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

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(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
<u>DATE</u>	<u>SIGNATURE</u>

CASE NO: 74647/2010

DATE: 3/4/2014

IN THE MATTER BETWEEN:

ADVOCATE M. PATEL N. O.
(on behalf of K.M.)

PLAINTIFF

AND

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

1. This is an action for damages instituted by the plaintiff in his representative capacity as the court-appointed curator *ad litem* to K.M. The action arises out

of injuries sustained by K.M. in a motor collision which occurred on the 25th of December 2005 on the R25 road between Groblersdal and Bronkhorstpruit.

2. K.M. sustained various injuries in the aforementioned collision and these injuries included:
 - 2.1 A severe diffuse brain injury associated with focal injuries to the left frontoparietal region with resultant neurological, neuropsychological and neurocognitive deficits;
 - 2.2 Contusion to the right frontoparietal brain area, with resultant neurological, neuropsychological and neurocognitive deficits;
 - 2.3 Soft tissue cutaneous injuries to the left cheek and left shoulder area; and
 - 2.4 Soft tissue and neurological injuries to the right leg and foot.
3. The plaintiff has sought to recover as against the defendant, damages in respect of past medical expenses, future medical expenses, future loss of earnings / earning capacity as well as general damages.
4. The parties have been able to agree to settle many of the issues in dispute in the following regard:
 - 4.1 The defendant has conceded liability for one hundred per cent of K.M.'s proved or agreed damages;
 - 4.2 The defendant will provide the plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of future medical expenses that K.M. may incur; and
 - 4.3 The defendant will pay a sum of R800 000-00 (eight hundred thousand Rand) in respect of general damages.
5. The only issue in dispute and requiring determination is the claim in respect of future loss of earnings.

While the parties are in agreement that K.M. has suffered a loss in earning capacity, the scope and extent thereof remain in dispute.

6. In this regard and in particular there is a dispute in respect of the following related issues:
 - 6.1 The future educational and vocational trajectory of K.M.;
 - 6.2 Whether the injuries K.M. sustained have rendered her unemployable, as the plaintiff contends or whether on the contrary, she retains a residual capacity to work, a contention made by the defendant;
 - 6.3 The anticipated retirement age of K.M.; and
 - 6.4 The contingencies to be applied to her claim for future loss of earnings.
7. Both parties commissioned various medico-legal reports and the various experts also met and produced joint minutes reflecting areas of agreement and disagreement. This is a point I will return to later.
8. The reports of the following experts commissioned by the plaintiff were by agreement admitted into evidence:
 - 8.1 Ms M. J. Adan (clinical neuropsychologist);
 - 8.2 Dr B. K. Cheyip (neurologist); and
 - 8.3 Dr C. Penn (speech and hearing therapist)
9. The plaintiff called three witnesses to testify in support of its claim. The witnesses were Ms Mita Belili, the mother of K.M., Ms F. van Vuuren, an educational psychologist and Ms E. Rossouw, an industrial psychologist. The defendant called Ms K Pulles, an industrial psychologist.
10. I now proceed to provide a summary of the impact of the injuries sustained by K.M.:

- 10.1 She was a student in Grade in the year of the collision and was promoted to Grade. She was only able to commence her studies in Grade during May 2006 and she failed Grade in that year. She subsequently passed Grade in 2007, and Grade in 2008 but she failed Grade and the supplementary Grade examination she sat for;
- 10.2 K.M. began to suffer from epileptic seizures in 2010 and she continues to experience these seizures at a frequency of at least once a month;
- 10.3 She experiences frequent headaches, and she suffers from poor memory and concentration;
- 10.4 She suffers from right-hand weakness which interferes with her ability to do ordinary tasks such as washing, ironing, cleaning and cooking;
- 10.5 She is short-tempered, irritable and has attempted suicide on two occasions; and
- 10.6 She has become a mother of a young baby but she is unable to properly care for this child. Her mother has taken substantial responsibility for the care and upbringing of the baby.

11. Returning to the issues in dispute, I proceed to deal with them as follows:

11.1 **Her educational and vocational trajectory but for the accident**

- 11.1.1 In the joint minute prepared by the industrial psychologists, they appear to reach an agreement that but for the accident, K.M. would have passed matric and

embarked on a tertiary education trajectory. Ms Rossouw says this could have led to obtaining a diploma or a degree, while Ms Pulles projects a certificate or diploma. In her evidence, Ms Pulles took a diploma projection as being the ‘high road’ – a best case scenario. I did not understand her to exclude the possibility of this happening.

11.1.2 Ms van Vuuren in her report and her evidence formed the view that pre-accident, K.M. would have been of average, or more likely, of high average ability and as such should have managed to complete an academic Grade 12 with the option of tertiary education and most probably at a Technikon.

11.1.3 Ms Rossouw has postulated a degree scenario alongside that of a diploma scenario while Ms Pulles has postulated a certificate and possibly a diploma scenario. Ms Adan, the clinical psychologist, forms the view that given her test performances, it seems likely she would have completed matric with sufficient points for post-school vocational training probably at Technikon Diploma level.

11.1.4 In my view and when I have regard to the evidence, a diploma scenario appears to be the most probable pre-accident trajectory for K.M. I find little merit in the suggestion by the plaintiff that it be a degree scenario or a median between a degree and a diploma, while at the same time the defendant’s suggestion that it be a certificate scenario or a median between a certificate and a diploma, is not supported by the evidence.

The study and the financial opportunities now available also are an added factor in coming to the conclusion that

but for the accident, K.M. would have passed matric and proceeded to obtain a diploma.

- 11.1.5 On this aspect, I accordingly conclude that but for the accident, K.M. would probably have completed matric as well as a diploma and that her damages should be calculated on that basis.

11.2 **Did the injuries K.M. sustained render her unemployable or has she retained a residual capacity to work?**

- 11.2.1 The industrial psychologists disagree on this aspect. Ms Rossouw's view is that K.M. is unlikely to pass matric and this has been borne out by her two unsuccessful attempts to do so. She takes the view that at best, K.M. would only be able to cope with a short practical course.
- 11.2.2 In this regard however and following a discussion she had with Ms van Vuuren, she expresses doubt as to whether K.M., on account of her cognitive impairment, would be able to use and to practically implement the knowledge she would gain from such a short course.
- 11.2.3 Ms van Vuuren in this regard expresses the view that given her fatigue and her on-and-off attention and concentration, K.M. may struggle to find and to hold on to jobs.
- 11.2.4 On this basis Ms Rossouw concludes that K.M. is limited in the type of work she can perform and will require structure and supervision in a sympathetic employment environment. She is thus of the view that the accident has for all practical purposes rendered K.M. unemployable.

- 11.2.5 Ms Pulles agreed that K.M.'s injuries have compromised her ability to compete in the open labour market and that she will require structure and supervision in a sympathetic employment environment. However she was of the view that K.M. retained a residual work capacity which would enable her to secure employment in the informal sector on a short contract or via 'piece' jobs with long periods of unemployment in between.
- 11.2.6 When one has regard to the neurophysical and neurocognitive deficits that have afflicted K.M., coupled with high levels of unemployment in the informal sector, the prospects of securing any employment with a sympathetic employer must be remote. In this regard she would be competing with many others who are free of deficits of the kind she has.
- 11.2.7 While the prospects of finding a sympathetic employer do exist, they are so remote in my view that they render K.M. unemployable. In addition, the kind of sympathetic employment that Ms Pulles contemplates has been regarded as largely therapeutic in nature with little financial reward.
- (See **CORDERIA v RAF 2011 (6A4) QOD 45 GNP** where the Court appeared to have accepted a conclusion drawn by the industrial psychologists in that matter in their joint minute where they characterised both sheltered employment and employment in a sympathetic environment as follows:

'We however draw attention to the scarcity and unavailability of these forms of 'employment' and reiterate the fact that these types of employment are

not financially rewarding and therefore their benefits will largely be therapeutic in nature’.)

11.2.8 Accordingly and on what is before me, I must conclude that the injuries K.M. has sustained, bringing with them the neurophysical and neurocognitive deficits to which reference has already been made, render K.M. practically unemployable.

11.3 **K.M.’s likely retirement age pre-accident**

Both industrial psychologists agree that K.M. would probably have continued to work as long as possible, consideration being had to her low-income background. Ms Rossouw accordingly uses sixty-five as her retirement age while Ms Pulles opines it would have been dependent on the company / organisational policy at the time in question.

It is indeed difficult if not impossible to speculate on what such policy would have been but in an age of increasing longevity, my view is that fixing her likely retirement age at sixty-five is both fair and reasonable.

11.4 **Contingencies**

11.4.1 The parties were in agreement that a five per cent contingency be applied to K.M.’s accrued loss. The plaintiff suggested a ten to fifteen per cent contingency on prospective loss, while the defendant proposed a forty per cent contingency arguing that her age, family background and the educational profile of her siblings, the financial constraints that she would face as well as poor success rates of black students at tertiary level all point in the direction of a higher contingency.

- 11.4.2 The task of determining an appropriate contingency has correctly been described as gazing into a crystal ball in order to predict the future.

In ***GOODALL v PRESIDENT INSURANCE CO. LTD.*** 1978 (1) SA 389 (WLD) MARGO J said:

'In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office.' (at 392H-393A)

- 11.4.3 It is so that K.M. was young at the time of the collision and that in the determination of an appropriate contingency, a higher rate is applied to children. (see the Quantum Yearbook 2014 (R Koch)).

In addition our Courts have distinguished between low areas of speculation that are inherent in determining contingencies in the areas of unskilled work compared with understandably higher levels of speculation that would be involved in higher levels of employment.

(see ***SOUTHERN INSURANCE v BAILEY*** 1984 (1) SA 98 (AD)).

- 11.4.4 Considering the age and the pre-accident employment trajectory (high level), I would fix the contingency for prospective loss considerably higher than fifteen per cent. In doing so I am not convinced that the family background or the pass rates of black students should be a factor in my

consideration. Doing so would simply perpetuate stereotypes that have abounded unchecked for too long.

My view is that a contingency at twenty-five per cent would be fair and reasonable in respect of K.M.'s prospective loss.

- 11.4.5 I have been provided with an actuarial calculation prepared by Gerard Jacobson and I have made the necessary adjustments to it in line with the conclusions I have reached at and I arrive at the following award in respect of loss of earnings:

Accrued Loss

Value of income but for accident	R401 715-00	
5% contingency deduction	<u>R 20 086-00</u>	
Net accrued loss		R381 629-00

Prospective loss

Value of income but for accident	R5 979 994-00
25% contingency deduction	<u>R1 494 998-50</u>
Net value of income but for accident	R4 484 995-50

<u>TOTAL NET LOSS</u>	R4866624-50
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ORDER

In the circumstances I make the following order:

1. The defendant shall pay to the plaintiff the amount of R800 000-00 (eight hundred thousand rand) in respect of general damages.
 - 1.1 The plaintiff is given permission to accept the amount of R800 000-00 in respect of the claim for general damages.

2. The defendant shall pay to the plaintiff the amount of R4866624-50 (four million, eight hundred and sixty-six thousand and six hundred and twenty four Rand and fifty cents) in respect of the plaintiff's claim for loss of earnings
3. The amounts referred to in 1 and 2 above shall be paid into the trust account of the plaintiff's attorneys of record, pending the creation of the Trust, who will hold the monies in an interest bearing trust account for the benefit of K.M. ('K.M.').
4. K.M., an adult female born on 18 June 1990, is hereby declared to be incapable of managing the awards in 1 and 2 above.
5. The plaintiff's attorney of record is ordered and authorised to create a trust to, *inter alia*, administer and / or manage the financial affairs of K.M., with ABSA Trust Ltd and to sign all documents necessary for the formation of the trust which is to be for the sole benefit of K.M. The aforesaid appointment shall be subject to the approval of the master of the High Court.
6. The trustee to be appointed shall be required to furnish security to the satisfaction of the Master in terms of section 6(2) of the Trust Property Control Act 57 of 1988, as amended, if so required.
7. Should the trustee fail to furnish such security within a reasonable time or vacate his office, the Master is authorised to appoint an alternate trustee, alternatively a *curator bonis* of his own choice to replace ABSA Trust Ltd.
8. The defendant shall provide the plaintiff with a undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of the costs of the future accommodation of K.M. in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to her arising from the

injuries K.M. sustained in the aforesaid motor vehicle collision and the *sequelae* thereof after such costs have been incurred and upon proof thereof.

9. The aforesaid undertaking shall include:

9.1 The costs of the creation of the Trust referred to and the appointment of a trustee subject to the proviso that such costs do not exceed the reasonable costs of the appointment of a *curator bonis*;

9.2 The costs of the trustee in administering the plaintiff's estate as determined by section 84(1)(b) of the Administration of Estates Act 65 of 1965, as amended, according to the prescribed tariff applicable to curators.

10. The defendant shall pay the plaintiff's costs on the High Court scale either as taxed or agreed, to date hereof. Such costs shall include:

10.1 The costs attendant upon the obtaining of payment of the amounts referred to in paragraphs 1 and 2 above;

10.2 The costs of the previous trial set down on 4 June 2012;

10.3 The costs of the plaintiff's expert reports, joint minutes and preparation fees where applicable, namely:

- (a) Dr. Marus (Neuro-surgeon);
- (b) Dr. Chiyep (Neurologist);
- (c) Ms. M. J. Adan (Neuropsychologist);
- (d) Ms E. May Rossouw((Industrial Psychologist);
- (e) H. I. Shibambo (Occupational Therapist);
- (f) Ms F. van Vuuren (Educational Psychologist);

(g) Dr. C. Penn (Speech Therapist and Audiologist); and

(h) G. W. Jacobson (Actuary);

10.4 The attendance fees of Ms. Adan and the appearance fees of Ms. van Vuuren and Ms. E Rossouw; and

10.5 The costs of the appointment of and the fees of the *curator ad litem*;

11. In the event that the amount of the plaintiff's costs is not agreed upon by the parties, the plaintiff attorneys will serve the notice of taxation in regard to the plaintiff's costs on the defendant's attorneys;
12. The defendant is to make payment of the plaintiff's taxed costs within 14 days of taxation;
13. The Trustee shall pay the plaintiff's attorneys costs in terms of the Contingency Fee Agreement entered into between K.M.'s Mother (Ms. Mita Belili) and the plaintiff's attorney, duly ratified by the plaintiff;
14. The trustee shall be entitled to call for an attorney and own client bill of costs from the plaintiff's attorney;
15. Upon finalisation of the taxation, alternatively should no taxation be called for, the plaintiff's attorneys of record shall be entitled to deduct all fees and disbursements from the proceeds referred to in paragraphs 1 and 2 above, and the balance thereof, together with any costs recovered from the defendant, shall be forwarded to the trustee to be invested for the sole benefit of K.M. or be utilised as the trustee deems appropriate;
16. The trust instrument contemplated in this order shall make provision for *inter alia* the following:

- 16.1 K.M. to be the sole beneficiary;
- 16.2 The Trustee of the Trust to be formed shall take all requisite steps to secure an appropriate bond of security to the satisfaction of the Master of the High Court for the due fulfillment of his/her obligations and to ensure that the bond of security is submitted to the Master of the High Court at the appropriate time as well as to all other interested parties if so required by the Master of the High Court;
- 16.3 The duty of the Trustee to disclose any personal interest in any transaction involving the Trust property to the Master;
- 16.4 The termination of the Trust upon the death of K.M., alternatively with the leave of the High Court; and
- 16.5 The Trustee shall be entitled, if he deems it necessary, to utilize the income of the Trust for the maintenance of K.M.;
- 17. The provisions referred to in paragraph 16.1 to 16.5 above shall, in accordance with the provisions of the Trust Property Control Act 57 of 1988, be subject to the approval of the Master of the High Court; and
- 18. This order is to be served by the plaintiff's attorney on the Master of the High Court, Pretoria and the nominated trustee within 15 days of the granting of this order.

N KOLLAPEN
JUDGE OF THE NORTH GAUTENG HIGH COURT

74647/2010

HEARD ON: 24, 25 & 26 FEBRUARY 2014

FOR THE PLAINTIFF: ADV S EBRAHIM

INSTRUCTED BY: RAZIA KHAN ATTORNEYS (ref: B 0030/08)

FOR THE DEFENDANT: ADV J. H. P. HATTING

INSTRUCTED BY: TSEBANE MOLABA INCORPORATED
(KBM/MAM/RAF644/10)