 18 February 2016. Therefore, the defendant is in terms of the agreement reached at the pre-trial conference "deemed" to have admitted the injuries. The plaintiff submits that this agreement included the assessment report by Dr Booyse delivered on 07 December 2015 (the Final Assessment Report). The defendant did not say much, if anything, by way of submissions in this regard. It is simply contended that it was legally justified for rejecting the Final Assessment Report. Therefore, I have to determine whether or not the defendant's rejection of the Final Assessment Report is valid or not.

[12] The determination to be made centres largely around the above quoted part of the minutes of the pre-tri al conference.[11] The minutes in this regard referred to the injuries as set out in the respective "medico legal reports"'. Whether or not the assessment report was included in the reference medico-legal reports is not clear from the papers, but it should be. Be that as it may, the Final Assessment Report was included as part of Dr Booyse's "medico legal report" dated 20 October 2015.[12] Therefore, whether or not it is a medico legal report is not an argument availing the defendant. However, in my view, the rub of the determination lies elsewhere.

[13] To start with, the agreement between the parties [as contained in the minutes of the pre-trial conference] is problematic. It appears, to me, to be about admission of the injuries sustained by the minor as stated in the reports. It does not clearly state whether or not the defendant is required to admit [and eventually deemed to have admitted] that the injuries

[11] See par 10 above.

[12] See pp 39-68 of expert reports bundle "A..: annexure "D" of the defendant's explanatory affidavit dated 03 March 2016.

were serious. But whether or not the defendant admitted that the minor suffered the injuries set out in the reports. It is one thing to admit that injuries were sustained and another, to admit that those injuries are of a serious nature. It may have been the plaintiff's intention to include the admission of the Final Assessment Report or that the minor's injuries are serious, but that much in my view, is not clear from the minutes. In my view such an admission need not be qualified by reference to "injuries suffered" but the entire contents of the reports. But. even with this, I still caution against such a blanket admission and urge practitioners to make it clear what is the nature and extent of the admissions sought and sufficiently record the agreement in pre-trial conference minutes. Otherwise. it may be difficult for the court to determine or even the parties to establish whether or not there was an agreement on an issue. It is for the aforesaid reasons that I find that the defendant did not admit that the injuries sustained by the minor are serious injuries. Therefore, the defendant's rejection of the Final Assessment Form delivered by the plaintiff stands and is valid. I now turn to deal with the issue of costs on this issue.

[14] As indicated above, the rejection of the Final Assessment Form by the defendant was two days before trial. The plaintiff argued that this conduct amounts to abuse of the court process. Consequently, I directed the defendant and its attorneys to furnish reasons by not later than 04 March 2016, why I should not grant a punitive costs order against them on an attorney and client scale or *de honis propriis,* respectively. I have already indicated that there was compliance with the court" s direction.

[15] The defendant's explanation or contention, if you will. is that it had 90 days from delivery of the Final Assessment Form on 07 December 201 5 to accept or reject it. It was

exercising its rights in this regard by doing so on the eve of the trial. This may be so, but in my view, the defendant's approach to the matter in this regard amounts to employing the legal or statutory principles for tactical gains. Quite beknown to the defendant the trial was set down before the lapse of the 90 day period for acceptance or rejection of the Final Assessment Form. Also known to the defendant was that the general damages were not severed from the trial or hearing and therefore, the defendant should, despite the non-lapsing of the 90 day period, have timeously rejected the document. There was no reason whatsoever that the rejection had to wait until the eve of the trial in this matter. The pre-trial conference was another opportune moment to do so or to indicate to the plaintiff that determination of the general damages should await this. Not just to remain radio-silent, so to speak. Naturally. plaintiff s preparation for trial included determination of issues relating to general damages. Therefore, a punitive costs order on the scale as between attorney and client is warranted regarding costs wasted by the non-inclusion of the general damages, as aspect of the tri al. Such an order will be imposed on the defendant.

[16] Regarding the role of the defendant's attorneys in the late rejection, I find their explanation unconvincing. Attorneys are in the forefront of litigation battles involving their clients. They may act on instructions, but they should be catalysts for acquisition of relevant instructions, rather than appear to adopt a supine approach to the running of matters or even complicit in inaction by their clients in matters. The acceptance or rejection of a RAF4 form is unlike settlement of merits or *quantum* in the matter. It comprises a critical part of the administration of a third party compensation matter, which may serve as a hurdle to a desperate victim of a motor vehicle accident in accessing relief Therefore, there is a responsibility on the fund and its attorneys in this regard, not to be intransigent. With reasons and on good cause the fund has to accept or reject the RAF4 form. It has to do so within 90

days and this does not mean that every day of the 90 days is required for each and every matter where the required determination is to be made. The 90 days is a maximum permissible time period and in some respect, like in this matter, there may be reason to decide before the expiry of the period. The fund does not have to wait for day 90 or anywhere near this deadline. However, as I could not find reasons to pierce the agency-veil inherent in attorney-client relationship. I will not impose any costs order directly on the attorneys.

Damages

[17] I proceed to deal with issues relating to *quantum* of the future loss of earnings. With the finding on the rejection of the serious injury assessment reports made above determination of general damages will be postponed *sine die.*

[18] The order will also reflect that the defendant has committed to furnish an undertaking in terms of section 17(4)(a) of the RAF Act, for payment of costs of future accommodation of the minor in a hospital or nursing home, or her treatment or for services rendered or goods supplied to her arising out of injuries sustained in the motor vehicle accident and their *sequelae* . Payment of these costs will be made once incurred and proven to the defendant.

[19] In determining loss of earnings, I will be relying on expert reports or medico-legal reports obtained by the plaintiff to support the claim that the minor's prospects of employment are affected by her injuries and their *sequelae.* Also of assistance will be counsel’s argument in this regard and further. I am grateful for the written heads of argument

filed on behalf of the plaintiff. I only deal with some aspects of some of these reports below for purposes of the award I will be making.

Neurologist

[20] According to Dr Kevin D Rosman, a neurologist, the minor's "traumatic social background" is probably the significant contributing factor to her headaches. She estimated the head injury to be only contributing 50%.[13] Adv DE Westebaar, appearing on behalf of the defendant belaboured this point and appeared to be actually submitting that the injuries sustained in the accident had nothing to do with the headaches. Obviously, that's not what Rosman said. He clearly attributed the accident as 50% cause of the headaches. I will revert to this aspect later.

Educational Psychologist

[21] Ms Paula Steyn furnished a report as an educational psychologist. She had assessed the minor on 27 January 2015. In her opinion, but for the accident, the minor would probably have failed once or twice at school, but she could have passed grade 12.[14] Post accident. Steyn note that the school reports reveal inconsistent marks, which may be related to concentration difficulties and emotional barriers. In her opinion, the concentration difficulties may have been present before the accident or perhaps exacerbated by the accident. She also holds the view that the minor's emotional state may have been negatively influenced by the death of her mother.[15] She concluded that it will not be unreasonable to predict that the minor

[13] See par 9.8 on indexed p 77 of the expert reports bundle "A".
[14] See indexed p 30 of the expert reports bundle "B".
[15] See indexed p 22 of the expert reports bundle "B".

might fail once every phase: will find school increasingly difficult and might leave school with grade 11 (NQF level 3) as her highest qualification. Her depressed mood and concentration problems are significant factors regarding her postulated academic achievements.[16]

[22] However, the accident does not appear to have been the only contributing factor to the minor's academic performance. Her grade 1 teacher reportedly remembered no significant changes after the accident, whereas the other staff members also considered her an "average learner".[17] Her first two reports in 2009 actually indicated an improvement after the accident.[18] The accident was in May of that year. However, thereafter her performance was inconsistent but above average.

[23] It is apposite, for current purposes, to highlight that Steyn also reported another factor, than the accident to the minor's complaints. The death of her mother. I will return to this aspect below.

Psychologists

[24] Ms Bev van Zyl acted as a psychologist and conducted neuropsychological evaluation on behalf of the plaintiff. She concluded in her report[19] that the minor was capable of attaining grade 12 level of education followed by further studies for a higher certificate

[16] See indexed p 35 of the expert reports bundle "B".
[17] See indexed p 22 of the expert reports bundle "B".
[18] *Ibid.*
[19] See indexed pp 1-16 of the expert reports bundle "B".

(NQF5) level of education, had the accident not occurred.[20] Due to her injuries from the accident and their *sequelae,* the minor's attainment of grade 12 will be "with failures along the way, is likely to represent scholastic ceiling, at best"[21]. This, obviously contradicts. Steyn's view that post accident the minor would not pass grade 12.

[25] Dr Merryll Vorster acted as a forensic psychiatrist. She examined the minor on 05 November 2015. She recorded that the minor complained about missing her mother a lot and remembers the day she died. The grandmother also reported that the minor cries about her mother. She had witnessed the death of her mother through the hand of her father in 2014. The father had since disappeared.[22]

[26] Vorster's mental state clinical evaluation confirmed that her cognitive capacity appeared largely intact. She was not irritable, labile or disinhibited. According to Vorster, her sorrowful witnessing of her mother's death is "likely to account for her general apathetic, depressed demeanour"[23]. She is likely to have cognitive deficits, but Vorster found this difficult to measure due to intrusive factor of her mother's death.[24]

Industrial Psychologist

[27] Mr Friedl van der Westhuizen compiled a report[25] and addendum[26] as an industrial psychologist. He assessed the minor on 03 May 2015 and naturally relied on other expert

[20] See indexed p 14 of the expert reports bundle "B".

[21] *Ibid.*

[22] See indexed pp 94-95 of the expert reports bundle "A".

[23] See indexed p 95 of the expert reports bundle "A".

[24] See indexed p 96 of the expert reports bundle "A".

[25] See indexed pp 62-82 of the expert reports bundle "B".

[26] See indexed pp 85-90 of the expert reports bundle "B".

reports for his opinions. However, he says that due to unavailability of school reports and limited "objective information" he was unable to "make conclusive assumptions" on the minors likely pre- and post-accident cognitive and educational potential. For this reason, he qualified his opinions and deferred to the opinions expressed by Steyn, the educational psychologist.[27] He does not explain why the school reports were not made available to him. Clearly Steyn was in possession of same for her assessments and report.

[28] He reported that it is generally accepted amongst industrial psychologists that a person with a grade 12 level of education could enter the labour market on a Paterson A3/B1 level and advance to a Paterson B4/5 level career-wise and regarding his or her earning potential. On the other hand, a person with a certificate level of education would enter the labour market on a Paterson 83 level and probably advance to a Paterson C1/2 level in his or her career and earning potential.[28] Van der Westhuizen projected two scenarios regarding the minor's earnings assumptions in quantifying her potential, but for the accident.

[29] In terms of scenario 1, the minor would have found herself a job after waiting for around two years, following her completion of grade 12 at the age of 19-20 years. She would have entered the market at a Paterson level A2/3 and progressed with three to five years intervals between levels until career ceiling Paterson level 83 with median earnings at the age of 45 years.

[27] See indexed p 73 of the expert reports bundle "B".

[28] See indexed p 74 of the expert reports bundle "B".

[30] Scenario 2 follows the same career path as scenario 1, save that she would have secured employment in the non-corporate sector all her working life, due to inability to secure employment in the corporate sector. She would probably have remained at a basic salary level, but been able to progress to career ceiling Paterson level 83 with median basic earnings at the age of 45 years. Van der Westhuizen proposed that a straight line increase be applied from entry level earnings until the career ceiling, with normal increases thereafter. The minor would have retired at the age of 65 years.[29]

[31] Regarding her post-morbid situation. Van der Westhuizen's views are as follows. The minor would have entered the labour market armed with only a grade 11 education at the age of 19-20 years and managed to secure a job after a waiting period of around three years. She would have entered the market between the lower quartile of unskilled workers earnings: progressed to between median and midpoint of the median and upper quartile of semi-ski l led worker earnings by age of 45 years, which will be a career ceiling, due to "the negative impact of the neurocognitive, neuropsychological and psychiatric deficits on her ability to sustain employment activities and job duties".[30] He also proposed that a straight li ne increase be applied from entry level earnings until the career ceiling, with normal increases thereafter. The minor would have retired at the age of 65 years.[31]

[32] Van der Westhuizen also opined, among others, that the minor would be a vulnerable employee due to her head injury with permanent neurocognitive and neuropsychological sequelae/deficits: depressive disorder. She would need an understanding and sympathetic

[29] See indexed p 75 of the expert reports bundl e "B".
[30] See indexed p 79 of the expert reports bundle "B".
[31] See indexed p 75 of the expert reports bundle "B".

employer and would face longer periods of unemployment, with constant threat to her earnings capacity. He suggested a higher post-accident contingency deduction than pre- accident.

Actuarial calculations

[33] Johan Potgieter of GRS Actuarial Consulting prepared an actuarial report[32] heavily relying on the findings of the industrial psychologist. He calculated the future income of the minor.

[34] In his view, if the accident did not occur, the minor's income or earnings would have been R2 626 471.00 in terms of scenario 1 and R2 205 743.00 in terms of scenario 2, stated above.

[35] Now that the accident had occurred, her income will be R 933 41 7 .00 in terms of both scenarios 1 and 2. The difference is R 1 693 054.00 for scenario 1 and R 1 272 326.00 for scenario 2. General contingencies had to be effected or applied to these figures.

[36] It is proposed in respect of both scenarios that a 15 % pre-morbid and 25% post morbid, contingencies be applied to the abovementioned future earnings. The results will be a net loss of R l 532 437.60 (being R2 232 500.35 - R700 062.75) for scenario 1 and R l 174 818.80 (being R l 874 881.55 - R700 062.75) for scenario 2.

[32] See indexed pp 91 -95 of the expert reports bundle "B".

Plaintiff's further submissions

[37] Further, from reliance on the opinions of experts, including those stated above. Mr SG Maritz, appearing for the plaintiff, made the following submissions in both written and oral submissions. He submitted that the minor's career will plateau at 84, and that 83 is the conservative. He mentioned his preference of scenario 1 pre-accident. A spread of 10%, being 15% pre-accident and 25% post-accident is reasonable, he submitted. He also postulated an alternative submission in terms of which 20% pre-morbid and 30% post-morbid is applied as contingencies. The nett loss, after applying these alternative contingency reductions, is in an amount of R l 447 785.00.[33]

Defendant's submissions regarding the above

[38] Defendant's counsel. Mr Westebaar, reiterated that the minor has a substance abuse problem. He also, with respect, belaboured the fact that the neurologist stated that only 50% of the headaches are attributable to the head injury. And that the orthopaedic surgeon said that "there will be 10% loss of functional work abilities due to the lumbar discus pathology and probably future discussectomy.[34] I did not get the full benefit of the logic of his submissions on this, particularly as he was not armed by controverting expert reports.

Analysis of the submissions and expert opinions

[39] The facts of this matter reveal a very tragic and unfortunate story involving a very young human being. Whilst the minor was coming to terms with the sad reality and

[33] See par 24.4 of the plaintiff's heads of argument on p20.

[34] See indexed p 51 of the expert reports bundle "A": indexed p 86 of the expert reports bundle "B".

consequences of her injuries from the accident, she had to experience the horror of the death of one parent by another. The two experiences, gathering from expert opinions, have now become influential and relevant for her emotional and psychological make-up. Some of the experts are even suggesting that it is difficult to make a determination on the *sequelae* of the accident because of the minor's parental tragedy. However, in my view, there is sufficient expert guidance in the reports to come to a determination of appropriate award for the minor's future earnings.

[40] The critical aspect of the determination to be made concerns the minor's academic prospects, pre and post morbid. She was injured at a very early age with no long spanning previous or track record academically. However, she performed well despite her injuries and their consequences, immediately after the accident. Thereafter, her performance became inconsistent. According, to the educational psychologist, "it would not be unreasonable to predict that she might fail in every phase"; found schooling increasingly difficult and ultimately quit school in grade 11. This view is expressed in an addendum report dated 01 February 2016. It is conspicuous by its absence from this expert's main report dated 11 February 2015 compiled after the assessment of the minor, a few days before, on 27 January 2015. The addendum refers to the same assessment. Therefore, no new material or source for the changed or supplementary opinions is disclosed.

[41] With respect, I find no clear basis for the conclusion that the minor will not achieve a grade 12 certificate. Even if I were to accept that this is so, I find it improbable that the accident will be the only cause for this lack of achievement. This view is supported by the same expert's (i.e. educational psychologist) opinion that the death of the minor's mother

"aggravated her situation"'[35] and that there were concentration difficulties without the accident.[36] Therefore, the accident is but one of the causes of her complaints.

[42] The industrial psychologist significantly relied on the educational psychologist's opinions for his conclusions.[37] The actuaries, in turn, based their calculations and forecasts on the industrial psychologist's views.[38]

[43] Therefore, I find it difficult to accept the scenarios proposed above as they are. There is no logical basis laid for the view that the minor would not achieve a grade 12 certificate. And even if she doesn't, available evidence clearly state that the accident would not be the only cause for her failures. Therefore, I accept the pre-morbid phase of scenario 1. Post-morbid, with a grade 12 education, the minor's income would be different from what is proposed by the actuaries, but will be along the lines of the proposal for her pre-morbid income. However, accepting that the accident contributed to her current complaints. I will also accept that even though she would pass matric, if she does, it may not be with competitive results. Her accident-related complaints or *sequelae* will also present a hurdle to her employability and competitiveness in this regard. Therefore, I accept the post morbid income of R933 41 7.00, but for the abovementioned reasons I would not apply any contingency and the result is a net loss of R 1 299 083.35. Any adverse effect on this income is ameliorated by the fact that the income may significantly be far higher with the minor's attainment of a grade 12 certificate and a job opportunity in the postulated sector indicated

[35] See indexed p 34 of expert reports bundle “8”.
[36] See indexed p 35 of expert reports bundle “8”.
[37] See indexed p 78 of expert reports bundle “8”.
[38] See indexed p 92 of expert reports bundle “8”.

above. I avoided applying a higher contingency for a post-morbid income based on my view that she would obtain grade 12 and the postulated employment opportunities.

[44] Actuarial reports, although based on actuarial expertise, just like other expert reports, generally benefit the court when making determinations, but are only a guide.[39] An actuary is an expert witness whose opinion is part of all of the other evidence before the court[40]. The actuary's report is only a base to be used with others in making an appropriate award of damages.[41]

[45] I also acknowledge counsel's referral to comparable cases or previous awards, particularly on possible contingencies to be applied. The comparisons offer broad and general guidelines and will inherently be influenced by the factual matrix of a particular matter.[42]

Conclusion

[46] Therefore, an amount of R l 299 083.35 in respect of future loss of earnings will be awarded. Determination of the general damages will be postponed *sine die* awaiting the disposal by the parties of issues regarding assessment thereof as serious injury or not.

[47] Further, the defendant will furnish the undertaking [in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996] to pay the cost of future medical and hospital expenses.

[39] See Potgieter JM, Steynberg L and Floyd TB Visser & Potgieter Law of Damages (3rd edition) (Juta Cape Town 2012) at p 467.
[40] *Ibid*
[41] See Klopper H B *Law of Third-Party Compensation* 3rd edition (LexisNexis Durban 2012) at p 177.
[42] See *Protea Assurance Co. Ltd v Lamb* 1971 (1) SA 530 (A) at 535H to 536 A.

[48] Costs will follow the result and also include the punitive costs order indicated above regarding wasted costs occasioned by the late rejection of the assessment report and the consequential postponement of determining issues regarding general damages.

Order

[49] I therefore make the following order:

1 . The *curator ad litem* is given leave to settle the abovementioned matter on behalf of N. I. M. (the minor child), as set out hereunder:

2. The minor child is entitled to 100% of her proven/agreed damages;

3. The Defendant shall pay the total sum of **R1 299 083.35 (one million two hundred and ninety nine thousand and eighty three rand thirty five cents)** to the Plaintiff s attorneys. Frans Schutte Attorneys, in settlement of the Plaintiff's action regarding future loss of earnings. in his representative capacity in respect of the minor child, payable by direct transfer into the trust account of Frans Schutte Attorneys, details of which are as follows:

Bank	Standard Bank White River
Branch code	053052
Account Holder	Frans Schutte Attorneys
Account number	[…]
Reference	D3639

4. The Defendant shall not be liable for interest on the aforesaid amount. if paid timeously:

5. The capital amount referred to 3 hereof, shall be invested by the Plaintiff's Attorney in an interest bearing account in terms of section 78(2)(A) of Act 53 of 1979 pending the establishment of the trust to be created.

6. WILLEM FRANCOIS BOUWER of WF BOUWER ATTORNEYS situated at […], Pretoria, is appointed as Trustee to the minor child and he is to provide security to the satisfaction of the Master of the High Court for the due fulfilment of his obligations in terms of the Trust Property Control Act. No 57 of 1988, as amended, with the powers as set out in the trust deed, a copy of which is annexed hereto as annexure "A":

7. The aforementioned appointment of the exercising by the Trustee of his powers as set out in the annexed trust deed is subject to the control of the Master of the High Court by virtue of the provisions of Act 66 of 1965:

8. Defend ant shall furnish the *Trustee* with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act. No 56 of 1996. to pay the costs of the future accommodation of the minor child in a hospital or nursing home, or treatment of or rendering of a service or supplying of goods to the minor chi ld. arising out of the injuries he sustained in the motor vehicle collision on 27 May 2009, and the *sequelae* thereof, after such costs have been incurred and upon proof thereof:

9. The Undertaking referred to in paragraph 8 hereof, will include payment of :

9.1 the reasonable costs of the *trustee* in establishing and administering the trust and the costs of administering the statutory Undertaking furnished in terms of Section 17(4)(a) of the Road Accident Fund Act No 56 of 1996. limited to the fees allowed for a *curator honis* in terms of Section 84 of Act 66 of 1965: and

9.2 the costs of the furnishing of security by the *trustee* .

10. The Defendant shall pay the Plaintiff s taxed or agreed party and party costs on the High Court scale, subject thereto that:

10.1 In the event that the costs are not agreed:

10.1.1 the Plaintiff shall serve a notice of taxation on the Defendant" s attorney of record:

10.1.2 the Plaintiff shall allow the Defendant 14 (fourteen) Court days from date of allocatur to make payment of the taxed costs.

10. 1.3 should payment not be effected timeously. the Plaintiff will be entitled to recover interest at the rate of 9.75% per annum on the taxed or agreed costs from date of allocatur to date of final payment.

10.2 such costs shall include:

10.2. 1 the costs incurred in obtaining payment of the amounts mentioned herein:

10.2.2 the costs of Senior-Junior counsel where employed, including his day fee and reasonable preparation:

10.2.3 the costs and fees of and consequent to the appointment of the *curator ad litem*, which costs and fees shall include, but not be limited to, perusal, preparation, consultation(s) as well as the costs of and consequent to the *curator ad litem* compiling his report and fee attending Court;

10.2.4 the costs of all medico-legal. radiological, actuarial, addendum and joint reports obtained by the Plaintiff, as well as such reports furnished to the Defendant and/or to the knowledge of the Defendant and/or its attorneys, as well as all reports in their possession and all reports contained in the Plaintiff's bundles:

10.2.5 the reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by the Taxing Master, of the experts as in 9.2.4 above:

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10.2.6 the reasonable costs incurred by and on behalf of the Plaintiff in, as well as the costs consequent to attending the medico-legal examinations of both parties.

10.2.7 the costs of holding all pre-tri al conferences, as well as round table meetings between the legal representatives for both the Plaintiff and the Defendant, including counsel's charges in respect thereof;

10.2.8 the costs of and consequent to compiling all minutes in respect of pre-trial conferences:

10.2.9 the costs of and consequent to the parties of both parties attending joint meetings, as well as costs of and consequent to compiling minutes of joint meetings between the experts, if any:

10.2.10 the costs of and consequent to the holding of all expert meetings between the medico-legal experts appointed by the Plaintiff, if any:

10.2.11 the reasonable travelling costs of the minor child, who is hereby declared a necessary witness:

10.2.12 the reasonable travelling costs of the witness. whose attendance is necessary:

10.2.13 the costs of the Court interpreter, where employed.

1 1 . The appointment of a trustee is subject thereto that:

1 1 .1 the *trustee* furnishes security to the satisfaction of the Master of the High Court.

1 1 .2 the exercise by the *trustee* of his aforesaid powers will be subject to the control of the Master of the High Court.

1 1 .3 The trustee's fees in administering the trust, will be limited to the fees allowed for a *curator honis* in terms of section 84 of Act 66 of 1965.

12. Determination of the issues relating to general damages is postponed sine die and the Defendant is liable for wasted costs occasioned, by the postponement on an attorney and client scale.

K. La M. Manamela
Acting Judge of the High Court

29 APRIL 2016

Appearances:

For the Plaintiff	Ad v SG Maritz
Instructed by	Frans Schutte Attorneys. White River c/o Schutte De Jong Inc. Pretoria
For the Defendant	Adv DE Westebaar
Instructed by	Brian Ramaboa Inc. Pretoria