Reportable:	*Yes/No*
Circulate to Judges:	*Yes/No*
Circulate to Magistrates:	*Yes/No*

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)

CASE NO.: 2018/2013

Date heard: 18-11-2019
Date delivered: 11-09-2020

In the matter between:

The Road Accident Fund **Appellant**

And

C N Laubscher **Respondent**

CORAM: PHATSHOANE AJP et WILLIAMS ADJP et VUMA AJ:

JUDGMENT

WILLIAMS ADJP:

1. The respondent, Mr Christian Nicolai Laubsher, was the plaintiff in a claim against the Road Accident Fund, the appellant, resulting from a motor vehicle accident which occurred on 10 January 2009. At the time he was 18 years old and in his matric year. It is common cause that he sustained various injuries including an injury to his back with multiple transverse process fractures on the right side between L2/L4 and a severe injury with a depressed skull fracture, small subdural bleeding and a minor haemorrhagic contusion of his brain, resulting in the

finding that the respondent had *"a neuropsychological status compatible with a brain injury sustained, and in particular with frontal brain injury."*

2. The merits of the case were settled on the basis that the appellant accepts liability for 80% of the respondent's proven damages.

3. At the commencement of the quantum proceedings before Pakati J on 15 November 2017, the legal representatives informed the court *a quo* that the parties had come to some agreement relating to certain issues but that the court *a quo* would be required, after hearing argument, to make a determination as to (i) general damages in an amount between R700, 00.00 and R800, 000.00; (ii) the method of calculation of the past and future loss of earnings of the respondent, to be utilised by Robert Koch Actuaries for purposes of such calculation; and (iii) the administration of the funds on behalf of the respondent. It was envisioned that the court *a quo* would make an initial order as to the past and future loss of earnings of the respondent whereafter the actuarial calculation would be made which would then be incorporated into the court order.

4. The joint minutes of the occupational therapists and industrial pshycologists were handed up by agreement between the parties to be accepted as evidence before the court *a quo*.

5. During argument before the court *a quo,* Mr Botha for the respondent, handed up a draft order setting out the relief sought by the respondent, purely for the convenience of the court. He pointed out that the draft order unfortunately failed to reflect the 20% apportionment against the respondent. As far as the contingency for past loss of earnings was concerned, Mr Botha submitted that the usual 5% would be appropriate. I may just mention at this stage that the respondent had been employed after the accident in various minor positions but had been unable to sustain any employment opportunity. The experts were in agreement that he be deemed unemployable. With regard to future loss of earnings Mr Botha contended, in light of the respondents unemployability, that the court *a quo* follow the approach of Opperman AJ in the unreported judgment of *Lettie Mofokeng v Road Accident Fund South Gauteng Local Division, Johannesburg)* Case no 2009/11101, delivered on 24 July 2014, wherein, he submitted, a 0% contingency was applied to future loss of earnings. He also proposed that a Trust be established to administer the funds to be awarded to the respondent since the experts were in agreement that due to the head injury, the respondent would not be in a position to manage his money on his own.

6. Mr Eia who appeared for the appellant, both in the court *a quo* and before us on appeal, argued before the court *a quo* for a 20% contingency to be applied to the future loss of earnings of the respondent as a result of his youthfulness as opposed to the normal 15%. He further contended that a *curator bonis* be

appointed to manage the funds of the respondent as agreed to by the industrial psychologists and the legal representatives. Mr Eia, who at that stage had not had sight of the respondent's draft order, alerted the court *a quo*, with regard to witness fees, that the respondent had appointed an expert who had died before the trial and that in addition the respondent had two similar experts which amounted to a duplication and that he would address these cost issues and other submissions on behalf of the appellant in a draft order which he undertook to deliver to the court *a quo* during the course of that day. The appellant's draft order was e-mailed to Pakati J's secretary at about 12:41 that afternoon but was apparently only opened the following morning.

7. On the next day, 16 November 2017, the court *a quo* made the following order:

"HAVING HEARD Advocate BOTHA for the Applicant and Advocate EIA for the Respondent and having read the documents filed of record:

IT IS ORDERED THAT:

1. *The Defendant will pay the Plaintiff, not later than 14 days from date of this order, the amount of R 800 000,00 for general damages suffered by the plaintiff arising out of the injuries sustained by him in the motor vehicle collision on 10 January 2009.*

2. *The Defendant will pay the Plaintiff's past medical expenses in the amount of R38 664.78.*

3. *The Defendant will pay the Plaintiff's taxed or agreed party*

and party costs on the High Court Scale up and until the date of the order as to loss of earning capacity , which costs will include:

3.1 *The qualifying fees of the following experts:*

Dr P Repko

Dr H Enslin

Dr T Enslin

Dr E Jacobs

Ben Janecke

Lizette Van den Berg

Letitia Delport

Dr Robert Koch

Drs Von Bezing Graham & Brand

Dr H Relling

3.3 *The reasonable travelling and accommodation costs of the Plaintiff from Kimberley to Welkom, Bloemfontein, Cape Town and Pretoria, and back, to consult with the experts of the Plaintiff and the Defendant.*

3.4 *The reasonable travelling and accommodation costs of the legal representatives of the Plaintiff from Kimberley to Port Elizabeth and back, to consult with the expert of the Plaintiff, to wit, Dr H Relling.*

3.5 *The qualifying fees of Ben Janecke for attending consultations and the trial on 14 November 2017.*

3.6 *The further costs of Dr R Koch for calculating the loss of support as referred to hereunder.*

4. *It is declared that the witnesses of the Plaintiff referred to in paragraph 3.1 above were necessary expert witnesses.*

5. *The Plaintiff shall in the event that costs are not agreed, serve the Notice of Taxation alternatively the notice contemplated in Rule 70 (3B) of the Rules, whichever is applicable, on the Defendant's attorneys of record.*

6. *The Plaintiff shall allow the Defendant 14 (fourteen) court days to make payment of the taxed costs.*

7. *The Defendant will pay interest on the above amounts at the rate of 10.25 % per annum, if the Defendant fails to make payment referred to in paragraph 6 above.*

8. *The Defendant will pay interest on the amount in paragraphs 1 and 2 at the rate of 10.25 % per annum, if the Defendant fails to make payment within 14 days of date of this order.*

9. *The Defendant will supply the Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service to her or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision on 10 January 2009, after such costs have been incurred and upon proof thereof;*

9.1 *Such costs will include the costs of a gardener once per week and a domestic worker once per week.*

10. *The Defendant will pay the above amounts into the following trust account of the Plaintiff's Attorneys:*

ELLIOTT MARIS WILMANS & HAY

STANDARD BANK TRUST ACCOUNT

ACCOUNT NUMBER 0400....

BRANCH CODE 050002

LOSS OF EARNING CAPACITY

11. *The joint minute of the industrial psychologists Dr E Jacobs and Mr Shapiro dated 11 May 2017 is accepted as evidence.*

12. *The joint minutes by the neuro psychologists, Ben Janecke and Cora de Villers, dated respectively 9 November 2017 and 7 November 2017 is accepted as evidence.*

13. *The actuary of the Plaintiff, Dr Robert Koch, is requested to calculate the Plaintiff's Past and Future loss of earning capacity on the following basis :*

13.1 PAST LOSS

*13.1.1 That, **uninjured**, Plaintiff would have entered the labour market in September 2009 earning R 61 000.00 per annum (Patterson level A2 LQ) followed by even compound real increases to R 217 000.00 per annum a age 50 (Patterson grade C3 Med) .*

13.1.2 Calculation to be done in 07/2018 rand values.

13.1.3 Escalation in line with inflation to age 65.

*13.1.4 That in the **injured** state the Plaintiff did earn R 128 400.00 up to February 2014.*

13.1.5 That contingencies of 5% be applied to Past Loss of earning capacity.

13.2 FUTURE LOSS

13.2.1 That the Plaintiff is unemployable and will not earn an income from February 2014 onwards.

13.2.2 That contingencies of 0 % be applied to Future Loss of earning capacity.

13.3 GENERAL

13.3.1 Calculation date to be 16 November 2017.

13.3.2 Life Table 4 Quantum Yearbook 2018 Male

13.3.3 Interest, 8% compound

13.3.4 Inflation 5.37 % per year compound for future, ie 2.5% per year NCR

13.3.5 Income tax deducted in terms of 2017/2018 table for future.

14. Leave is granted to the parties to approach the court in chambers to make an order in terms of the loss of earning capacity once the calculation is received from Dr Koch.

15. Payment of the amount for loss of earning capacity will be subject to the same conditions as the other payments in this order.

16. The order as to payment of loss of earning capacity will form part of this order."

8. The aforesaid order, is for all intents and purposes a replica of the draft order handed up by Mr Botha. The respondent instructed Robert Koch Actuaries to attend to the calculations, prepared a new draft order which made provision for the 20% apportionment against the respondent as well as the establishment of a Trust to be named the Christiaan Nicolai

Laubsher Trust, with the respondent's attorneys as trustees, to hold and administer the funds to be paid for the benefit of the respondent.

9. The appellant refused to have this new draft order made an order of court since it did not address all the mistakes and shortcomings of the order of 16 November 2017. In any event it would have been inappropriate to do so. A flurry of correspondence thereafter ensued between the legal representatives and Pakati J's secretary in which Mr Eia pointed out the deficiencies in the order. Eventually Pakati J directed that the legal representatives address her in court on 25 January 2018 on the reasons for the differences in the amounts in the various draft orders submitted to her.

10. On 25 January 2018, Mr Eia brought an application in terms of Rule 42 from the bar and which he had alluded to in an e-mail sent to Pakati's J's secretary and the legal representatives for the respondent on 17 November 2017. The application sought to correct the omissions relating to the 20% apportionment and the mechanism to be employed for the protection of the respondents' funds. It sought also to address the issue of the 0% contingency applied to the future uninjured earning capacity of the respondent and the costs orders contained in the order of 16 November 2017 which appellant's counsel had not had the opportunity to address the court on.

11. On 16 June 2018, Pakati J dismissed the Rule 42 application on the basis that the court had become *functus officio* after making a final order and thus had no authority to correct or supplement it. The appellant was ordered to pay the costs of 25 January 2018 on the basis that costs follow the result and that *"Instead of arguing fully the actuarial calculation as far as past and future loss of income, the parties concentrated on the interlocutory application".*

12. The appeal, with leave of the court *a quo*, lies against:

    12.1 The court *a quo's* failure to apply the 20% apportionment against the respondent to the general damages awarded, the past medical expenses and the undertaking in terms of s17 (4) (a) of the Road Accident Fund Act, 56 of 1996 (for the costs of future accommodation of the respondent in a hospital or nursing home or rendering of a service to him arising out of the injuries sustained);

    12.2 The award of costs in favour of the respondent relating to the qualifying fees of experts, travelling and accommodation costs of the respondent and his legal representatives and the further costs of Robert Koch without hearing any argument or submissions by the appellant;

    12.3 Declaring the respondent's expert witnesses to be necessary witnesses;

    12.4 The failure of the court *a quo* to instruct the actuary to apply any contingency deduction to the calculations of the

respondent's uninjured future loss of income/earnings, alternatively by instructing that a 0% contingency be applied.

12.5 The failure to apply the 20% apportionment to any amount calculated for loss of income/earnings;

12.6 The failure to order the appointment of a curator bonis and/or failing to put any mechanism in place to safeguard the respondent's award; and

12.7 The order that the appellant pay the costs of the dismissed Rule 42 application.

13. On appeal before us the respondent readily conceded that the court *a quo* had erred in not taking into account the merits apportionment applicable as well as not making provision for the administration of the respondent's funds. These concessions had been made as early as 17 November 2017 when the respondent's legal representatives attempted to correct these glaring omissions in a new draft order which I refer to in paragraph 8 herein. Ms De Vos SC who appeared for the respondent in the appeal, further conceded *inter alia* that the court *a quo* had erred in not instructing the actuary to apply a contingency deduction to the calculation of the respondent's future loss of earnings and by ordering the appellant to pay the qualifying fees of the expert witness Dr P Repko, who had passed away before the trial date as well as that of Ms Lisette Van de Berg whose contribution to the proceedings was an unnecessary duplication of services.

14. The above concessions, which are encapsulated in a proposed order attached to Ms De Vos' heads of argument, have however not achieved much success in attempting to settle the issues on appeal. The issues still extant are (i) the contingency to be applied to the uninjured future earnings of the respondent; (ii) the order declaring the respondent's expert witnesses to be necessary witnesses; (iii) whether a Trust should be established or a curator bonis be appointed to administer the respondent's funds; and (iv)the costs of the Rule 42 application.

The contingency to be applied

15. Ms De Vos argued that the normal 15% contingency be applied to the respondent's uninjured future earnings while Mr Eia insisted on a 20% contingency based on a quarter per cent per year over the projected working life of about 40 years of the respondent. (My own calculations to this effect result in a contingency of 10%, not 20%.) In the Rule 42 application Mr Eia argued for a contingency of 15% and I see no reason in the circumstances why the usual 15% contingency should not apply.

16. Mr Eia makes the accusation that the respondent's legal representatives, specifically Mr Botha, had either misled the court *a quo* or had misread the Mofokeng judgment and had persisted to do so even up to the Rule 42 application stage. The relevant paragraph in the *Mofokeng* judgement appears to be

paragraph 94 thereof, in which Opperman AJ states the following:

"Plaintiff's counsel has suggested a contingency of 5% to be applied to past loss of earnings pre-accident. Defendant's counsel has suggested 50% pre-accident. In my view, 5% is an appropriate contingency to apply. In respect of the contingencies to be applied to the future loss of earnings, the plaintiff's counsel has suggested 15% and the counsel for the defendant, 50% pre-accident and 35% post-accident. In my view a contingency of 15% pre-accident and 0% (nil percent) post-accident is appropriate."

17. In my view there can be nothing unclear or confusing about the contingency Opperman AJ found to be appropriate with regards to the uninjured or pre-accident future loss of earnings of the plaintiff in the *Mofokeng* matter. Mr Botha as well as his instructing attorney Mr Van Niekerk, are both senior practioners who appear in this court regularly in matters of this nature. It is almost inconceivable that they would (a) have understood the finding in *Mofokeng* to have been a 0% contingency for future loss of earnings without factoring in a contingency for uninjured future loss of earnings, which is the established practice to reflect the ordinary accidents and chances of life, or (b) have intentionally misled the court *a quo* in this regard.

18. Fact of the matter is however that Mr Botha persisted with his argument for a 0% contingency to be applied to the future loss of earnings of the respondent two months later when Mr Eia

argued the appellant's Rule 42 application. What could have been deemed as an oversight or a slip of the tongue on his part when the matter initially served before the court *a quo,* had then been unquestionably confirmed as the position of the respondent with regard to this issue. The attitude of the respondent's legal representatives in this regard is inexcusable. However, every coin has two sides – whilst it is the duty of counsel to place the correct information before court, it is nevertheless incumbent on the presiding officer to verify such information, unless circumstances such as extreme urgency prevail, which was not the case *in casu*.

19. The Judge *a quo* apparently realised her mistake after hearing argument in the Rule 42 application and having had time to reflect upon the situation, issued a notice on 6 June 2018 informing the parties that she intended to request Koch Actuaries to *"make a calculation regarding the future uninjured earnings of the plaintiff applying the 15% normal contingency in respect of future loss of earnings."*

This intended request was apparently abandoned by the Judge when she found in the Rule 42 application, that the court was *functus officio* and had no authority to correct, alter or supplement a final judgment or order.

The costs orders.

20. The remaining complaint under this heading is the qualifying fee of the respondent's clinical psychologist, Mr Ben Janecke,

for attending the consultation and trial of 14 November 2017. This fee, Mr Eia contends, is a duplication because the qualifying fee of Mr Janecke had already been catered for in the order relating to the qualifying fees of the respondent's experts. Therefore it would be the function of the taxing master and not the court (where the parties do not agree), to determine whether the consultation and attendance at court of Mr Janecke formed part of the process of qualifiying himself. I agree with Mr Eia in this regard. See *City Deep Ltd v Johannesburg City Council* 1973(2) SA 109 (W) at 117 C-118F.

The order declaring the respondent's experts to be necessary witnesses.

21. In this regard Mr Eia correctly contended that it would be a usurpation of the taxing master's functions to make such an order in circumstances where none of the expert witnesses testified. See *Stanley Motors Ltd v Administrator Natal* 1959(1) SA 624 (D).

Trust versus Curator Bonis

22. The argument on behalf of the appellant is that the respondent's legal representatives had reneged on the agreement reached between the parties following upon the joint minute of the clinical psychologists, Mr Janecke and Ms Cora De Villiers dated 9 November 2017, that a curator bonis be appointed to manage the respondent's financial affairs. The

fact that the proposed trustees were to be the respondent's attorneys of record added oil to the fire of the already strained relationship between the respective legal representatives. Mr Eia contends that the establishment of a Trust in such terms is an opportunistic move on the part of the respondent's attorneys and exploitative of the funds to be awarded to the respondent. He contends that the appointment of a curator bonis would be a more cost effective way of administering the funds of the respondent with the additional safeguard of it being under the supervision of the Master.

23. Although the respondent's attitude remains that a Trust be established, Ms De Vos has attempted to allay the distrust on the side of the appellant by informing us that the respondent's father was willing to be a co-trustee with the respondent's attorneys. Ms De Vos readily conceded however that the issue of a Trust *viz a viz* a curator bonis would fall squarely within the discretion of the court.

24. Whilst we were not addressed by respondent's counsel on the advantages of a Trust to be established in respect of the respondent's funds, Mr Eia referred us to the unreported judgment of *WD v The Road Accident Fund* case no 12648/2014; *CD v The Road Accident Fund* case No 4082/2016; *OP v The Road Accident Fund* case no 20263/2013, delivered on 15 November 2019, wherein Savage J made a comparative analysis of three possible mechanisms to be employed in the management of a patient's affairs i.e. the

Guardian Fund (in the case of a minor), a *curator bonis* and a Trust and came to the conclusion that it would be appropriate to appoint a *curator bonis* to manage the affairs of adult patients, elaborating as follows at paragraphs 16 and 17 of the judgment:

"16. Turning to whether a trust should be created or a curator bonis appointed to manage the affairs of the two adult patients, it is an important consideration that the Master has repeatedly not supported the creation of a trust on the basis that she has supervision over curatorship's in terms of the Administration of Estates Act 66 of 1965 and that the powers granted to the curator bonis are "usually subject to the approval of the Master". The Master states that she holds no objection to the nominee of Standard Trust being appointed as curator bonis, nor an objection to security being dispensed with for such curator bonis. The Master expresses concern that she does not have direct and constant supervision over trusts.

17. Whilst the respondent has granted an undertaking, which will apparently cover the fees and costs in respect of the capital and the administration costs and charges incidental to the formation of the trust, it is matter of concern that these fees are not subject to taxation by the Master. I am not persuaded that the provision of an annual account to the Master is sufficient protection against the risk of inflated costs and whilst the provisions of the trust deed and the Trust Property Control act provide constraints, it appears to me that the Master is able to exercise greater controls over the performance of the functions of a curator bonis. I accept Advocate Mouton's reported concerns regarding delays in the Master's office, concerns which have been evidenced even in the current matter, but I am not satisfied that these delays provide sufficient reason to do away with the closer oversight role which the Master is able to perform where a curator bonis is appointed. It is material that where there is dissatisfaction with the conduct of a

curator bonis, the Master provides oversight. No such similar protection exists in the circumstances of a trust. I am aware that recently orders have been made in this division permitting the creation of trust in circumstances in which the settlement amounts paid are also under R1 million. However, it is my view that careful regard should be had by the Court to the quantum of the settlement paid and in the current circumstances, I am not persuaded that, considered together with the issues set out above, the costs of establishment of a trust, which are not subject to the Master's close scrutiny, is an appropriate mechanism for ensuring the proper management of such funds when a curator bonis may undertake such role. An annual account to the Master does not solve this difficulty and the fact that the respondent has undertaken to pay costs is not a sufficient basis for approving the formation of trust in circumstances in which the result may well be to saddle the Road Accident Fund with higher costs when less may have been possible."

25. I consider the above analysis and discussion by Savage J to be persuasive and compelling in favour of the appointment of a *curator bonis*, also *in casu*. The order to be made herein should therefore provide for the appointment of a *curator bonis*. The appellant has indicated that it was prepared to bear the costs of such an application

The costs of the Rule 42 application

26. When the Rule 42 application was heard there were two issues which the parties were in agreement that the court *a quo* had omitted to deal with in the order made and which could be corrected in terms of Rule 42 (1)(b), which states that:

"(1) The court may in addition to any other powers it may have, mero moto or upon the application of any party affected, rescind or vary:

(a) . . .

(b) *An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission."*

27. These issues are the 20% merits apportionment, which had not been deducted from the capital awards and the failure of the court *a quo* to deal with the mechanism to be implemented for the administration of the respondent's funds. The issues relating to witness fees and costs and that of the contingency to be applied to future earnings were disputed by Mr Botha as not being open to correction *mero moto* since he insisted that those orders were correctly made.

28. The court *a quo* in my view was incorrect in holding that she was *functus officio* with regard to those patent errors and/or omissions which she was in fact alerted to soon after making the order and which pre-eminently resorts under Rule 42. In fact in the absence of hearing Mr Eia on the issue of the witness fees and costs, that issue could also have been reconsidered and thereafter corrected, altered or supplemented. (See *Thompson v South African Broadcasting Corporation* 2001(3) SA 746 (SCA) at paragraph 6 thereof; *Hart v Broadacres Investments Ltd* 1978(2) SA 47 (NPD) at 49 C-E.)

29. However the appeal lies not against the dismissal of the Rule 42 application, but the costs order made against the appellant.

Ms De Vos argued in this regard that the appeal is devoid of all merit since it falls foul of s16(2)(a)(ii) of the Superior Courts Act 10 of 2013 and should therefore be dismissed with costs. S 16(2)(a)(ii) should be read with s 16(2)(a)(i) and reads as follows:

"16(2)(a)(i)When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs."

S 16(2)(a) in general speaks to the issue of whether a judgment or order on appeal would have a practical effect or result and a court of appeal's discretion in this respect. S16(2)(a)(ii) provides that in exceptional cases the question whether or not a decision on appeal would have a practical result could be determined with reference to considerations of costs. In *Naylor and Another v Jansen* 2007(1) SA 16(SCA), Cloete JA had occasion to deal with the similar provisions of s 21A of the now repealed Supreme Court Act of 59 of 1959 and stated as follows at 22 D-E thereof:

"I had occasion in Logistic Technologies (Pty) Ltd v Coetzee and Others to express the view that a failure to exercise a judicial discretion would (at least, usually constitute an exceptional circumstance – I still adhere to that view – for, if the position were otherwise, a litigant adversely affected by a costs order would not be able to escape the consequences of even the most egregious misdirection which resulted in the order simply because an appeal would be concerned only with cost, and that obviously, cannot be the effect of the section."

A court of appeal will interfere with an order as to costs if it is satisfied that there has not been a judicial exercise of the court *a quo's* discretion or where the exercise of its discretion is not proper, it has a wrong view of the facts or wrongly holds that it has no discretion at all (See also *Wait v Estate Wait* 1930 CPD).

30. Whilst the general rule is that costs follow the result and that the successful party is entitled to his cost, the fact of the matter is that neither of the parties were successful in having the errors and omissions in the order corrected. The court *a quo* called for this hearing, which could have been for no other conceivable purpose other than to reconsider certain aspects of her order. There was no winner and the proper order must be that each party is to pay its own costs relating to the hearing of 25 January 2018.

Costs of the Appeal

31. In this regard Mr Eia contends that the respondent's legal representatives be ordered to pay the cost of the appeal *de bonis propriis* as a result of them having adopted an opportunistic and obdurate approach to the proper and equitable compromise of the respondent's claim against the appellant and therefore having brought the administration of justice into disrepute. Ms De Vos on the other hand argues that the appellant pay the costs of the appeal as from 26 March 2019 on which date the respondent, with a view to settling the

issues on appeal, presented the appellant with a draft order in the same terms as that proposed by Ms De Vos at the hearing of the appeal.

32. The draft order referred to by Ms De Vos and/or the concessions made by the respondent at the appeal did however not dispose of all the issues between the parties and as this judgment shows, the appellant in our view was entitled to persist on appeal with those issues unresolved by the draft order of 26 March 2019. There is no reason why the appellant should pay the costs of the appeal incurred after such draft order.

33. As far as the appellant's argument for costs *de bonis propriis* is concerned, it is trite that such costs are not lightly awarded. The unsatisfactory course of events leading up to the appeal could have been avoided entirely had the *court a quo* applied her mind to the arguments presented to her by counsel instead of making an order in terms of the uncorrected and one-sided draft order presented by the respondent's counsel.

34. It may well be, in all fairness to the court *a quo,* that when the appellant's draft order was not received by the end of the day (through no fault of counsel), the court a quo assumed the appellant's acquiescence with the order sought by the respondent (one is unfortunately left in the dark in this respect since there are no reasons accompanying the order). However, even if this was the case, a court should not act as a

mere rubber stamp for the parties. The Supreme Court of Appeal's judgment in *PM obo The v Road Accident Fund* 2019(5) SA 407 (SCA), which deals with the court's duty when making a settlement agreement an order of court is instructive in this regard, especially when public funds are involved. A few extracts from paragraph 32 to 35 the SCA judgment would be apposite:

"[32] Our courts have a duty to ensure that they do not grant orders that are contra bonos mores, or that amount to an abuse of process. Section 173 of the Constitution specifically empowers the court to prevent any such abuses . . . . . .

[33]. . . . the Court also has a duty to members of the public. Public funds are being disbursed and the interests of the community as a whole demand that more scrutiny be involved in the disbursement of such funds. . . . . .

[34] The RAF is an organ of state, established in terms of s2 of the Road Accident Fund Act 56 of 1966 (the Act). It is thus bound to adhere to the basic values and principles governing the public administration under our constitution. Section 195(1) requires, inter alia, that a high standard of professional ethics must be promoted and maintained; and that efficient and effective use of resources must be promoted.'

[35] In cases involving the disbursement of public funds, judicial scrutiny may be essential. . . . . "

35. There has unfortunately in this case been no compliance by the court *a quo* with its duties as set out in the above excerpts of the SCA judgment.

36. Be that as it may, what is of concern is the apparent eagerness with which the respondent's legal representatives embraced those parts of the order which suited them, when they should have known that the whole order constituted a misdirection. I am however aware that hindsight is the father of wisdom and while the respondent's legal representatives may be criticized for their handling of the matter, I do not think that it is deserving of a cost order *de bonis propriis.* They are however warned that in future the court might not take such a lenient approach.

Closing remarks

37. Mr Eia has suggested that the respondent's claim for loss of earnings (past and future) be resubmitted, with the correct contingencies, to Koch Actuaries for a recalculation. This is not necessary. The calculation is simple enough to make, given the appellant's concession that the respondent's career path in paragraph 13 of the order of 16 November 2017 is correct and therefore only the contingency for future loss of earnings and the 20% apportionment need to be factored into Kochs original calculations. The order which follows incorporates the apportionment and contingencies where applicable.

The following order is made:

a) The appeal succeeds.

b) The order of Pakati J dated 16 November 2017 is set aside and replaced with the following:

1. The Defendant will pay the Plaintiff, not later than 14 days from date of this order, the amount of R640, 000-00, for general damages suffered by the Plaintiff arising out of the injuries sustained by him in the motor vehicle collision on 10 January 2009.

2. The Defendant will pay the Plaintiff, not later than 14 days from date of this order, the amount of R2,327 483-12 for the past and future loss of earning capacity.

3. The Defendant will pay the Plaintiff's past medical expenses in the amount of R30, 931-83.

4. The Defendant will pay the Plaintiff's taxed or agreed party and party costs on the High Court Scale which will include:

4.1 The qualifying fees of the following experts:
Dr Hans Enslin
Dr Theo Enslin
Dr Everd Jacobs
Ben Janecke
Letitia Delport
Dr Robert Koch
Drs Von Benzing Graham & Brand
Dr Hans Relling

4.2 The reasonable travelling and accommodation costs, subject to the discretion of the Taxing Master, of the Plaintiff from Kimberley to Welkom, Bloemfontein, Cape Town and Pretoria, and back, to consult with the experts of the Plaintiff and the Defendant.

4.3 The reasonable travelling and accommodation costs, subject to the discretion of the Taxing Master, of the legal representatives of the plaintiff from Kimberley to Welkom, Pretoria, Bloemfontein and Port Elizabeth, and back, to consult with the experts of the plaintiff, to wit.

5. The Plaintiff shall in the event that costs are not agreed, serve the Notice of Taxation alternatively the notice contemplated in Rule 70 (3B) of the Rules, whichever is applicable, on the Defendant's attorneys of record.

6. The Plaintiff shall allow the Defendant 14 (fourteen) days to make payment of the taxed costs.

7. The Defendant will pay interest on the above amounts at the rate of 10.25% per annum, if the Defendant fails to make payment referred to in paragraph 6 above.

8. The Defendant will pay interest on the amounts in paragraphs 1, 2 and 3 at the rate of 10.25% per annum, if the Defendant fails to make payment within 14 days of date of this order.

9. The Defendant will supply the Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, limited to 80% for those costs of future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision on 10 January 2009, after such cost has been incurred and upon proof thereof:

9.1 Such cost will include the cost of a gardener once per week and a domestic worker once per week.

10. The plaintiff's attorneys are directed to keep the monies received, including interest thereon in an interest bearing

account for the benefit of the plaintiff until a curator bonis is appointed to administer the funds of the plaintiff.

11. The defendant is ordered to pay the reasonable taxed or agreed costs in respect of the appointment of a *curator bonis*.

(c) The costs order of 14 June 2018 is set aside and replaced with:

"Each party is to pay his own costs relating to the proceedings of 25 January 2018."

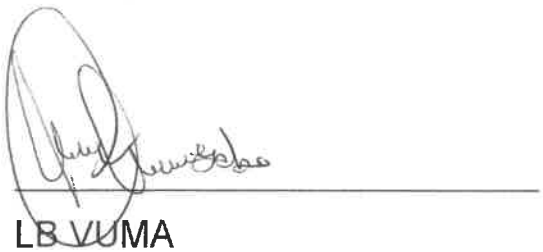
(d) The respondent is ordered to pay the appellant's costs of the appeal.

CC WILLIAMS
JUDGE

I concur

MV PHATSHOANE
JUDGE

I concur



LB VUMA

ACTING JUDGE

For Appellant: Adv. P Eia
Robert Charles Attorneys

For Respondent: Adv. A De Vos SC
With Adv C Botha
Elliot Maris Wilmans & Hay