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

CASE NO: 30913/2017

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

03.08.2022

In the matter between:

**D [....] 1 F [....] T [....] on behalf of
D [....] 2 V [....]**

plaintiff

and

ROAD ACCIDENT FUND

defendant

JUDGMENT

CRUTCHFIELD J:

[1] This matter served before me on Thursday 28 and Friday 29 July 2022, in respect of a claim for damages brought by the plaintiff pursuant to injuries and their *sequelae* suffered by the plaintiff's child as a result of a motor vehicle collision ('the collision').

[2] The plaintiff is D [...] 1 F [...] T [...] in her representative capacity as the biological mother and legal guardian of D V, born on 20 December 1999.

[3] The defendant is the Road Accident Fund established under s 2(1) of the Road Accident Fund Act 56 of 1996. The defendant did not appear at the trial.

[4] Certain heads of damages became settled prior to the trial commencing before me. The issues of the plaintiff's loss of income earning capacity and general damages came before me for determination.

[5] This judgment deals with the applicable contingencies to be applied to the plaintiff's claim for loss of income earning capacity.

[6] The plaintiff, a minor at the time that the collision occurred on 2 October 2016 and upon inception of these proceedings was represented by her mother in the litigation. The defendant was the Road Accident Fund.

[7] The plaintiff was a major when the matter came before me.

[8] In respect of the plaintiff's future loss, the plaintiff's counsel submitted that a contingency of 15% should be applied to the pre-morbid scenario and a contingency of 30% on the post morbid scenario, resulting in a claim of R2 506 476.00 for loss of income earning capacity.

[9] In *Road Accident Fund v Gueddes*,¹ referring to *Goodall v President Insurance Co Ltd*², the court applied a 'sliding scale' of 0.5% per year to retirement age.

[10] The victim is currently of 21 years and seven months of age and her anticipated age of retirement is 65 years.

[11] Upon an application of the 'sliding scale,' a pre-morbid contingency of 21% is appropriate in this matter. A post- morbid contingency of 15% is ordinarily utilised in matters such as this.

[12] The contingencies abovementioned applied to the plaintiff's actuary's calculations under scenario 1 result in a loss of R2 196 925.00 in respect of the claim for loss of earning capacity.

[13] The plaintiff's claim for general damages stands to be referred to the HPCSA for a determination on whether the plaintiff's injuries qualify as serious in terms of regulation 3 of the Road Accident Fund regulations of 2008.³

[14] The victim agreed to the establishment of a trust for the protection of the proceeds of the claim in the light of the brain injury sustained by her in the collision.

[15] In the circumstances, an order was granted in the following terms:

¹ *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at 587 – 588.

² *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W).

³ *Road Accident Fund v Duma* 2013 (6) SA 9 SCA para 19-20 ('Duma'); *Road Accident Fund v Faria* 2014 (6) SA 19 SCA para 34 ('Faria').

1. The defendant shall pay the sum of R2 196 925.00 (two million, one hundred and ninety six thousand, nine hundred and twenty five rand), to the plaintiff's attorneys, MOSUNGWA ATTORNEYS, in settlement of the plaintiff's claim for future loss of earnings arising from the injuries she sustained in the motor vehicle collision that occurred on 2 October 2016 and its *sequalae*, which amount shall be paid to the plaintiff's attorneys by direct transfer into their trust account, details of which are as follows:

Account Name: MOSUNGWA ATTORNEYS TRUST ACCOUNT

Account number: [...]

Branch: Johannesburg

Bank: Standard Bank

2. The capital amount referred to in paragraph 1:

2.1 Is payable within 180 days from date of the order;

2.2 Will bear interest at the rate of 10.25% per annum calculated from and including the 15 (FIFTEENTH) calendar day after the date of this order up to and including the date of payment thereof.

3. The defendant shall provide the plaintiff with an undertaking as envisaged in section 17(4)(a) of Act 56 of 1996, for 100% of the costs of the future accommodation in a hospital or nursing home and such treatment, services or goods as the plaintiff may require as a result of the injuries that she sustained in the accident on 2 October 2016, as set out in the medico legal reports obtained on behalf of the plaintiff, after such costs have been

incurred and upon proof thereof, which costs shall include:

3.1 The costs to be incurred in the establishment of a trust to *inter alia* protect, administer and/or manage the capital amount and the proceeds thereof referred to in paragraph 1 of this order;

3.2 The costs of the appointment and remuneration of the Trustees in administering the capital amount, which remuneration shall amount to 1% per annum on the amount held in the trust;

3.3 The costs of administering the statutory undertaking furnished in terms of section 17(4) (a) of the Road Accident Fund Act; and

3.4 The costs of the annual security bond/s to meet the requirements of the Master of the High Court in terms of section 77 of the Administration of Estates Act, No. 66 of 1965, as amended.

4. The defendant shall provide the aforesaid Undertaking within fourteen (14) days of this order.

5. The plaintiff's attorney, MOSUNGWA ATTORNEYS, shall:

5.1 Cause a trust ("the Trust") to be established in accordance with the Trust Property Control Act No. 57 of 1988, within six months of the date of granting of this order and shall approach this Court for condonation and further direction/s should the Trust not be established within the said period of six months;

5.2 Deposit all proceeds in terms hereof into an interest-bearing account, for the sole benefit of the plaintiff, as contemplated in the Legal Practice Act 28 of 2014, pending the establishment of the Trust;

5.3 Pay all monies held in trust by them for the benefit of the plaintiff, to the Trust immediately upon creation of the Trust;

5.4 Be entitled to deduct their disbursements from the aforesaid amount.

6. The Trust instrument contemplated above shall make provision for the following:

6.1 The plaintiff is the sole beneficiary of the Trust during her lifetime and after her death, her lawful descendants;

6.2 The sole purpose of the Trust is to administer the capital amount and the proceeds thereof referred to in paragraph 1 of this order, in a manner that best takes account of the plaintiff's interests;

6.3 Subject to the approval of the Master of the High Court, the First Trustees shall be:

6.3.1 THEMBA HAWULEGWE NXUMALO with identity number [...], as representative of TRUST CARE (Pty) Ltd, as an independent Trustee;

6.3.2 ETTUS ATHUR MAKAMU, an admitted attorney of this court, as an independent Trustee;

6.3.3 D [...] 1 F [...] T [...], the mother of the plaintiff and a Trustee by virtue of being a member of the plaintiff's family.

6.4 The two independent Trustee(s) are to provide security to the satisfaction of the Master during the lifetime of the plaintiff;

6.5 The family member appointed as a Trustee shall be exempt from filling security as a Trustee to the Master of the High Court;

6.6 Ownership of the Trust property vests in the Trustees of the Trust in their capacity as Trustees;

6.7 The Trust property to be excluded from any community of property or accrual arising from any valid marriage concluded by the plaintiff;

6.8 The Trustees be authorised to recover the remuneration of and costs incurred by the Trustees in administering the undertaking in terms of section 17(4)(a) of Act 56 of 1996 in accordance with the Undertaking to be provided by the defendant;

6.9 The amendment or termination of the Trust instrument be subject to the leave of this Court during the lifetime of the plaintiff;

6.10 The Trust property and the administration thereof be subject to an annual audit during the lifetime of the plaintiff.

7. The Trust instrument shall *inter alia* make provision for the following:

7.1 The plaintiff to be provided with a reasonable monthly allowance if reasonably required by the plaintiff;

7.2 The number of Trustees of the Trust shall be three (3) and such number shall not be exceeded or reduced;

7.3 The Trustees shall include at least one (1) independent professional Trustee who must be properly qualified to administer the Trust assets;

7.4 The composition of the board of Trustees and the structure of the voting rights of the Trustees shall be such that:

7.4.1 The calling and holding of meetings is specified;

7.4.2 The taking of all resolutions is properly regulated and recorded in writing;

7.4.3 Procedures to resolve any potential disputes are specified;

7.4.4 The independent Trustee/s cannot be overruled or outvoted in relation to the management of the Trust assets by any other Trustee/s;

7.4.5 A deadlock between the Trustees is avoided;

7.4.6 In the event of the number of Trustees being reduced below three as prescribed; the remaining Trustees are prevented and/or precluded from acting otherwise than to achieve the appointment of a replacement Trustee,

7.5 No charge shall be made by the Trustees in relation to the receipt of the initial or any subsequent payment to the Trust of the proceeds of the litigation.

7.6 The powers of the Trustees shall be exercised:

7.6.1 Subject to the approval of the Master of the High Court;

7.6.2 In a tax efficient and cost- effective way at all times including but not limited to making investments;

7.6.3 With specific reference to the circumstances of the plaintiff and such as to include but not be limited to:

7.6.3.1 applying the nett income of the Trust Fund and if that is not adequate at any time for the purpose, the capital thereof, for the maintenance of the plaintiff, her general upkeep, welfare

benefits and rehabilitation and the acquisition or provision of residential facilities or a residence for the plaintiff. The income not used as aforesaid shall accumulate to the capital;

7.6.3.2 The right to invest and reinvest the Trust capital and/ or income subject always to the interests of the plaintiff and her circumstances;

7.6.4 The duty of the Trustees or any one of them to disclose any personal interest in any transaction involving the Trust property, to the Master of the High Court.

8. The plaintiff's attorneys shall not recover their fee/s until such time as the party and party bill of costs has been taxed.

9. The provisions of this order shall be exercised in accordance with the provisions of the Trust Property Control Act, No. 57 of 1988, and, subject to the approval of the Master.

10. The defendant is directed to pay to the plaintiff's attorneys, the costs of the action to date which costs shall include, subject to the discretion of the Taxing Master:

10.1 The costs attendant upon obtaining payment of the capital amount set out in paragraph 1 hereof;

10.2 The costs consequent upon the employment of counsel, which costs shall include, preparation, consultations, appearance on trial on 28 and the reasonable costs of 29 July 2022;

10.3 The reasonable costs of the reports, addendum reports, if any, RAF4 forms, joint minutes, if any, and the preparation and reasonable reservation costs to be determined by the Taxing Master of the expert witnesses.

11. The aforesaid costs are to be paid by the defendant to the plaintiff's attorneys to be held in Trust as per paragraph 5 above.

12. Payment of the costs is subject to the following conditions:

12.1 The plaintiff shall, in the event that costs are not agreed, cause the notice of taxation to be served on the defendant; and

12.2 The plaintiff shall allow the defendant¹⁴ (fourteen) court days after taxation to make payment of the taxed costs.

12.3 The defendant is directed to pay interest *a tempora mora* on the aforesaid agreed or taxed costs or any part thereof from 14 days after agreement or taxation to date of payment.

13. This order must be served by the plaintiff's attorneys on the Master of the High Court within 30 (thirty) days from the date of this order.

14. The contingency fee agreement concluded between the plaintiff and her attorneys of record is declared invalid.

15. The issue of the plaintiff's general damages is:

15.1 Separated in terms of Rule 33(4) and postponed *sine die* pending the determination by the HPCSA on whether the plaintiff's injuries qualify as serious in terms of regulation 3 of the Road Accident Fund regulations of 2008.

CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **3 August 2022**.

COUNSEL FOR THE APPLICANT:	Mr L L Mathebula
INSTRUCTED BY:	Mosungwa Attorneys
COUNSEL FOR THE DEFENDANT:	No appearance
INSTRUCTED BY:	No appearance
DATE OF THE HEARING:	28 & 29 July 2022
DATE OF JUDGMENT:	3 August 2022