

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case No: 47146/2012

Date Heard: 3 June 2014

Date Handed down: 10 June 2014

Not reportable

Not of interest to other judges

In the matter between.

K[...] C[...] O[...]

First Plaintiff

ADV M VAN DEN BARSELAAR

in his capacity as *Curator ad Litem* to **L[...] -G[...] D[...] O[...]**

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The first plaintiff is the father of L[...] -G[...] D[...] O[...] ("L[...] -G[...]"), an adult male scholar born on [...]. The first plaintiff instituted action in his personal capacity for past hospital and medical expenses incurred as a result of the treatment of his son.

[2] The second plaintiff is Michael van den Barselaar N. O., an advocate who sues in his official capacity as

duly appointed *curator ad litem* for L[...] -G[...]

[3] L[...] -G[...] sustained the following injuries in a motor vehicle collision that occurred on 16 August 2008:

- i) a severe head injury;
- ii) nasal fractures, with resultant deviation of the nasal septum;
- iii) a neck injury, with displacement of the lateral mass of the C1 vertebra on C2, with ligamentous injuries;
- iv) a chest injury, with resultant right pneumothorax, requiring intercostal drainage;
- v) a fracture of the left femur;
- vi) a fracture of the left tibia;
- vii) a fracture of the right clavicle; and
- viii) an open wound over the left eye.

[4] At the inception of the trial, I was informed by the parties that the following issues have been settled:

- i) merits, in that the defendant conceded liability to compensate the first plaintiff and L[...] -G[...] for the damages that resulted from the collision;
- ii) past hospital and medical expenses in the amount of R 183 089, 84;
- iii) future medical expenses by means of an undertaking in terms of the provisions of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996;
- iv) general damages in an amount of R 1 000 000, 00.

[5] L[...] -G[...]’s future loss of earnings, however, remained in dispute.

[6] For purposes of the determination of L[...] -G[...]’s future loss of earnings, the defendant conceded the contents of the report of Louise Schubert, an industrial psychologist as well as the actuarial calculations by Ivan Kramer, an actuary, based on the report.

[7] Ms Schubert provided for two scenarios pertaining to L[...] -G[...]’s prospective loss of income and Mr Kramer calculated the loss in respect of the two scenarios as follows:

but for the accident

but for the accident

Basis A

Basis B

Diploma

Learnership

Gross prospective

value of income 5 741 524

6 051 629

[8] For the purpose of the calculation of contingency deductions, the parties have agreed that the prospective loss is R 5 000 000, 00.

[9] The only remaining issues pertaining to the prospective loss of income are:

i) whether L[...]-G[...] has retained some residual capacity to work, and

ii) the contingency deduction to be applied in respect of the prospective loss of income.

[10] Mr Stais SC, counsel for L[...]-G[...], submitted that L[...]-G[...] did not retain a residual work capacity. He further submitted that a 15% contingency deduction should be applied in respect of the prospective loss of income.

[11] Mr Badenhorst, counsel for the defendant, contended that L[...]-G[...] did retain a residual work capacity and submitted that the contingency deduction should be 25%.

Residual work capacity

[12] Mr Badenhorst based his submission in respect of L[...]-G[...]’s residual work capacity, *inter alia*, on the following extract from the report of ms Schubert:

"L[...]-G[...] would probably be limited to performing unskilled work options in the informal sector; at best Taking into account; his credentials, as well as his significant accident-related cognitive-, emotional-and behavioural constraints, L[...]-G[...] is not considered suited for working on his own (i.e. working with money). Employment; where he was able to work for somebody else, would be very scarce (only 8% of individuals functioning in the infomial sector work for somebody else and many

individuals/discouraged job seekers are reliant on piece jobs, which are difficult to secure). L[...] -G[...] could, for example, as a last resort, consider performing unskilled piece jobs, e.g. as a Gardener, or might be required to generate an income on the odd occasion, as an unskilled worker (labourer/'handyman'). His earnings prospects in any viable scenario are; however, perceived to be poor. In this regard, the bracket between the lower quartile and median of an unskilled worker could possibly serve as a reference (i.e. between R6400 and R16 400 per annum; according to relevant survey information presented- as per Quantum yearbook, Koch 2013.)"

[13] The paragraph, however, continues as follows:

"Considering the constraints; however, which L[...] -G[...] might face (probably being reliant on public transport, and as a Handyman, requiring various tools), he would probably have a very limited (diminishing) client base. When taking into consideration the risk factors discussed in the various expert reports, particularly considering the fact that L[...] -G[...] would be prone to erratic and inconsistent behaviour and performance levels, L[...] -G[...] might well be rendered totally unemployable. He might be a good candidate for sheltered/sympathetic employment at a facility where his retained abilities could be put to good use. This would; however; be more for purposes of creating meaning in his life, rather than securing a sustainable source of income."

[14] During argument, Mr Badenhorst referred to the unreported decision of Kollapen J in *Advocate M. Patel N.O. (on behalf of K.M.) v Road Accident Fund Gauteng Division*, case number 7464/2010.

[15] The facts of the matter, in so far as residual work capacity is concerned, are on par with the facts herein.

[16] In paragraph 11.2.7 (p.7) of the report Kollapen J held as follows:

"While the prospects of finding a sympathetic employer do exist, they are so remote in my view that they render K.M. (the patient) unemployable. In addition, the kind of sympathetic employment Ms Pulles contemplates has been regarded as largely therapeutic in nature with little financial reward."

[17] In view of the aforesaid, Kollapen J held that the patient did not retain any residual work capacity.

[18] The facts herein lead to a similar conclusion and I find that L[...] -G[...] has not retained any residual work capacity.

CONTINGENCY DEDUCTION

[19] L[...] -G[...] is presently 19 years of age. I have had regard to the reasoning in *Goodall v President Insurance* 1978 (1) SA 389 W, pertaining to the so-called "sliding scale" approach in respect of the

appropriate contingency deduction for future loss of income.

[20] Having regard to L[...] -G[...]’s youth, I am of the view that a 20% contingency deduction is appropriate in the circumstances.

[21] The award in respect of future loss of income is therefore R 4 000 000, 00.

ORDER

I grant an order in terms of the draft attached hereto and marked "X".

JANSE VAN NIEUWENHUIZEN

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

Applicants’ attorneys: De Broglia Inc c/o De Broglia Inc

Applicants counsel: Adv Stais SC

Adv N Van Den Barselaar (in his capacity as Curator ad Litem)

Respondent attorneys: Mr Mphalele

Respondent counsel: Adv C Badenhorst

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

Case No: **47146/2012**

PRETORIA, ON THIS 10th DAY OF JUNE 2014

BEFORE THE HONOURABLE JANSEN VAN NIEWENHUIZEN, J.

In the matter between:

K[...] **C[...]** **O[...].**.....
Plaintiff

1st

ADV. M. VAN DEN BARSELAAR
Plaintiff

2nd

in his capacity as Curator-ad-Litem to **L[...]-G[...]** **D[...]** **O[...]**

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

HAVING heard counsel for the parties, it is ordered that:

1. Defendant shall pay 1st Plaintiff in his personal capacity a capital amount of R183 089.84 (ONE HUNDRED AND EIGHTY-THREE THOUSAND AND EIGHTY-NINE RAND AND EIGHTY-FOUR CENTS) in delictual damages.
2. Defendant shall pay 2nd Plaintiff in his representative capacity as the duly appointed Curator-ad-Litem on behalf of **L[...]-G[...]** **DANZEL OOR**, born on [...] ("the Patient") a capital amount of R 5 000 000-00 (five million rand) in delictual damages.
3. The aforesaid amounts are payable to the Plaintiffs attorneys' trust account, the particulars of which are:

De Broglia Inc.

Nedbank Business : North Rand

Account Number : 1[...]

Branch Code : 146 905

Reference : P515

through means of a direct transfer within fourteen (14) days.

4. Should the Defendant not pay the aforesaid amount on or before the due date for payment thereof, Defendant will be liable for interest on such amount at the rate of 15.5% per annum from the due date to date of payment, both days inclusive.

5.

5.1. The 2nd Plaintiffs attorneys of record shall retain the aforesaid amount, nett of the attorney's agreed fees and disbursements, in an interest-bearing account in terms of Section 78(2)(A) of the Attorneys Act, for the benefit of the Patient, pending the appointment of a Curator *Bonis* and/or Curator *ad Personam* in terms of Rule 57 on behalf of the Patient.

5.2. The 2nd Plaintiff's attorneys, upon receipt of the capital above, shall forthwith pay a once off amount of R60,000.00 and thereafter an amount of R12,000.00 on a monthly basis to the 1st Plaintiff, who is his biological father and current caregiver, pending the appointment of a Curator *Bonis* and/or Curator *ad Personam* in terms of Rule 57 on behalf of the Patient.

6. Defendant shall furnish the 2nd Plaintiff and/or the Patient with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 ("the undertaking"), to reimburse the 2nd Plaintiff and/or the Patient for the cost of the future accommodation of the Patient in a hospital or nursing home, or treatment of, or rendering of a service, or the supplying of goods to him, arising out of the injuries he sustained in the motor vehicle accident that occurred on 16 August 2008, after such costs have been incurred and upon proof thereof. In addition, the undertaking shall include the costs of annually obtaining a security bond as required and the costs of the Curator *Bonis* in respect of the administration of the estate and the costs of a Curator *ad Personam*.

7. The First Plaintiff shall forthwith apply for the appointment of a curator *bonis* to the patient in terms of

Rule 57.

8. Defendant shall pay Plaintiffs taxed or agreed party and party costs on the High Court scale, such costs to include:

8.1. the costs attendant upon the obtaining of payment of the full amount referred to in paragraphs 1 and 2 above; and

8.2. the costs of all 2nd Plaintiff's expert medico-legal reports, as well as the reasonable taxable, qualifying and reservation fees, if any, of such experts; and

8.3. the 2nd Plaintiff's reasonable travel and accommodation costs to attend the Defendant's and own experts, the costs of the actuarial report of Mr. Ivan Kramer; and

8.4. the taxed or agreed costs of senior counsel; and

8.5. Plaintiffs are declared necessary witnesses; and

8.6. the costs relating to the appointment of the 2nd Plaintiff as Curator-ad-Litem, as well as the reasonable costs of the Curator-ad-Litem as marked on brief;

8.7. the costs relating to the application and appointment of a curator *bonis* in terms of Rule 57.

9. Plaintiff shall, in the event that costs are not agreed upon, serve the Notice of Taxation on Defendant's attorneys of record.

10. Plaintiff shall allow Defendant fourteen (14) Court days after taxation to make payment of such taxed costs.

BY THE COURT

REGISTRAR