HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 10329/2019

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
DATE: 27 AUGUST 2019
SIGNATURE

In the matter between:

MORONGE RUTH MODISE obo a MINOR Plaintiff

and

ROAD ACCIDENT FUND Defendant

Coram: Davis J

Minors – duty of court – Courts as upper guardians of minors have an oversight role to play in instances where damages were suffered by and are claimed on behalf of minors against the Road Accident Fund.

Motor Vehicle Accident – Damages – Plaintiffs under a general duty to mitigate damages, this includes reliance on or utilisation of an undertaking as contemplated by Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 ("an undertaking")

Road Accident Fund –	Duty to concede merits where it is proper to do so and not prolong litigation by unmeritorious denial thereof.
Road Accident Fund –	Duty to furnish an undertaking as soon as it is justifiable and not to frustrate plaintiffs' obligations to mitigate their damages.
Practice – trials –	Road Accident Fund liable to incur punitive costs where blanket and unjustifiable denial of liability persisted with or where litigation obligations to curtail proceedings are ignored.

JUDGMENT

DAVIS, J

[1] Introduction

1.1 This is the judgment in one of nine civil trials I heard over the course of four days last week. All but one of the trials were actions against the Road Accident Fund (the "RAF"). These figures are representative of the civil trial roll in this Division and what judges on that roll face on a weekly basis. No less than 80% of the daily civil trial roll comprises of RAF litigation. Effective case management and responsible litigation by all parties concerned are therefore imperative.

1.2 The present matter is a claim for damages suffered as a result of a motor vehicle accident. It is a so-called "pedestrian claim". As a minor is involved, in addition to hearing the case, judicial oversight by the court as upper guardian of minors is required. This is a Constitutional

imperative[1]. The minor was 2½ years old at the time of the accident, which took place today exactly eight years ago.

[2] Merits

2.1 The accident occurred on the sunny afternoon of 12 August 2011 in the town of Welkom. The Plaintiff and her son, the minor, were walking on the side of a dirt road, just off a tarred suburban street when a drunk driver sped around the corner, ran over the mother and child, then careered on and crashed into the garden wall of a property on the opposite side of the street. The driver tried to run away but was apprehended on the scene by community members. This was the version of Plaintiff supported by various statements, the contents of a police docket, sketch plans and photographs.

2.2 During argument near the end of the trial, it was alleged by the RAF that it had, prior to commencement of litigation, made an offer to the minor's mother, a lay person. It was alleged that this offer implied an acceptance of liability by the RAF. Not only was this fact never put to the Plaintiff since institution of the action, but it was never discovered nor previously disclosed to the Plaintiff's legal representatives or to the court. Instead, once litigation ensued some years ago, the RAF pleaded a bare denial of the occurrence of the accident and steadfastly refused to concede merits.

2.3 At a pre-trial conference, held more than two years after delivery of the RAF's plea, the RAF's attorneys indicated that they still awaited instructions on whether to concede the merits or not. The trial was therefore set down to proceed on both the issues of merits and quantum

[1] Section 28(2) of the Constitution provides that "a childs best interests are of paramount importance in every matter concerning the child". See also: S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) at paras [12] – [26] and the cases mentioned there.

and the requisite trial bundles were prepared on both issues. During roll-call on the day of the trial only, did the RAF concede the issue of merits. Up to that stage, they had no evidence and no witness on the issue of merits and no version or explanation as to why they would not be liable in respect of damages suffered as a result of the injuries sustained by a minor pedestrian in a motor vehicle accident. This lack of explanation was never cured.

2.4 Regrettably, this mode of litigation concerning the merits of similar RAF trials, appear to be the norm rather than the exception.

[3] Prejudice

3.1 As will appear hereinlater, expert evidence lead by the Plaintiff confirmed that, had the minor received the benefit of medical treatment and ancillary therapeutic intervention in the years since the accident to date of trial, his compromised situation post the accident would have been ameliorated and some of his loss of amenities would have been limited or, at the very least, his quality of life would have been improved.

3.2 Absolutely no reasons could be furnished by the RAF as to why it had failed the minor in this regard. Of course, an undertaking could not have been furnished while RAF still contested liability by way of denial of the merits.

3.3 I have often, both in judgments and in judicial case management meetings conducted in court, expressed the view that, the sooner merits are conceded in circumstances where they should properly be conceded, such as in the present case and the sooner an undertaking to cover medical and related costs is furnished in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in instances where it is clear that the

injured person would be in need of future medical care and attention, the sooner such a person, be it a Plaintiff or, as in this case, a minor, can receive such treatment or afford to do so. This will not only benefit the injured person and fulfill some of the objects of the Act, but it will also enable a plaintiff to begin to satisfy the general onus of mitigating one's damages[2]. In that way, not only will plaintiffs and injured persons experience beneficial relief in respect of their compromised or diminished amenities of life, but they might be assisted on the road to recovery, be it by way of surgical or scar-removing procedures, or psychiatric or remedial educational therapy, to name but a few examples.

3.4 Although, as will appear later, the neurocognitive deficits suffered by the minor in this case due to his brain injury are irreversible, he would have benefitted greatly from the other treatment. He is representative of a great many other minors in similar positions in RAF cases. Often this court sees years going by prior to the finalization or concession of merits and further years going by prior to the RAF furnishing an undertaking as referred to above. Often, plaintiffs even have to launch applications to compel the furnishing of undertakings despite even the existence of a court orders in this regard. There are for example, yet again such matters on my unopposed motion court roll set to commence at the conclusion of this judgment.

3.5 What the RAF also apparently and persistently fails to appreciate, is that every medical or ancillary intervention rendered pursuant to the furnishing of an undertaking might have a downward impact on the eventual quantum to be awarded. Scarring can be removed, orthopeadic remedial surgery can take place, a minor might be assisted in reaching his

[2] See: Hazis v Transvaal & Delagoa Bay Investment Co Ltd 1939 AS 372 as quoted in Visser & Potgieter Law of Damages through the cases at [24] and referred to in Swart v Provincial Insurance co Ltd 1963 (2) SA 630(A).

pre-accident learning potential and the like. An injured person might be rehabilitated or re-trained so as to enable him to compete better in the labour market. This all might result in a reduction of the eventual award for damages including, in appropriate circumstances, even general damages. It is a matter of public record that the RAF is insolvent and has been for many years. The failure to take such a simple step as the furnishing of an undertaking in terms of section 17(4)(a) of the Act amounts to a dereliction of duty. In this instance, as I have already mentioned, that dereliction prejudiced a minor child, a representative of one of the most vulnerable segments of our society.

[4] Trial readiness

4.1 Despite the passage of more than two years after delivery of its plea very little, if anything at all, has been done by the RAF to prepare its case on the quantum of damages. No experts have been briefed or consulted, no requests have been sent to have the minor examined and no version has been put up or an estimate been made regarding any aspect of the damages claimed. This, again, is representative of a large number, if not perhaps the majority of RAF trials.

4.2 Apart from the lack of preparedness regarding the potential gathering of evidence, expert or otherwise, pre-trial preparation was also lacking. Rule 37 of the Rules of this court is not only designed to facilitate a narrowing of issues, delineation of disputes and curtailment of trial duration but enjoins litigants to actively participate therein. The practice directives of this court further, without the need to detail the contents thereof, places a "continuous obligation" on litigants to seek to narrow issues.

4.3 Considerations of public policy regarding the limitation of litigation costs and the avoidance of unnecessary costs shaped amendments to Rule 37, which have by and large and until recent amendments, endured since 1994. These considerations and the frustration in non-compliance with the Rule, have been raised by this court since as long ago as 1995 by, inter alia, Fleming DJP in Lekota v Editor, 'Tribute' Magazine and another 1995 (2) SA 706 WLD. The learned DJP emphasised that a pre-trial conference is "*a stocktaking of possible co-operation in steps which will limit or prevent avoidable effort and costs*". These public policy considerations (mentioned by Fleming DJP at 708G – 709A) apply even more onerously where, as in the case of the RAF, public funds are involved.

4.4 In addition to the Rules (including those pertaining to the "stocktaking" at pre-trial stage) and the Practice Directives (which have, as a result of the overburdening of the trial rolls by RAF matters, recently undergone major changes in an attempt to force parties to actively contribute to identifying triable issues and to get cases trial ready to deal with those issues), our courts have on numerous occasions underlined the "litigation obligations" of parties, particularly in cases where damages are claimed pursuant to personal injuries suffered[3]. These obligations include the duty to avoid any conduct which could be obstructive to finalising a case or conduct which could cause prejudice to the other party or lead to the incurring of unnecessary costs[4].

---

[3] See: Mokhethi v MEC of Health, Gauteng 2014 (1) SA 93 (GSJ) at paragraph [25], [26] and [32], Viking Inshore Fishing Ltd v Mutual & Federal Insurance Co. Ltd [2016] 2 All SA 730 (SCA) para [8] and Kleynhans v Road Accident Fund [2016] 3 All SA 850 (GP).

[4] See: Nkala & Others v Harmony Gold Mining Co (Treatment Action Campaign NPC and Another as amici curiae) 2016 (5) SA 240 (GJ) at paragraph [226] and [227].

4.5 Rule 60.1 of the Code of Conduct for Legal Practitioners, promulgated by the South African Legal Practice Council in terms of the Legal Practice Act, 28 of 2014, provides that all legal practitioners "*shall act in a manner that shall promote and advance efficiency of the legal process*".

4.6 It is against this background that the conduct of the RAF in this case must be examined. The pre-trial minute in question, contains the following examples of its conduct:

> "*6. The Defendant was requested to indicate whether any issues should be transferred by the parties for mediation, arbitration or decision by a third party and on what basis it should be so referred.*
>
> *Answer: The parties' rights are reserved ...*
>
> *8. The date of trial is set down for 7 August 2019. The Plaintiff requested the Defendant to indicate whether it is ready to proceed on all the outstanding issues or whether any issue should be separated in terms of Rule 33(4).*
>
> *Answer: Both parties are ready to proceed, subject to paragraph 6 above.*
>
> *C. Admissions in terms of Rule 37(6)(g):*
>
> *Merits:*
>
> *11. The issue of merits is in dispute and the Plaintiff requested the Defendant to concede merits at the outset of the Pre-Trial Conference.*

Answer: *The parties discussed the concession of liability by the Defendant. The Defendant's attorney awaits instructions.*

Quantum:

The parties discussed the various heads of damages:

Future medical, hospital and related expenses:

12. *The Plaintiff's attorney requested the Defendant to tender an undertaking in terms of section 17(4)(a).*

Answer: *The Defendant's attorney awaits instructions.*

Loss of earning / earning capacity:

13. *The Plaintiff referred to the medico-legal reports and the actuarial calculations. The parties discussed this issue and the Plaintiff indicated the amount she would accept for purposes of settlement.*

Answer: *The parties discussed the contingency deductions to be applied. The Defendant's attorney awaits instructions.*

General damages:

14. *The Plaintiff qualifies for general damages as the minor suffered serious injuries as contemplated in the Act more specifically as provided in the AMA Guide. Reference is made to the RAF4-form compiled by the Experts.*

Answer: *The parties discussed affair amount. The Defendant's attorney awaits instructions and reserve's its rights.*

D.

15 *The Plaintiff appointed the following experts:*

15.1 *Dr R Kahn (Independent Medical Examiner) and RAF4;*

15.2 *Dr JJ Du Plessis (Neurosurgeon);*

15.3 *Dr JB Prins (Orthopaedic Surgeon);*

15.4 *Dr JPM Pienaar (Plastic and Reconstructive Surgeon);*

15.5 *Ms A Cramer (Neuropsychologist);*

15.6 *Ms E Prinsloo (Educational Therapist);*

15.7 *Ms A Stroebel (Occupational Therapist);*

15.8 *Mr K Prinsloo (Industrial Psychologist);*

15.9 *Human & Morris (Actuary).*

16. *The Plaintiff's attorney has served all the reports and requested the Defendant to indicate that it is in receipt of all the reports.*

Answer: *Yes.*

17. *Defendant's attorney was requested to admit the qualifications and expertise of the abovenamed experts.*

Answer: *Yes*

18. *The Defendant's attorney was requested to admit the contents of the experts' reports and more specifically the experts' findings in respect of injuries sustained by the Plaintiff, the experts' opinions and the experts' conclusions. The Defendant was requested to indicate specifically what aspect or aspects of the clinical findings, opinions or conclusions of the said reports are denied.*

Answer: *The Defendant's attorney will endeavor to obtain instructions to admit Plaintiff's reports before close of business on Tuesday, 6 August 2019. The Plaintiff's attorney will reserve the necessary experts".*

(I hasten to note that counsel who appeared for the RAF at the trial, had not been briefed to attend the pre-trial conference)

4.7 Despite the answers given at the pre-trial conference, no further attempts were made to narrow the issues despite the fact that the RAF simply did not have any controverting evidence or contrary expert opinions. None of the often repeated instructions which were "awaited" were forthcoming.

4.8 Instead, the RAF's counsel was sent in with the instructions, as if in a criminal trial, to insist on the Plaintiff proving every aspect of her case. Repeatedly, this court was reminded by counsel that "he who avers must prove". This is, of course, a reference to the well-known case of Pillay v Krishna 1944 AD 946 at 952 per Davis, AJA. The reliance on this case is misplaced – it dealt with the incidence of onus, not the manner in which litigants should approach the delineation of disputes during pre-trial procedure and in conducting the trial itself.

4.9 In a trial which also involved a minor and which also involved expert evidence of a medical nature and in which the defendant therein had also failed to obtain or file any expert reports, this court in Mokhethi and Another v MEC for Health, Gauteng supra (at footnote 3) dealt with very similar conduct as follows:

> "*The trial*
>
> *[25] What perturbed me about the conduct of the defendant during the trial was his uncooperative attitude, of refusing to make any admissions regarding the correctness of the expert reports files by the plaintiff. It required the plaintiff to call several of the expert witnesses merely to come and state that their reports were correct and they confirmed the contents and conclusions therein. ... Mr Malindi, appearing on behalf of the defendant, was given no instructions to cross-examine them, with the result that all of these witnesses came and merely confirmed their reports, and said no more, or very little. All I can say is that I was extremely displeased with the manner in which the defendant and his instructing attorney conducted the trial in this matter.*
>
> *[26] I expressed my dissatisfaction with this procedure and indicated that, although I could not force Mr Malindi to make admissions regarding the contents of the plaintiffs' experts reports, the displeasure of this court would be shown in an appropriate costs order at the end of the trial, and that is exactly what I propose to do when it comes to deciding the question of costs of the trial.*"

4.10 In the present instance, Mr Madileng who appeared for the RAF, was given some instructions regarding cross-examination of the Plaintiff's experts, but these very scant in content and none of it based on facts or contrary opinions. The instructions also appeared to have disregarded addendum reports, which I shall refer to later. The instructions were also given without his attorney even having been present when the Plaintiff's first and most crucial witness, the neurosurgeon testified. Yet counsel valiantly soldiered on, making the best of what he had been instructed to do. This was also, I might add, despite repeated reminders of the RAF's litigation obligations.

4.11 I need to make it clear that the litigation obligations do not require a party such as the RAF to willy nilly accept the correctness of the conclusions reached in reports filed by a Plaintiff, simply in order to curtail proceedings or to save costs. Conversely, there is also no general obligation (as the tendency appears to be) to appoint "counter – experts" in every discipline. If, for example, the conclusions of an orthopeadic surgeon accord with the hospital or clinical records or with that of the independent doctor who had completed the RAF 1 and 4 forms, why appoint another orthopeadic surgeon? The same applies to all the other disciplines. There is no need nor a justification to obtain a "hired gun" to support a defendant's position[5]. In each instance a defendant such as the RAF must apply its mind, considering the disputes involved measured against the facts of each case.

4.12 This judgment should therefore not be interpreted to constitute either a blanket authority or an instruction to do away with any of the generally applicable principles pertaining to expert evidence. Expert reports are,

[5] See: Scheider NO v Aspeling [2010] 3 All SA 332 (WCC)

unless an agreement has been reached between the parties, simply what they purport to be – an opinion expressed by a person who, by virtue of his qualifications and expertise is regarded as an expert in a specific field which renders his opinion admissible and which opinions and conclusions might assist a court in adjudicating a case[6]. Where the facts relied on by such expert are incorrect on where the pinion expressed is not justifiable, the evidence tendered should de contested.

[5] The Plaintiff's evidence

5.1 The Neurosurgeon

Dr JJ du Plessis testified that he was a neurosurgeon with 29 years' experience. His qualifications and expertise were not in question. He testified that he had examined the minor and had interpreted an MRI scan done at his instance. He also had regard to the hospital clinical notes (such as they were) and the history obtained from the Plaintiff. He explained that MRI scans can in layman's terms detect iron molecules present in red blood cells in a manner which can indicate intracranial haemorrhaging many years after an incident. Wide-spread bilateral petechial haemorrhaging was found to have occurred in the minor's brain, indicating a high velocity rotational impact on his skull. He concluded that the minor had sustained a moderate diffused brain injury compatible to the mechanism of the accident as described above. In cross-examination he explained the difference between mild, moderate and severe brain injuries, the functioning of the Gloscow-coma scale, the irreversibily of the injury as a result of the tearing of axons in the brain and the severe impact of such an injury on a young and developing brain. He dispelled suggestions that the injury could have occurred by falling

[6] See: Holzhausen v Roodt 1997 (4) SA 766 (W) and Visagie v Gerryts 2000 (3) SA 670 (C).

out of a tree or on a playground. He also explained the difference between a diffused and a focal brain injury. He confirmed that, if no spontaneous recovery took place within the first two years after such an incident, none could be expected in the future. His examination of the minor took place well beyond the two year period.

Dr Du Plessis's evidence was neither shaken nor disturbed in cross-examination. What was in conclusion suggested to him, was that he could not exclude the possibility that an other incident than the motor accident in question, could have caused the injury. He conceded the theoretical possibility of such an unknown incident.

5.2 The Neuropsychologist

Ms Cramer testified as an expert in this regard. Her qualifications and expertise were also not placed in dispute. She had produced two reports. In the first report she carried out clinical interviews and had a psychometric assessment of the minor done. She also had regard to the hospital records, the RAF1 and 4 forms completed by an independent doctor and the report of an occupational therapist. She concluded that the minor had a negative neurocognitive profile with compromised scholastic functioning. She stated "*his functioning as a learner had considerably negatively been affected as a result of the psychological sequelae of the accident, which extended over a significant period of time without any psychological intervention. The prolonged nature of the RAF claim and a lack of intervention appeared to have contributed to persisting feelings of anger and depression*".

The neuropsychologist could not pinpoint the exact cause of the consequences she hadobserved but, in an addendum report which she

compiled with the benefit of the neurosurgeon's report, as well as a report from a plastic surgeon and a further RAF4 form, she concluded and stated as follows:

> "2 <u>Discussion</u>
>
> 2.1 *These additional reports have been made available to me since completing my original report on 13/03/2019. Of particular importance is the report of neurosurgeon, Dr Du Plessis. In my original report I noted that the available information a the time did not suggest that the minor sustained a head injury of any significance,, but I expressed concern that in light of his very young age at the time , any impact to the head and thus to the immature brain would still require comment by a neurosurgeon*".

After referring to the findings of the neurosurgeon pursuant to the MRI scan and the diagnosis of a moderate diffuse concussive brain injury, she continued as follows:

> 2.3 *The minor's neurocognitive profile was indicative of cognitive difficulties in areas relate to attention, concentration, response speed, learning abilities and memory. At the time, I speculated that if he did not sustain a significant head injury, these deficits would have to be ascribed to possible subtle premorbid cognitive difficulties and also the psychological factors. However, in light of Dr Du Plessis's MRI findings and clinical conclusion of a moderate brain injury, I would agree that the deficits would be related to the accident and injury to the brain primarily,*

and exacerbated by psychological factors including his elevated levels of anger, anxiety and depression.

2.4 *Given his very young age at the time of the accident, consideration needs to be given to his psychological vulnerability due to exposure to a traumatic event as this would be considered significantly distressing. In the absence of earlier psychologist intervention, the impact of probable ongoing or unmediated psychological intervention, the impact of probable ongoing or unmediated psychological distress on his adjustment through childhood into a new social setting when commencing formal schooling as well as repeating Grade 1 in 2016 needs fair consideration."* She then considered that impact of the organic brain injury as a cause for his difficulties in schooling compared to psychological factors and then went on as follows:

> *"2.5 It can be expected that the minor may experience more difficulties in higher grades of learning where academic demands increase and become more complex, while the brain matures at a slower rate than that of an uninjured child, resulting in the co-called sleeper effect. This implies that he will also not achieve according to his premorbid intellectual potential, which will lead to lowered performances compared to his uninjured peers. As this was a paediatric brain injury, there is the likelihood of a delay in his intellectual development,*

which will ultimate affect his educability and occupational prospects".

After having confirmed the remainder of her conclusions and reports, initial cross-examination then centered around the possibility of other factors being to blame for the minor's position with reference to comments in the reports of, inter alia, the educational psychologist and the occupational therapist. This line of questioning did not take into account opinions expressed by these other experts after the neurosurgeon had, with the assistance of the MRI scan conclusively determined the nature and extent of the minor's injury.

What the cross-examination did elicit however, was that had the minor, having been left with irreversible brain damage, received psychological therapy and occupational therapy, he would, as an, injured person, have been assisted with coping with his deficiencies, adjusted to formal schooling and, had the huge facial scar been removed, he would have been less exposed to ridicule by his peers. All of this would have assisted his schooling and would have qualitatively enhanced his life.

5.3 The Plaintiff

The only factual basis on which the neurosurgeon's report had been attacked, had been the raising of a possibility that there could have been another cause for the identified injury than the motor vehicle accident. This contention was raised on behalf of the RAF without any foundation or a shred of evidence to support it. For this reason and, to exclude such a "possibility", the Plaintiff sought to present the evidence of herself as

mother of the minor. As no interpreter was available at that hour of the day, the matter stood down to the next day, being the Thursday prior to the long weekend. It was at this stage that I sounded the same caution as Claassen, J did in para [26] in Mokhethi's case mentioned in paragraph 4.9 above, pertaining to the possibility of punitive costs.

[6] The conclusion of the trial

6.1 On the second day of trial, the RAF apparently had had a re-think of the matter. It is not clear how much my express invitation for the claims handler to attend trial had to do with this. In the end, the claims handler, apparently operating from her offices in Cape Town from where she either dispatched instructions or, as was apparent in this case, refrained from dispatching instructions, declined to attend court.

6.2 After lengthy discussions by the RAF counsel with the claims handler two revised offers were made to the Plaintiff, one which resulted in agreement being reached on the quantum of general damages in the amount of R800 000. The remainder of the offers were rejected, which resulted in the Plaintiff continuing with her case. It was at this stage, while she had already entered the witness box and shortly prior to the interpreter administering the oath that a fresh stance by the RAF was taken, namely that it would no longer rely on the "possibility" of another cause for the minor's injuries and that it would accept the Plaintiff's expert reports which could be accepted as evidence by the mere production thereof (provision for which had already been made by way of a bundle, prepared as proposed in the pre-trial conference) and that the trial could be concluded by way of argument on the relevant

contingencies to be applied to the actuarial calculations, which were also no longer placed in dispute[7].

6.3 By this time however, the Plaintiff had filled the court benches with all its experts, one of which had taken an urgent flight to be able to attend court, all only to testify in confirmation of the contents of their previously delivered reports. On the assurance of counsel for the RAF that this would no longer be necessary, they were all excused. The wasted costs for their preparation, reservation and attendance had by then already been incurred.

6.4 I need not repeat the contents of the reports. The basis on which the actuary calculated the future loss of earnings was, as set out in the reports of the Educational Psychologist, the Occupational Therapist and the Industrial Psychologist that, pre-accident, the minor would have completed Grade 12 in a mainstream school after which he would eventually have progressed to the plateau of a C2 Median Paterson scale from age 45 onwards at an annual package of R 467 8198. Due to his age, the Plaintiff was prepared to accept a contingency deduction of 25% in this regard, while the RAF suggested 35%. These was no basis argued by the RAF for this increased percentage and, having regard to, inter alia Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A) at 116G – 117A, Goodall v President Insurance Co. Ltd 1978 (1) SA 389 (W) and Shield Insurance Co Ltd v Hall 1976 (4) SA 431 (A) I find that a 25% contingency should be applied to the minor's uninjured scenario.

6.5 Post-accident, the experts seemed to agree that the minor would not be able to reach a higher education level than Grade 12 in a school for

[7] In similar fashion as in Kleynhans v RAF [2016] 3 All SA 850 (GP) by a full court of this Divison.

children with special needs and actuarially this related to a career path with a maximum income of R46 764 per annum from January 2014 onwards. Counsel for the RAF suggested 0% contingency without any basis for such an extraordinary suggestion. It makes no provision for the uncertainty of future events or the vicissitudes of life referred to in the case law. I find that a 10% higher contingency than pre-morbid would be justifiable in the circumstances, i.e 35%. The actuary has provided a useful table in which all these permutations have been calculated, resulting in a quantification of the value of loss of earnings suffered by the minor being R2 796 058. I have included this amount in the draft order prepared in blank in this regard by the Plaintiff's attorneys (and of which a copy had been furnished at the conclusion of argument to the RAF's counsel without demur).

Costs

7.1 In both the minority and majority judgment in the recent decision of Public Protector v SA Reserve Bank of SA [2019] ZACC 29 of 22 July 2019 the legal principles that guide the granting of costs orders in litigation have been set out. In the minority judgment, punitive costs such as costs on the scale as between attorney and client are referred to in general in para [36] of the judgment with reference to Madyibi v Minister of Safety and Security 2008 JDR 0505 (TK) and Loots v Loots 1974 (1) SA 431 (E) at 433H – 434A.

7.2 In the abovementioned majority judgment in the constitutional Court the issue of costs on the scale as between attorney and client is dealt with from para [219] and further. I need not repeat the principles but to state that it is in the ambit of a court's discretion to award punitive damages if a litigant's conduct is such that a court would be justified in marking its

disapproval thereof by making such an order. Over the years, courts have awarded cost on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fide conduct, vexatious conduct or conduct that amounts to an abuse of the process of court[8].

7.3 I hasten to add that the conduct of the RAF counsel and attorney in this case was never viewed as mala fide or vexations, let alone fraudulent or dishonest. The RAF panel attorneys also work under a strict service level agreement which limits their ability to conduct a trial without instructions on even such basic and routine steps as consulting experts, arranging for their reports or briefing of counsel timeously for trial. This much has been confirmed by the RAF's counsel.

7.4 However, there is another category of conduct which can be sanctioned by a punitive costs order, that is where the conduct has prejudiced the other party, such as in Limpopo Legal Solutions v Eskom Holdings SOC Ltd [2017] ZACC 34. A punitive costs order will also be justified where the best interests of a minor child is compromised such as in SS v VV –S [2018] ZACC 5; 2018 JDR 0275 (CC).

7.5 The conduct of the RAF in the manner in which this trial had been run, also caused extensive unnecessary time wastage and litigation-related expenses as already set out earlier in this judgment. The Plaintiff should not be liable for these expenses and the causing thereof by the RAF justifies, in my view, a mark of disapproval by this court[9].

7.6 I shall accordingly amend the draft order where necessary to reflect punitive costs against the RAF on the scale as between attorney and

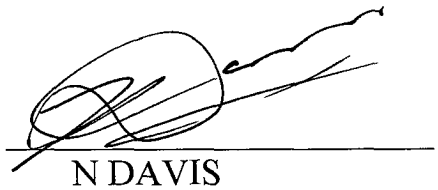
[8] See: Footnotes 175, 176 and 177 at par [223] of the Public Protector – judgment supra.
[9] See also: Nel v Davis SC NO 2016 JDR 1339 (GP) at para 25.

client. The order also makes adequate provision for the protection of funds in a trust.

7.7 It is a matter of grave concern that this case, exhibiting the incurrence of unnecessary costs, the wastage of time and the prejudice caused to a Plaintiff, including a minor child, is representative of a large number of cases conducted by the RAF virtually on a daily basis in this Division. For this reason, I direct that a copy of this judgment be sent to the acting CEO of the RAF for her attention.

[7] Order

1. Draft order marked 'X' as amended is made an order of court.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 7 and 8 August 2019

Judgment delivered: 12 August 2019

APPEARANCES:

For the Plaintiff :	Adv M van Rooyen
Instructed by:	Savage Jooste & Adams Attorneys, Pretoria
For the Defendant:	Adv. T Madileng
Instructed by:	Ningiza Horner Attorneys, Pretoria