



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

15/12/14

CASE NO: 53921/2011

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) DATE DELIVERED: 08/12/12
(4) SIGNATURE: [Signature]

In the matter between:

SIYANI SUCCEED MKHABELA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

[1] Counsel for the both parties advised me from the outset that the only issue I was required to decide was future loss of earnings and that the matter would be argued on the basis of the expert reports as the dispute

has been narrowed further by discussions between the legal teams. I commend them for taking this initiative because it is a known fact that the defendant's representatives are often constrained by lack of instructions, resulting in unnecessary postponements. I am satisfied that the remaining issue in contention is one that would in any event require me to exercise my discretion even if I were to hear oral evidence of the experts.

[2] I was also advised that the other heads of damages were settled and the agreement was made an order of court on 27 November 2012. This order will be incorporated into the final order.

[3] It appears from the court order of 27 November 2012 that the claim for loss of earnings was postponed *sine die* to enable the parties to obtain expert evidence with regard to the extent of the head injury.

[4] A bundle of documents with expert reports and joint minutes of the relevant experts was handed in and I marked them as Exhibit A. The only disagreement between the industrial psychologists is whether the plaintiff has any residual earning capacity.

[5] Actuarial calculations were made on the basis of the respective differing views of the industrial psychologists and they appear on page 122 of Exhibit A.

RELEVANT FACTS

[6] The plaintiff, then 18 years old, and a first year student at the University of Johannesburg, was knocked down by a car whilst waiting for a bus to transport him to school on 12 May 2008.

[7] His studies were interrupted for some time, however, he subsequently went back and obtained his National Diploma in Accounting during 2011, almost in record time.

[8] At the moment he is unemployed, despite his efforts to seek employment and having attended several interviews. He also expressed a wish to further his studies.

ISSUES THAT ARE COMMON CAUSE FROM THE EXPERT REPORTS

[9] As indicated above, subsequent to the postponement, medical reports with regard to the head injury were obtained. The experts also prepared joint minutes.

[10] In their joint minute dated 26 February 2014, the neurosurgeons, Dr LF Segwapa and Prof. P.L Lekgapa, are in agreement that the plaintiff sustained a mild (grade 3) concussion.

In paragraph 4 of the minute, and with regard to whether there is any neuropsychological impairment post accident, the neurosurgeons

indicated that they defer an opinion in this regard to the psychiatrists and psychologists.

[11] In their joint minute dated 19 May 2014, the psychiatrists, Drs Jan Chabalala and Francis N Kariuki , agreed that the mental consequences of the accident were severe. They agreed that the plaintiff developed certain personality changes that are directly due to his head injuries and these *"were overlooked in favour of the more life threatening physical injuries. That was because they (the head injuries) were not obvious at that time"*

The personality changes identified are:

" 4. He also started abusing alcohol and behaving in a manner that is completely out of character. This included violent and aggressive episodes. He also stated to steal money to finance his habit"

[12] In paragraph 7 of the minute, the psychiatrists indicated that they agree that the plaintiff has developed recurrent mental illness, which include hallucinations . This mental illness is *"likely to be lifelong and he will need medical treatment for the rest of his life, and we both believe it could be due to a type of Epilepsy which arose out of the injury"*

[13] In their first minute dated 26 November 2012, the industrial psychologists, T Ntsieni and L Tabane did not reach a substantive agreement as they were not in possession of expert opinion of the neurosurgeons and psychiatrists.

[14] The industrial psychologists filed an addendum to their joint minute on 01 October 2014. They agreed that pre-morbid, the plaintiff could have pursued a career in the field of accounting and would have worked until retirement age. They differed on whether this would be 60 or 65 years.

[15] They also agreed on the plaintiff's earning capacity and that he would have commenced at the Patterson B4 salary scale, with a progression at interval periods of 3 to 5 years.

ISSUES THAT ARE IN DISPUTE

[16] The disagreement between the industrial psychologists is whether , taking into account the limitations identified by various experts, the plaintiff has any residual earning capacity or not. The plaintiff's industrial psychologist (Tabane), is of the opinion that he is unemployable, and on the other hand, Ntsieni, for the defendant is of the view that the plaintiff has some residual earning capacity.

[17] The defendant's view is based on the fact that despite the cognitive and mental challenges identified by the experts, the plaintiff

was able to resume his studies and to complete his National Diploma in Accounting in 3 and a half years.

[18] The plaintiff's industrial psychologist on the other hand maintains that despite his intellectual capacity, the plaintiff is nevertheless debilitated by the consequences of the head injury. He is a psychiatric patient who is failing to realize his vocational potential. His vocational crisis will probably not resolve.

[19] On whether plaintiff would be employable in an open labour market, the defendant's view is that he would be, if he gets a sympathetic employer who would understand his challenges and afford him time to go for checkups and to get medical treatment when he gets psychiatric attacks.

[20] The opinion of an occupational therapist was also sought with regard to the plaintiff's possible functionality in a work environment.

In her report of May 2012, Ms Adeleide Phasha indicated, amongst other things that *"from a cognitive point of view, his overall work speed does not meet open labour market standard. His slowed speed and concentration limitations are expected to affect his work performance to a large extent. He will not be able be an equal competitor in the open labour market. He would need to be accomodated and he will need*

supervision as well as encouragement to ensure that he does what is required of him at work".

WHETHER THERE IS ANY RESIDUAL EARNING CAPACITY

[21] The plaintiff's counsel conceded, correctly so in my view that under the circumstances, the plaintiff has some residual earning capacity. This, in turn has further narrowed down the issue for determination to the question of whether a low or higher percentage contingency should be applied on the calculated future loss of income.

[22] Arguing for a lower percentage contingency, Mr Williams indicated that it is common cause that as the psychiatrists have opined, the plaintiff is in and out of mental institutions. His changed personality is most likely to have an impact on his relationships with employers and colleagues.

[23] Whilst acknowledging the limitations that the plaintiff has, Mr Modisa, for the defendant argued that a higher contingency should be applied because the plaintiff managed to finish his studies after the accident and furthermore, he indicated that he has applied to further his studies with the University of South Africa.

He also argued that the fact that the plaintiff is currently unemployed could be a result of lack of job opportunities and nothing to do with the consequences of the head injury.

[24] I was tempted to agree with the latter argument advanced by Mr. Modisa. The reason being that the plaintiff has had at least four years since his graduation to obtain employment and that there is no evidence that his unemployment has anything to do with the identified limitations.

However, having considered all the reports and joint minutes, it is clear that there is consensus that the issue is that even if he were to obtain employment, the plaintiff will not be able to function optimally or to his pre-morbid state. The reasons for his current unemployment are therefore irrelevant.

[25] On the approach I should adopt to determine an acceptable contingency to be applied under the circumstances, Mr Williams submitted and with reference to the well-known case of **Southern Insurance Association LTD V Bailey NO¹** that the exercise is a guesswork and blind plunge into the unknown.

[26] In this matter, Nicholas JA stated the following at p.113 paragraph G-H

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future. All that the court

¹ 1984(1) SA 98

can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

It has open to it two possible approaches.

One is for the judge to make a round estimate of an amount that seems to him to be fair and reasonable. This is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. There are cases where the assessment by the court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages'.

[27] It is trite that I have a discretion with regard to an appropriate contingencies to be applied and that I may take into account the peculiar circumstances in which the plaintiff finds himself as a result of the accident. (Nicholas AJ in the matter of Southern Insurance Association v Bailey at 116H – 117).

[28] In this matter, the parties have submitted actuarial calculations prepared by Wim Loots of Independent Actuaries & Consultants. On the approach of the plaintiff's industrial psychologist, the pre-morbid income

of the plaintiff was calculated as R7 919 376.00 and R6 329 676.00 on the approach of the defendant's expert.

[29] When the matter came before me, the parties had, in an attempt to reach a settlement, already agreed (and made calculations) that they should work on the meridian between the two amounts, and this is R6 706 146.00. A contingency of 20% on the basis of the plaintiff's youth was conceded, leaving a net future loss of R5 364.916.00 on the plaintiff's version. The actuary had calculated an amount of R4 115 370.00 as the plaintiff's loss on the basis of the defendant's approach that there was some residual earning capacity.

CONCLUSION

[31] The reasons advanced by the defendant on why a higher percentage contingency should be applied is that the plaintiff managed to finish his diploma and that he may get a symphathetic employer who may understand his mental state.

[32] The first argument is out because as I have indicated above, the experts are agreed that even if he were to obtain employment, he would struggle to function optimally, and furthermore, there are practical challenges that he will be in and out of hospitals. The second argument is

also not realistic because it is also a fact that he is not able to get employment now. The chances of a prospective employer retaining a mentally challenged employee who is in and out of hospital are minimal.

[33] In my view, and taking into account the limitations that the plaintiff will endure in a work environment as identified by the various experts, it would be fair and equitable if his future loss of income is reduced by 15%

After the matter was adjourned for me to consider the expert reports and to apply my mind to the issues, I requested the parties to make calculations on 15% contingency on the basis of the actuarial calculations as adjusted in their respective submissions.

I was informed that the net future loss of income will be **R4 747 611.00**.

ORDER

I make an order in terms of the draft attached hereto as **"XYZ"**



TAN Makhubele

Acting Judge of the High Court

08 December 2014.

APPEARANCES:

PLAINTIFF: ADV JO'D WILLIAMS

Instructed by: **BALOYI ATTORNEYS**

241 Schubart Street

Suite 107, 1st Floor

Olivetti House

PRETORIA

Tel: (012) 323 6504

Ref: 0806/BALOYI/MVA

DEFENDANT: ADV. H.O MODISA

Instructed by: **TSEBANE MOLABA INCORPORATED**

806 Stanza Bopape Street

Eastwood

PRETORIA

Ref: Mr. Maphutha /M.A/1907/11

"X7Z"

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

CASE NO : 53921/2011

ON WEDNESDAY, 3 DECEMBER 2014
BEFORE MADAM JUSTICE MAKHUBELA

MKHABELA, SIYANI SUCCEED

Plaintiff

And

THE ROAD ACCIDENT FUND

Defendant

ORDER

Having heard counsel :

1. It is noted that on 27 November 2012 the defendant was ordered to pay to the plaintiff R700,000.00 (SEVEN HUNDRED THOUSAND RAND) in respect of the plaintiff's claim for general damages and to furnish a section 17(4)(a) undertaking. A copy of the order with the Trust Deed sanctioned is attached as annexure "X".
2. The defendant is ordered to pay the to plaintiff, in respect of the remaining claim for loss of earnings, R 4 747 611.00 (Four Million Seven hundred forty seven thousand six hundred and eleven rand Only)
3. In addition to the costs order made on 27 November 2012, the defendant is ordered to pay the plaintiff's costs of the

action, such costs to include :

- 3.1 the costs of two counsel;
- 3.2 the reasonable taxable fees for consultation and preparation for trial, qualifying and reservation fees (if any and on proof thereof) as well as the costs of the reports, addendum reports and joint minutes of the following experts :
 - 3.2.1 Adelaide Pasha;
 - 3.2.2 Dr Kumbirai;
 - 3.2.3 Dr Chabalala;
 - 3.2.4 Prof Lekgwara;
 - 3.2.5 Dr Mureriwa;
 - 3.2.6 Mr Thabane;
- 3.3 the costs of obtaining all actuarial calculations from the actuaries Robert J Koch and Wim Loots;
- 3.4 the plaintiff's reasonable hotel accommodation, transportation costs for attending consultation with the medico-legal experts as well as reasonable transportation for attending to Court;
- 3.5 the costs of the trial enrolled for 28 November 2014 up to and including 3 December 2014.

4. It is ordered that after deduction of disbursements (including counsel's fees) and agreed attorney and client fees due to Baloyi Attorneys and their correspondent, and after payment of an advance in the amount of R200,000.00 (TWO HUNDRED THOUSAND) to the plaintiff, the balance of the monies received in terms of paragraph 2 above, is to be paid to the SIYANE SUCCEED MKHABELA TRUST.
5. The amount in paragraph 2 and the costs are to be paid into the trust account of Baloyi Attorneys as follows :

NAME : BALOYI ATTORNEYS
BANK : NEDBANK
ACCOUNT NO : 1604809582
BRANCH CODE : 160445
6. It is noted that the plaintiff has agreed to furnish the defendant with at least 14 (FOURTEEN) days written notice of taxation.
7. The plaintiff's attorney is entitled to charge contingency fees in terms of the Contingency Fees Act on the basis of the contingency fee agreement dated 26 February 2011.

BY ORDER

REGISTRAR

**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]**

CASE NO : 53921/2011

1X4
27/11/12

**ON TUESDAY, 27 NOVEMBER 2012
BEFORE HIS LORDSHIP MR JUSTICE VAN DER MERWE DJP**

MKHABELA, SIYANI SUCCEED

Plaintiff

And

THE ROAD ACCIDENT FUND

Defendant

ORDER (BY AGREEMENT)

1. The Defendant is ordered to pay Plaintiff R 700 000.00
IN RESPECT OF GENERAL DAMAGES
2. The Defendant is ordered to furnish Plaintiff with a section 17(4)(a) undertaking in respect of future accommodation of plaintiff in a hospital or nursing home for treatment of or rendering of a service or supplying of goods to him, to compensate the Plaintiff in respect of the said costs after the costs have been incurred and on tendering of proof thereof, arising from the collision which occurred on 12 May 2008. It is noted that the undertaking includes the costs of a trustee as if he/she were appointed under the Administration of Estates Act.

3. The defendant is ordered to pay the plaintiff's costs of suit, such costs to include :

3.1 the costs of two counsel;

3.2 the reasonable taxable fees for consultation and preparation for trial, qualifying and reservation fees (if any and on proof thereof) as well as the costs of the reports, addendum reports and joint minutes of the following experts :

3.2.1 Adelaide Pasha;

3.2.2 Dr Kumbirai;

3.2.3 Dr Chabalala;

3.2.4 Prof Lekgwara;

3.2.5 Dr Mureriwa;

3.2.6 Mr Thabane;

3.3 the costs of obtaining all actuarial calculations from the actuary Robert J Koch;

3.4 the plaintiff's reasonable hotel accommodation, transportation costs for attending consultation with the medico-legal experts as well as reasonable

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transportation for attending to Court;

3.5 the costs of establishing the SIYANI SUCCEED MKHABELA TRUST.

4. SIYANE SUCCEED MKHABELA (born 6 June 1989) is declared incapable of managing his own affairs.

5. MARTHA MAGDALENA PRINSLOO is appointed as trustee for SIYANI SUCCEED MKHABELA.

6. It is noted that the amount in paragraph 1 and the costs are to be paid into the trust account of Baloyi Attorneys as follows :

NAME : BALOYI ATTORNEYS

BANK : NEDBANK

ACCOUNT NO : 1604809582

BRANCH CODE : 160445

7. It is noted that after deduction of disbursements and attorney and client fees due to Baloyi Attorneys and their correspondent, the net amount of the claim is to be paid to the SIYANI SUCCEED MKHABELE TRUST. A copy of the trust deed is attached hereto.

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8. It is noted that the Plaintiff has agreed to furnish the Defendant with at least 7 (SEVEN) days written notice of taxation.

9. The claim for loss of earnings is postponed *smu chiu*.

BY ORDER

REGISTRAR



6/27/11/02

Deed of Trust

for the

SS MKHABELA TRUST

TRUST DEED

ENTERED INTO BY AND BETWEEN:

B BALOYI in his capacity as legal advisor of **SIYANI SUCCEED MKHABELA**
(BORN: 06/07/1989).

(Hereafter called "the FOUNDER")

And

ABSA TRUST LIMITED

Herein represented by its nominee from time to time
(Hereafter called "the TRUSTEES")

WHEREAS:

1. The FOUNDER has decided to put up a trust for and on behalf of **SIYANI SUCCEED MKHABELA**.
2. The FOUNDER has decided to transmit to the TRUSTEE an amount of **R495 000.00 (FOUR HUNDRED AND NINETY FIVE THOUSAND RAND ONLY.)**, or any other amount which may become due for the administration as set out below which amount became available as a result of an action in terms of the Road Accident Fund Act No. 56 of 1996 for compensation for injuries sustained by **SIYANE SUCCEED MKHABELA**.
3. The FOUNDER hereby transmits the said amount (hereafter called "the TRUST FUND" to the TRUSTEE to be held in trust for the purposes and subject to the conditions and directives set out below.
4. The TRUSTEE is prepared to accept the aforesaid trust and the appointment as such with the powers and duties as set out below and to accept all benefits granted herein on behalf of the beneficiary/beneficiaries; subject to all the terms and conditions set out below:

Now therefore this Deed records that the parties have agreed as follows:

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1. NAME OF THE TRUST

The name of the trust is the **SS MKHABELA TRUST**.

2. TRUSTEE

2.1 The TRUSTEE of this trust is **ABSA TRUST LIMITED** as represented by its nominee from time to time.

2.2 The TRUSTEE shall be entitled to resign from his office after having given at least 30 (thirty) days written notice of such resignation to the FOUNDER, before the resignation takes effect.

2.3 Should the TRUSTEE for any reason whatsoever no longer fulfil the office of trustee, the FOUNDER shall be entitled to appoint another person as trustee, who shall then occupy the office subject to the provisions of this Deed.

3. NO DONATION

It is hereby confirmed that the creation of this trust is not a donation but a payment for compensation for injuries sustained in terms for the Road Accident Fund Act No 56 of 1996.

4. BENEFICIARIES

The BENEFICIARY is:

SIYANI SUCCEED MKHABELA (BORN: 06/07/1989)
(Hereinafter called the BENEFICIARY)

5. PURPOSES

5.1 The beneficiary will have immediate vested rights in the trust fund.

5.2 For so long as any capital remains, or any portion thereof, the **TRUSTEES** may in their sole discretion, make such payment of the income, and in such amounts as they shall decide for reasonable maintenance or for any other purposes which they may decide to be in the **BENEFICIARY'S** interest. If the income is not sufficient for the purpose the trustees may utilise capital. Any surplus income not utilized for the purposes set out herein shall be capitalised.

5.3 The trust shall terminate when the TRUST FUND has been paid out. In event of a beneficiary dying before the termination of his trust its portion shall devolve upon his estate.

5.4 To accept any further amounts or endowments on behalf of the beneficiary.

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6. POWERS OF TRUSTEE

The TRUSTEE shall have unlimited and absolute power, for the purposes of this trust, in its sole and absolute discretion, to:

- 6.1 Acquire any shares, unit trusts, debentures, stocks, negotiable instruments, mortgage bonds, notarial bonds, securities, certificates and any moveable or immovable property or any incorporeal rights and to invest in such assets and to lend funds to any party or make a deposit or investment with any institution, such investment to be of such nature and on such terms and conditions as the TRUSTEE may deem fit.
- 6.2 Exchange, replace, re-invest, sell, let, insure, manage, modify, develop, improve, convert to cash or deal in any other manner with any asset which from time to time forms part of the TRUST FUNDS:
- 6.3 Borrow money.
- 6.4 Pledge any trust assets, to encumber such assets with mortgage bonds or notarial bonds to utilise same as security in any manner whatsoever.
- 6.5 Institute or defend any legal proceedings or otherwise to take any other steps in any court of law or other tribunal and to subject controversies and disagreements to arbitration.
- 6.6 To call up and/or collect any amounts that may from time to time become due to the TRUST FUND.
- 6.7 Settle or waive any claim in favour of the trust.
- 6.8 Exercise any option and to accept and exercise any rights.
- 6.9 Exercise any rights or to incur any obligation in connection with any shares, stocks, debentures, mortgage bonds or other securities or investments held by this trust.
- 6.10 Open accounts at any bank or other financial institution and to manage such accounts and if necessary to overdraw such account.
- 6.11 Draw any cheque or promissory note, to execute or endorse same.
- 6.12 Take advice from any attorney or advocate or any other expert for the account of the relevant trust account.
- 6.13 Lodge and proof claims against companies in liquidation or under judicial management and against insolvent or deceased estates.
- 6.14 Appoint professional or other persons on a temporary or permanent basis to conduct the whole or any portion of the business of the trust under supervision of the TRUSTEE or to manage the investment of part or the entirety of the funds of the trust and to remunerate such persons for their services out of the funds of the trust.

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- 6.15 Form any company and to hold any interest in any company and to form any other trust to hold an interest in any other trust or partnership or undertaking for the purposes of this trust or in the interest of any beneficiary.
- 6.16 Amalgamate with any other trust with the same or similar aims as this trust.
- 6.17 Commence any business or continue such business or to acquire an interest therein and for such purpose to acquire assets or to incur expenses and to partake in the management, supervision and control of any business and to conclude any partnership or joint venture.
- 6.18 Accept any disposal in favour of this trust and to comply with any conditions regarding such disposal.
- 6.19 In general do all things and to sign all documents required to give effect to the aims of this trust.

7. ACCOUNTING

The TRUSTEE shall keep complete records, statements and accounts of all transactions and shall prepare proper statements in connection with all financial activities in accordance with the generally accepted accounting practice in South Africa.

8. REMUNERATION

The TRUSTEE shall be entitled to the normal remuneration payable to trustees as determined from time to time by ABSA TRUST LIMITED. In addition, the TRUSTEE shall be entitled to charge market related fees in respect of specialized services which it may have performed on behalf of the trust.

9. REGISTRATION OF THE TRUST

The TRUSTEE undertakes to register this trust deed at the office of the Master of the High under the Trust Property Control Act 1988 as amended and shall be entitled to settle the costs payable in respect of such registration, as well as the revenue stamps on this deed, out of the income and if necessary out of the capital of the trust.

10. EXEMPTION FROM SECURITY

The TRUSTEE shall NOT be obliged to furnish security to the Master of the High Court or any other authority for the proper compliance of its duties as such.

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11. INDEMNITY

The TRUSTEE and any person in its employment, shall insofar it may be valid in terms of the Trust Property Control Act, Act 57 of 1988, be indemnified against liability for expenses, incurred in the execution of its duties as trustee in terms of this trust deed and against any loss the TRUST FUND may suffer as a result of the depreciation of any investment made by the TRUSTEE.

12. PROHIBITION AGAINST ENCUMBRANCE

No beneficiary receiving benefits under this trust deed may utilize his or her interest in the TRUST FUND as security for debt or encumber it in any manner whatsoever and should such event occur, shall the encumbrance of benefits of those beneficiaries not be recorded against the TRUST FUND.

13. EXCLUSION FROM JOINT ESTATE

Any benefit accruing or payable to any beneficiary in accordance with this trust deed, does not form part of the joint estate of that person and that person's spouse and no husband of any female person, whether the marriage be in or out of community of property, shall have or receive any marital power, control, power of alienation or administration in respect of any benefit received by any such female beneficiary under this deed.

14. AMENDMENT OF THIS DEED

The provisions of this trust deed, excluding the appointment of the beneficiaries, may only be amended in writing jointly by the FOUNDER and the TRUSTEE of the trust.

This done and signed at RETOLIN on this 4 day of APRIL 2013

AS WITNESSES:

1.
2.


THE FOUNDER

This done and signed at on this day of 2013

AS WITNESSES:

1.
2.

.....
THE TRUSTEE