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

Case Number: 2017/45731

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

In the matter between:

ADV LUVUNO N.O

obo S: N M E

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CLAIM NO: [...]

LINK NO: [...]

Neutral Citation: *Adv Luvuno NO obo S: N M E v Road Accident Fund* (Case No: 2017/45731) [2023] ZAGPJHC 426 (5 May 2023)

JUDGMENT

AYAYEE AJ:

Summary: Default trial against the Road Accident Fund. Determining

appropriate

award of general damages.

[1] This matter proceeded before me on 19 April 2023 as an action for default judgment. The plaintiff in the present matter, is the appointed *curator ad litem*, having been so appointed by an order of this Court on 16 September 2021. The plaintiff thus acts in a representative capacity, on behalf of the minor child (hereinafter referred to as “*the Patient*”).

[2] On 7 April 2022 the interlocutory Court struck out the defence of the Road Accident Fund (hereinafter referred to as “*the Fund*”). The plaintiff was further granted leave to approach the Registrar for the allocation of a default judgment trial date. Despite such fact at the commencement of the proceedings I was advised of the presence of a Ms Nkateko Mhlongo, acting as a representative of the Fund. Whilst there was no formal application either for the rescission of the order striking out the defence of the Fund or to allow for the Fund’s participation in the proceedings, the legal representatives of the plaintiff raised no objection, and I allowed Ms Mhlongo to address the Court to a limited extent.

[3] At the commencement of the proceedings, I was advised by the plaintiff that the parties had reached settlement of the portion of the claim pertaining to loss of earnings and earning capacity in the sum of R796 000,00. This was confirmed by the Fund’s representative. On the present facts, this amount constitutes a reasonable settlement.

[4] However, the above coupled with the fact that the Fund had previously conceded the merits, its acquiescence to the loss of earnings and earning capacity claim, was tantamount to conceding the balance of the essential elements of a delict. This is as in RAF cases; wrongfulness is inferred from the fact that the insured driver negligently caused the accident. Thus, by conceding the loss of earnings and earning capacity claim, the Fund implicitly accepts that the damages were caused by the negligence of the insured driver.

[5] A draft order was consequently handed in, *inter alia* reflecting the agreement reached on the question of loss of earnings. In consequence the issues requiring determination were limited to:

- (i) Past medical and hospital expenses, treatment and modalities;
- (ii) Future medical and hospital expenses, treatment and modalities;
- (iii) General damages.

[6] Concerning the claim for past and future medical expenses, the claimant did not in the proceedings pursue an order for payment of a globular amount for such future losses, but sought to be furnished an unlimited undertaking as envisaged in section 17(4)(a) of the Road Accident Fund Act, No. 56 of 1996, as amended (*“the Act”*), to the effect that the Fund would compensate the Patient in respect of 100% of all future medical expenses, treatment and modalities.

[7] The matter of *Knoetze obo M B Malinga v Road Accident Fund*¹ records a blanket election by the Fund to furnish an undertaking to every claimant who is entitled to a claim for payment of future medical and ancillary expenses in terms of section 17(4)(a). The judgment records:

“[26] Insofar as there may have been doubt as to either the existence of a “blanket election” or whether this fact has sufficiently been so notorious that a court could have taken judicial notice thereof, such doubt has now been removed by the Fund’s CEO. Counsel for the Fund has confirmed in open court that courts can now take judicial notice of this. The result is that, once a plaintiff proves its claim as contemplated in section 17(4)(a), it is entitled to claim an order catering for a

¹ *Knoetze obo Malinga and Another v Road Accident Fund* [2023] 1 All SA 708 (GP) (2 November 2022).

direction to the Fund to furnish such an undertaking and a court is entitled to grant such an order. This will also apply in instances where orders by default are sought.”

[8] I am accordingly satisfied that the plaintiff in this case, with the issues of negligence, causation and nature of the damages suffered having been conceded by the Fund, is entitled to such an order. I turn to deal with the sole contentious issue, being to determine an appropriate award for “*general damages*”.

[9] The facts at present are not in issue. The Patient was 14 years of age, when as a pedestrian walking on the side of the road, he was struck by a truck driven by the insured driver. As a result of the collision, the Patient was rendered unconscious with a gaping hole in the head which bled excessively and he had to be removed from the scene by an ambulance.

[10] During the trial, the plaintiff’s legal representative applied for the admission of the affidavits of the plaintiff’s various experts in terms of Uniform Rule 38(2). Exercising the Court’s broad powers to regulate its own processes in the interests of justice, the affidavits of the plaintiff’s various experts were admitted into evidence. These affidavits paint an anguishing picture of a life cut short. According to the orthopaedic surgeon, the Patient suffered a severe head injury which resulted in spastic right hemiplegia. This has amongst others led to a situation where the Patient is unable to speak and can only communicate his needs only by pointing. The Patient is unable to walk, is permanently wheelchair bound, unable to feed himself, unable to chew and is thus wholly dependent on others for all aspects of living. The orthopaedic surgeon concludes that the Patient is unlikely to regain mobility and, in all likelihood, will permanently be totally reliant on a caregiver. The Patient’s whole person impairment is pegged at 94%.

[11] The Patient’s woes are compounded by a shortened life expectancy, pegged variably by the neurosurgeon, Dr Segwapa, at a remaining 16 years, and

by the neurologist, Dr Rosman, at 26 remaining years. On all accounts the accident left the Patient severely disfigured and he had to endure months of pain. He now suffers from spastic quadriparesis which is characterised by an overall weakness in both his arms and legs although the evidence suggests that he is able to move some limbs with encouragement.

[12] The Patient has thus lost the ability to enjoy the amenities of life with the total loss of the ability to live and to function independently.

[13] The plaintiff further led evidence that the Patient is presently suffering from physical and emotional pain flowing from adjusting to his present circumstances and resulting in depression and anxiety. Whilst such argument was not countermanded by the Fund, due to the nature of the proceedings, I am minded that the evidence also pointed to the Patient being unable to speak as well as an inability to use oral, written and non-verbal communication effectively. To that extent some doubt exists in my mind as to the Patient's current state of awareness and whether being as per the neurological examination "*severely retarded with minimal response to anything at all*", whether the Patient is aware of his present circumstances, experiences complex emotions with attendant pain and depression.

[14] The Court's task in determining an appropriate award for general damages in RAF matters where there is no opposition by the Fund is a difficult task.

[15] General damages by their nature are designed to compensate the Patient for damages which cannot be quantified with reference to actual patrimonial loss. In *Smit v Road Accident Fund*² Makgoka J held:

"In determining the award of damages to be made under the heading general damages there are of course no scales upon which one can

² 2013 (6A4) QOD 188 (GNP).

weigh things like pain and suffering and loss of amenities of life, nor is there a relationship between either of them and money which makes it possible to express that in terms of money with any approach to certainty. The broadest general consideration and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all circumstances of the case."

[16] Ultimately a Court confronted with a claim for general damages, must do the best it can on the evidence available by assessing damages with regard to all relevant facts in applying a general discretion.

[17] In this matter, I am of the view that the following considerations are material and relevant to the determination of the general damages to be awarded. They are on the undisputed facts that:

- 17.1 The collision has left the Patient severely disfigured;
- 17.2 The Patient spent five months in hospital, with attendant pain and discomfort;
- 17.3 The Patient spent a further thirteen months in rehabilitation in circumstances where the evidence of the orthopaedic surgeon reveals, that the Patient suffers extra pain each time that his hips flex;
- 17.4 The Patient is permanently disabled;
- 17.5 The Patient suffered acute pain for two weeks after the collision and chronic pain for at least approximately six months;
- 17.6 The Patient has been rendered totally dependent on others for all aspects of living;

17.7 The Patient now has a shortened lifespan;

17.8 There is evidence (whilst open to doubt) that the Patient continues to suffer emotional pain, adjustment difficulties, as well as experiences depression.

[18] Despite the above considerations, this Court is also minded of the fact that it must equally be conservative and ensure that whilst giving compensation to the Patient, it does not “*pour out largesse from the horn of plenty at the defendant’s expense*”³ and it must also recognise that there is regrettably a limit to the interventions for which such monies awarded may be employed to ease the suffering of the Patient. As submitted in heads of argument filed on behalf of the Plaintiff “*the Patient has reached maximal medical improvement*”.

[19] At the close of the plaintiff’s case, I afforded Ms Mhlongo being the representative of the Fund an opportunity to make submissions as to the Fund’s view of an appropriate award for general damages. The Fund’s representative submitted that an appropriate award would be in the amount of R2 200 000,00. Pressed for a justification for this amount, she could provide no reasons. Her submission is thus of no assistance to the Court.

[20] Having had regard to the facts of the matter, and with reference to the evidence and the submissions of the representatives of the parties, I make the orders set out hereinbelow:

It is ordered that:

[1] The defendant shall:

1.1 compensate the plaintiff:

³ *Pitt v Economic Insurance Co Ltd* 1975 (3) SA 284 (N) at 287.

1.1.1 for 100% of the proven or agreed delictual damages sustained by the Patient during the motor vehicle collision which occurred on 17 September 2016;

1.2 pay to the plaintiff:

1.2.1 the amount of R2 696 000,00 (two million six hundred and ninety-six thousand rand) (*“the capital sum”*):

1.2.1.1 comprising the amounts of:

1.2.1.1.1 R1 900 000,00 in respect of general damages;

1.2.1.1.2 R796 000,00 in respect of loss of earnings and earning capacity;

1.2.1.2 within 180 (one hundred and eighty days) from date of this order (*“the payment date”*);

1.2.2 interest on the capital sum at the rate of 9.75% per annum, calculated:

1.2.2.1 from the date of judgment;

1.2.2.2 to the date of final payment;

in the event of the defendant failing to pay the capital sum by the payment date,

by electronic fund transfer into S.S Ntshangase Attorneys Trust cheque account ([...]) maintained at Nedbank (Branch Code [...]);

(*“the compensation payment”*).

[2] The compensation payment shall be made:

- 2.1 into the attorney’s trust account, which trust account shall be one envisaged in terms of section 86(4) of the Legal Practice Act, 28 of 2014;
- 2.2 for the sole benefit of the Patient, pending the establishment of a trust contemplated in paragraph 4, and the issuing of letters of authority (*“the Trust”*).

[3] The defendant shall pay directly to the attorneys, the costs of suit in this action (to date), as taxed on a party and party scale:

- 3.1 such costs to include the costs:
 - 3.1.1 attendant upon the obtaining of the order for the payment of the compensation costs;
 - 3.1.2 occasioned by the employment of counsel inclusive of the costs of preparing heads of argument;
 - 3.1.3 arising from:
 - 3.1.3.1 the creation of the Trust;
 - 3.1.3.2 the provision of security by the

trustee(s) of the Trust;

3.1.3.3 the management of the Trust;

3.1.4 occasioned by the preparation of the expert reports of:

3.1.4.1 Dr Rosman, neurologist;

3.1.4.2 Dr Segwapa, neurosurgeon;

3.1.4.3 Dr Barlin, orthopaedic surgeon;

3.1.4.4 Ms M R India, occupational therapist;

3.1.4.5 Dr Fine, psychiatrist;

3.1.4.6 Dr Selahle, plastic and reconstructive surgeon;

3.1.4.7 Dr Botha, specialist physician;

3.1.4.8 Ms Mokgata, speech and language therapist;

3.1.4.9 Dr Maluleke Baloyi, physiotherapist;

3.1.4.10 Mr Tshikovhele, clinical psychologist;

3.1.4.11 P Ntlhe, educational psychologist;

3.1.4.12 Dr Shaik, industrial psychologist;

3.1.4.13 Mr Jacobson, actuary;

3.1.5 the Patient's reasonable travelling expenses to and from medico-legal appointments.

[4] The plaintiff's attorneys are hereby directed to:

- 4.1 cause a trust (hereinafter referred to as "*the Trust*") to be established in accordance with the provisions of the Trust Property Control Act, 57 of 1988, within a period of 6 (six) months from the date of this order to administer the estate of the Patient;
- 4.2 pay all monies held in trust by them for the benefit of the Patient to the Trust after deduction of their fees, costs and disbursements.

[5] The plaintiff's attorneys must after the taxation of all bills of cost in the action, pay over to the trust all such legal costs as may be recovered.

[6] The Trust instrument contemplated in paragraph 4 of this order, shall make provision that:

- 6.1 the Patient is the sole capital and interest beneficiary of the Trust;
- 6.2 the trustees are to provide security to the satisfaction of the Master, however, should Phumla Millicent Nkhize be nominated as a trustee, she is absolved from providing security;
- 6.3 the trustees are to query and satisfy themselves within 6 months of appointment that necessary steps have been engaged to recover, legal costs associated with this action, that are subject to taxation, but which are due to the Trust;
- 6.4 the ownership of the Trust property vests in the trustees of the

Trust in their capacity as trustees;

- 6.5 at least 2 (two) but not more than 3 (three) trustees must be appointed of which at least 1 (one) must be an independent professional trustee. Trustees are to be nominated by Phumla Millicent Mkhize, the legal guardian of the Patient;
- 6.6 the primary purpose of the Trust is to administer the funds in a manner which best takes into account the ongoing interests of the Patient;
- 6.7 the trustees will have the right to purchase, sell and mortgage immovable property, invest and re-invest the trust capital and to pay out so much of the income and/or capital as is reasonably required to maintain the Patient (with due regard being had to the obligations of any person having a duty to support the Patient, the requirements of the Patient and the purpose of the award of damages);
- 6.8 the powers and authority of the trustees shall not exceed those usually granted to trustees of special trusts;
- 6.9 the trustees shall set out procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by a Court of law;
- 6.10 the amendment of the Trust Deed be subjected to the leave of this Honourable Court;
- 6.11 upon the termination of the Trust upon the death of the Patient, the remaining assets in the Trust shall devolve upon the Patient's legal heirs;

- 6.12 the Trust property and the administration thereof be the subject of an annual audit;
- 6.13 in the event of the Trust not being created within 6 (six) months from the date of this order, the plaintiff and his attorneys are directed to approach this Court within 3 (three) months after the expiry of the first period of 6 (six) months, to obtain further directions about the manner in which the capital amount should be further administered on behalf of the Patient.
- [7] The Trust Deed shall make provision for the following payments:
- 7.1 The costs of the creation of the Trust and the appointment of a trustee, *inter alia*, to protect, administer and/or manage the compensation payments (inclusive of interest);
- 7.2 The costs of the trustees furnishing annual security and obtaining an annual security bond to meet the requirements of the Master of the High Court in terms of section 6(2)(a) of the Trust Property Control Act, 57 of 1988, as amended.
- [8] The plaintiff's attorneys are directed to pay all monies held in trust by them for the benefit of the Patient to the Trust, after making the payments envisaged in paragraph 4.2.
- [9] The attorneys shall be entitled to make payment of:
- 9.1 expenses incurred in respect of accounts rendered by:
- 9.1.1 the expert witnesses;
- 9.1.2 counsel employed on behalf of the plaintiff;

9.1.3 their own fees pertaining to this action,

from the funds held by them in trust for the benefit of the Patient, subject to the limitations set out above, and taking into account the amounts recovered from the defendant for expert fees.

[10] Trustees of the trust shall ensure that the payments to be deducted by the plaintiff's attorneys, as disbursements and/or as their own fees are fair and reasonable.

[11] The Trustees shall ensure the taxation of the attorney own client bill, as presented by the plaintiff's attorneys, should such amount be in excess of 25% of the compensation payment. In all circumstances, the trustees shall ensure that the amounts claimed as payment by the plaintiff's attorneys constitute fair and reasonable charges for their services and is in strict accordance with the provisions of Section 2(2) of the Contingency Fees Act 66 of 1997.

[12] The defendant shall furnish an unlimited undertaking as envisaged in section 17(4)(a) of the Road Accident Fund Act, No. 56 of 1996, as amended, to the effect that the defendant shall compensate the Patient in respect of 100% of:

12.1 the costs of the future accommodation of the Patient in a hospital or nursing home;

12.2 the treatment of the Patient;

12.3 the rendering of medical and associated services to the Patient;

12.4 the supplying of goods to the Patient,

after such costs have been incurred and on proof thereof arising from the injuries sustained by the Patient, which forms the subject-matter of this action.

[13] This order must be served by the plaintiff's attorneys on the Master of the High Court, Gauteng Local Division (Johannesburg) within a period of 30 (thirty) days of the making thereof.

A E AYAYEE

ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 5 May 2023

Appearances:

On behalf of the plaintiff:	Adv. P. Uys
Instructed by:	SS Ntshangase Attorneys
On behalf of the respondent:	Ms Nkateko Mhlongo
Instructed by:	State Attorney

Date Heard:	19 April 2023 (matter recalled on 20 April 2023)
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Handed down Judgment:	5 May 2023
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