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

CASE NUMBER: 2016 / 38846

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
27 January 2023

In the matter between:

N[....]: A[....] OBO
Z[....] N[....] Applicant

and

ROAD ACCIDENT FUND Defendant

JUDGEMENT

Z KHAN AJ

BACKGROUND

1. This is an application for default judgment against the Road Accident Fund for an amount of R 3 368 900.

2. The Plaintiff claims compensation on behalf of her biological minor daughter, for damages suffered as a result of a motor vehicle collision on 5 May 2014, when the minor was 4 years of age. The injuries include a head injury, occipital hematoma, hearing impairment, cognitive impairment and sequalae including an inability to follow instructions.

3. The Defendant previously conceded 100% liability in favour of plaintiff and agreed to payment of an amount of R 450 000 in respect of the claim for General Damages. An undertaking for the minors future treatment and ancillary services in terms of section 17(4)(a) of the Road Accident Fund was also to be furnished. This agreement was made an order of court on 5 December 2017. The determination of the minor's future loss of earning was postponed.

4. On 7 June 2021, the Defendant was ordered to attend a pretrial conference with the Plaintiff. This did not occur. On 20 September 2022, the Defendants defence was struck off by order of court and the matter referred for default judgment.

CURRENT EVENTS

5. The Plaintiffs legal team indicated an eagerness to proceed to finalise the application for default judgment on the presently uncontested medico legal reports of various experts before the court.

6. It was initially the stance of the Plaintiff that the Defendants defence had been struck off and as this was an application for default judgement, the court could not

entertain submissions by Mr Coetzee, a state attorney appearing for the Defendant. This stance was rightly abandoned during argument, provided Mr Coetzee limited himself to submissions based on the Plaintiffs medico legal reports and the law.

7. Mr Coetzee drew the courts attention to the fact that the majority of the medico legal reports before the court featured assessments of the minor during 2017 when she was 7 years old. The initial report of the Industrial Psychologists is dated 27 September 2017 and actuarial calculation is dated 10 November 2017. A revised assessment of the minor was carried out by the Educational Psychologist on 9 April 2019 with the report dated 17 November 2019, when the minor was 9 years old. The minor is currently 12 years old.

8. The Plaintiffs representatives sought to finalise the matter on the papers before the court and estimated a duration of 1 hour for the default judgment application in their practice note. There was no indication that any witness was to be called to testify in furtherance of the application for default judgment.

9. Mr Vilakazi explained that the earlier court attending to the order relating to liability and the payment in respect of General Damages required the minors reassessment in 2019, which was done. It then transpired that the panel of attorneys representing the Road Accident Fund had their mandates terminated and the Road Accident Fund was rudderless. Covid then intervened and this resulted in a further delay in finalising the matter.

10. Mr Coetzee advised that it was not his instructions to seek a postponement of the matter but that the court ought to take into account that the medico legal reports furnished on behalf of the Plaintiff were “stale” and thus of little evidentiary benefit. He also advised that the minors current school reports were not before the court, with the last school report being in respect of the 2019 academic year.

11. He also complained that the Plaintiffs Educational Psychologist recommended remedial schooling for the minor and that there was a payment in respect of General Damages and a medical undertaking furnished to the Plaintiff. The undertaking appears to the gone unutilised and there is no reporting of any remedial schooling or current scholastic ability before the court.

12. The crux of the complaint was that the best evidence is not before the court to assess any future loss of income. If the minor's circumstances have improved then the Plaintiff will be over-compensated and if her circumstances have deteriorated then she would be under-compensation. I am in agreement with this submission.

13. Mr Vilakazi proposed that the matter proceed on the existing medico legal reports as the matter was ready to proceed during 2017 and again during 2019. It was his submissions that the reports do not prejudice the Plaintiff as these reports are undisputed and the Plaintiff is entitled to finality of the matter.

THE POSTPONEMENT APPLICATION AND INTERIM PAYMENT

14. Upon invitation for submissions from the bench as to the Road Accident Funds social responsibility towards the minor and the Courts responsibilities as the Upper Guardian of the minor, Mr Coetzee sought to stand down the matter for better instructions and returned seeking a postponement of the application for default judgment from the bar. He submitted that it would not be in the minors best interest to finalise the case on the basis of evidence before the court and the Road Accident Fund would be remiss in its social obligation if this were to occur.

15. This application was initially opposed by Mr Vilakazi. During argument in opposing the postponement application, it was submitted that reports become stale after 2 years and are of little evidentiary value in the normal court due to the changing vicissitudes of life. This is however no bar to a court accepting such stale reports. The

court was referred to Van Tonder N.O v Road Accident Fund (4032/2013) [2021] ZAGPPHC 382 (30 May 2021) regarding such a discretion.

16. In Van Tonder, Mr Justice Maumela drew attention to all reports being stale as they are 'all far from 2 years, which is conceived to be the normal years for the reliable (*sic*) expert reports'. He finds that it is for the court to take into account all relevant factors in arriving at an amount to be awarded.

17. This matter is distinguishable in that the claim was for general damages, which by its very nature is 'not capable of being determined with mathematical precision' [*De Jongh V Du Pisanie No* 2005 (5) SA 457 (SCA)]. The matter also featured a claim by a 36-year-old whose sequalae had settled.

18. All relevant factors are not before me and I refuse the invitation to hazard a guess on the compensation to be awarded to the minor.

19. Mr Vilakazi then took instructions and conceded that fresh medico legal reports would be needed to serve the best interests of the minor and avert any possible claim of negligence against his attorney. He moved on to seek an interim payment for the minors future loss of income. He sought an amount of R 1 million as an interim payment.

20. The Plaintiffs entire claim as presently quantified is R 3 368 900. An interim payment of R 1 million would effectively serve as compensation for a third of the minors future possible employment. This is untenable as the minors claim for future loss of income would commence at age 18.

21. Upon enquiry as to the status of the monies received by Plaintiff in respect of the minors claim for General Damages, I was advised from the bar that the Plaintiff had utilised those monies to purchase a home for her family including the minor.

22. In exercise a courts duty as an upper guardian of a minor, I have considered factors such as the socio economic circumstances of the Plaintiff and the minor, which appear to be dire, the current duration for a new court date in this Division, as well as the possible retirement age of the minor but for the accident, on the current uncontested reports as well as the requirement that the Plaintiff first pay for the minors treatment and remedial schooling and then claim the monies back from the Road Accident Fund, which is currently not functioning as it ought to (See : Hlatshwayo v Road Accident Fund, Mpumalanga Division case 3242/2019, as yet unreported case dated 24 January 2023).

23. I also enquired from Plaintiffs counsel if the attorneys would be prepared to guarantee repayment of any monies that were paid by the Road Accident Fund as an interim payment to the Plaintiff, should there arise the eventuality that the interim payment constitutes an overcompensation in the final determination of the claim. This was confirmed in the affirmative.

24. I further enquired if conditions ought to be set on the spending of the interim award of monies, given that the General Damages have now been exhausted. Counsel submitted that the minors parents, with whom she resides, would be in the best position to make such an assessment of the minors needs.

25. I have taken the entire actuarial calculation as it currently stands (in respect of a possible 40 year work life) and applied a rough computation of 2 years, being a maximum time period to return to court with fresh reports, in coming to an interim award..

26. I have had regard to the provisions of the Uniform Rules of Court relating to interim payments as well as the interests of the minor and the courts obligations in terms of section 173 of the Constitution, regarding the interests of justice.

27. In exercising my discretion regarding costs, I have taken into account the Defendants delay in approaching the court for a postponement and raising its concerns, specifically in light of its social obligations to victims of motor vehicle accidents.

In the circumstances I make the following order:

1. This matter is postponed sine die;

2. The Defendant shall make an interim payment in the amount of R 200 000 to the Plaintiff in respect of the claim for the minor's future loss of income, within 120 days of date hereof;

3. The aforementioned monies are to be used for the sole and exclusive benefit of the minor, Z[....] N[....], without any deduction for legal and other fees by the Plaintiffs' attorneys;

4. The aforementioned payment is guaranteed by each and every director and / or partner of the Plaintiffs' attorneys, jointly and severally, in the event that a court orders repayment of the abovementioned monies to the Road Accident Fund, in its final determination of the Plaintiffs claim.

5. The Defendant shall pay the plaintiffs costs occasioned by this postponement of the matter, as agreed or taxed.

Z KHAN

Acting Judge of the High Court: Johannesburg

This judgment was prepared and authored by Acting Judge Z Khan. It is handed down in open court on 27 January 2023 and electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 27 January 2023.

HEARD ON:	23 January 2023
DELIVERED ON:	27 January 2023
For the Plaintiff:	Adv J Vilakazi
Instructed by	Mangxola Attorneys
For the Defendant:	Mr Coetzee (State Attorney)
Instructed by	Road Accident Fund - Johannesburg