

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 44466/2018

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

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DATE

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SIGNATURE

In the matter between:

L: N obo

Plaintiff

L: K

and

THE ROAD ACCIDENT FUND

Defendant

HEARD ON: 10 FEBRUARY 2020

JUDGMENT

MIA, J

- [1] On 10 February 2020, counsel for the plaintiff and defendant handed up various documents, the first being exhibit 1, being the agreed facts and opinions extracted from the expert's reports; discovered documents; and pre-trial minutes. The defendants produced no expert

minutes. The plaintiff's experts reports were the only reports on which the matter was to be determined. The remainder of the documents related to the contingency fee agreement and an affidavit to set up a trust for the protection of the minor. The plaintiff sued the defendant in terms of the Road Accident Fund Act, 56 of 1996, for injuries sustained by her minor child during a motor-vehicle collision which occurred on 10 March 2018.

- [2] The plaintiff claimed damages from the defendant in her representative capacity on behalf of her minor child, aged 12 years and 9 months. The collision causing the damages occurred when the minor child was 10 years old. The parties agreed that this action be determined on the basis of the agreed facts as contained in exhibit 1. The court was also referred to the actuarial calculations to assist with the calculation regarding the general damages and future loss of earnings to be determined.
- [3] The defendant accepted 100% liability to compensate the plaintiff in her personal and representative capacity for all damages suffered by the minor child as a result of the injuries sustained during the collision. The defendant further undertook to deliver an undertaking for future medical and hospital expenses and modalities as envisaged in section 17(4) (a) of the Road Accident Fund Act.
- [4] On the day of the collision the child was on his way home from the swimming pool. He was crossing the road when he was hit by a motor vehicle at around 18h00. He was hospitalised at Charlotte Maxeke and was in the Intensive Care Unit for a week and transferred to a general ward thereafter. He was hospitalised from 10 March 2018 to 19 March 2018. He sustained injuries to his head, face and his left hip region.

After receiving treatment he still experiences health and mobility issues. His injuries will be discussed further below.

[5] The minor child was examined by the following experts:

- 5.1 Dr Read (Orthopaedic Surgeon);
- 5.2 Dr G Marus (Neurosurgeon);
- 5.3 Ms A Cramer (Clinical Psychologist)
- 5.4 Ms L Jacquire(Occupational Therapist);
- 5.5 Prof. L.A. Chait (Plastic Surgeon)
- 5.6 Ms A Mattheus (Educational Psychologist)
- 5.7 Ms M Hough (Industrial Psychologist)
- 5.8 Munro Actuaries

[6] The defendant previously admitted the medico legal reports of the plaintiff's orthopaedic surgeon, clinical psychologist, plastic surgeon and neurosurgeon but did not admit the severity of the minor child's head injury until the 10 February 2020. The defendant subsequently admitted the plaintiff's reports on the occupational therapist, all the psychologists, including the industrial psychologist and the actuarial calculation.

[7] The court is required to quantify the general damages and the minor's future loss of earnings.

[8] According to the experts the minor sustained the following injuries:

8.1 an open depressed occipital skull fracture with resultant moderate to severe brain injury and lacerations to the skull;

8.2 comminuted fracture of the superior pubic ramus

8.3 left ear laceration;

8.4 chest wall abrasions;

8.5 small amount of free fluid in the abdomen;

8.6 soft tissue injury to the pelvic region.

The minor only woke up after a week and remained confused until 17 March 2018 according to nursing staff records. He was kept sedated on morphine and Dormicum.

[9] The child returned to school three months after the collision and his mother received complaints that he was unco-operative and preferred to play outside. He failed his June exams and was condoned at the end of grade 5 without writing exams. He is prone to short temperateness, experiences occasional headaches and has undergone behavioural changes. He does not like doing homework and prefers to play outside. Cold weather aggravates the pain in his pelvis. He also suffers from impaired balance post the collision. He has also stopped playing sport at school.

[10] The orthopaedic surgeon indicates he will require an annual consultation to follow up on his pelvic X-rays until he reaches maturity and provision needs to be made for future surgery. The neurosurgeon indicates a moderately severe concussive injury based on the child's lack of consciousness for a week and his inability to recall what occurred and how he got to the hospital. The conclusion is thus with the post traumatic amnesia displayed, his injury appears to be compatible with a moderate to severe brain injury. Both his personality

change and the poor academic performance are indicative of the moderate to severe brain injury according to the neurosurgeon.

- [11] The occupational therapist indicates he scored below average for motor co-ordination and will require occupational therapy to address this shortfall. The various scars on his knee, shin, scalp and forehead will also require attention. The plastic surgeon indicates that whilst all these can be treated the minor will still be permanently disfigured, impacting on future recreation and employment opportunities. According to the clinical psychologist his cognitive functioning, memory and concentration is impacted and this in turn affects his academic performance. The cognitive difficulties according to this expert are considered to be related to the cerebral damage. The minor is also considered to have suffered losses in scholastic functioning and academic progress as a result of the accident.
- [12] The educational psychologist noted that he had pre-existing learning difficulties evidenced by his repeating certain grades. His absence from school and the head injury impacted on his learning ability further and on his academic performance. It is concluded that he would struggle in a mainstream school and would be best placed in a vocational school. He would most likely leave this setting at the age of 18 years with a NQF level 2 and acquire a vocational skill such as welding or spray painting, making him eligible for sheltered employment.
- [13] The industrial psychologist opines that in the pre-morbid scenario if the minor had completed the Higher Certificate or Higher Certificate Courses he could have entered the semi-formal labour market where he would have been paid a basic salary according to the Paterson scales, plus a 13th cheque. It is envisaged he would have progressed to the Paterson level C1 where he would have reached the occupational ceiling and would not have progressed further after the

age of 45 years old. Increases in his income thereafter would have been limited to inflationary increases. The post morbid scenario indicates that he will only be eligible for sheltered employment. His earnings and future prospects will be limited and insignificant. There are limited opportunities for sheltered employment coupled with high unemployment rates. In view of the above the industrial psychologist is of the view that the minor will remain unemployable for the rest of his life.

FUTURE LOSS OF INCOME

- [14] An actuarial report was handed in by agreement between the parties. The actuary's method of calculations as well as the assumptions on which the calculations were based, has not been disputed. The minor's income was projected at R172 050.00 per year from January 2028, with a ceiling income of R403 300.00 per annum being reached in the year May 2052. His projected income was estimated at R 5 402 700.00. A 35 % contingency was applied in view of his back ground. He attends a school which is overcrowded and does not receive any extra attention to address the learning difficulties he experiences, he repeated one grade three times; he comes from an impoverished background and his mother was not able to support him to improve his academic performance. He lives in overcrowded conditions in a two bedroom home with extended family. Counsel for the plaintiff argued that whilst a 20 % contingency would ordinarily be applicable in view of the above factors the contingency was increased to 35% to accommodate the above factors. This results in a deduction of R1 890 945.00, bringing the future loss of earnings to R3 511 755.00. The contingency percentage is appropriately applied having regard to the factors considered above.

GENERAL DAMAGES

[15] In support of the claim for general damages counsel referred the court to various cases. In *N. obo N. v Road Accident Fund (60812/14) ZAGPPHC 1116* (1 November 2016), a thirteen year old boy suffered a brain injury and lacerations to the head. The brain injury caused irreversible significant long term neurocognitive sequelae and was described as a severe brain injury. The minor was awarded R1 400 000.00 bringing the current value to R1 600 000.00. In *Minnie NO v Road Accident Fund 2012 (6A6) QOD 82 (GSJ)* the minor would only have been able to work in sheltered employment after a serious head injury. The court awarded R 800 000.00 which bears a current value of R 1 271 000.00. In view of the above awards both counsel agreed that the amount of R 1000 000.00 was a fair amount.

[16] I accept the basis for calculations set out in the actuary's report. I turn to deal with the contingency allowance to be made. Counsel for the plaintiff and defendant agreed with the contingency allowance of 35%. The allowance to be made in respect of contingencies falls within this Court's discretion. The court has a wide discretion is evident from the judgment in *Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A)* at 116G–117A. In the assessment of the appropriate allowance for contingencies the court has taken into account plaintiff's tender age, his impoverished background, his learning difficulties prior to the collision and subsequently. These factors would have impacted on his future career prospects. Having regard to these considerations the court is of the view that the contingency deduction of 35% is appropriate.

[17] Having considered all relevant factors and experts reports and the case law referred to, the court is of the view that the sum of R1 000 000.00 would constitute fair and adequate compensation in respect of the plaintiff's general damages and the amount of R 3 511 755.00 is a fair amount of compensation for the plaintiff's future loss of earnings.

[18] In conclusion, the full amount for general damages and loss of income is therefore R 4 511 755.00 as provided in the draft order handed up. The draft order made provision for the applicable rate of interest, the undertaking to be furnished in terms of section 17 (4) (a) of the Road Accident Fund Act, 56 of 1996. I have also noted the affidavit regarding the trust to be set up as well as the contingency fee agreement which all appear to be in order.

[19] Having considered the exhibits and having heard counsel herein I make the following order:

1. The draft order marked " X" is made an order of court.

S C MIA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the plaintiff	:	Adv. P. Uys
Instructed by	:	Kruger & Pottinger Attorneys
On behalf of the defendant	:	Adv. V. Maqethuka
Instructed by	:	Mathipane Tsebane Attorneys
Date of hearing	:	10 February 2020
Date of judgment	:	12 February 2020