IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

15/12/14

Case No: 45588/2011

In the matter between:

ADVOCATE SAJEEDAH SAYED N.O. Plaintiff

(*Curator ad litem for* **N.F. THWALA**)

AND

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

15-12-2014
DATE

SIGNATURE

ROAD ACCIDENT FUND Defendant

DATE OF HEARING : **27 NOVEMBER 2014**

DATE OF JUDGMENT : **15 DECEMBER 2014**

JUDGMENT

MANAMELA AJ

Introduction

[1] This matter came before me on trial on 27 November 2014. Mr M Dixon appeared for the plaintiff and Ms K.Potgieter for the defendant. Ms S. Sayed, as the appointed *curator ad litem* also attended. Counsel made oral submissions on the bases of the expert reports filed, without leading any *viva voce* evidence. At the end of the trial, I reserved judgment and requested counsel to file heads of argument. I am grateful that counsel complied with this request bearing in mind the tight deadlines imposed for delivery of same.

[2] The only issue in this matter is the determination and award of an appropriate amount for loss of earnings of Nonkululeko Fortunate Thwala, who was at all material times a minor.[1] Ms Thwala was injured in the Ekuvukeni Location, Ladysmith on 22 December 2005. She was 9 years old at the time. She was a pedestrian when she was hit by the insured driver, whose further details only became known to the plaintiff later[2].

[3] She had sustained the following injuries: compound fracture of the right tibia and fibula (midshaft); 0.5 cm wound anterior medical surface (sutured) and head injuries. Ms Thembeka Pretty Mthembu, in her capacity as her mother and natural guardian instituted legal action against the Road Accident Fund, as the statutorily[3] liable entity for the negligence of the insured driver. An amount of R350 000.00 was

[1] See paragraph 3.1 plaintiff's heads of argument 05 December 2014.
[2] Although the registration details of the vehicle are stated in the particulars of claim on page 3 of the indexed pleadings.
[3] Road Accident Fund Act 56 of 1996.

initially claimed, but at the trial hereof the claim was already in millions. She was later replaced by Advocate Sajeedah Sayed, as a duly appointed *curator ad litem*.[4]

[4] The merits of the matter were settled between the parties on 10 October 2014 when the matter came up for trial for the first time. The defendant accepted full liability for the total proven damages of the plaintiff and also agreed to pay an amount of R500 000.00 in respect of plaintiff's general damages.[5]

[5] The parties appointed various experts to assist them and consequently this court in assessment of the injuries and determination of a fair and reasonable amount in respect of the plaintiff's claim. I will mostly have regard of the joint minutes of experts which conveniently summarise the respective experts' opinions. Before then, a brief narrative of Ms Thwala's background is necessary in order to provide the necessary context to experts' opinions.

Plaintiff's (or in fact, the minor child's) educational and employment background

[6] As stated above, Ms Thwala was 9 years old at the time of the accident on 22 December 2005. She was born on 10 September 1996. She was hit by a vehicle whilst she was a pedestrian with another minor child around her area of Ekuvukeni Location in Ladysmith.

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[4] In terms of an order of this division per Davis AJ made on 16 July 2014.
[5] See paragraph 1.2 of the plaintiff's heads of argument.

[7] She recuperated at home for a month before starting to attend school at Inkunzi Primary School at the end of January 2006 to complete grade 5, which she failed. She repeated grade 5 at Umbulwuani Primary School and completed grade 7 there. She was condoned to grade 8 and completed grade 9, both at Silondukuhle High School, after which she moved to Duck Ponds High School in 2013 for grade 10, which she did not pass. She was repeating grade 10 in 2014 at the same school. Further details appear from discussions regarding joint minutes of experts below.

[8] It is now contended that the most significant impact of the accident is the neuropsychological effect it had on Ms Thwala's cognitive capacity, which in turn is said to have had an adverse effect on her future earning capacity.

[9] I deal next with the findings of the industrial psychologists employed by the parties.

Opinions of Industrial Psychologists

[10] Ms Lariska van Rooyen (LVR) was retained as an industrial psychologist on behalf of the plaintiff and, Ms A.C. Strydom (AS) acted as an industrial psychologist for the defendant. They held "electronic discussions"[6] from 14 to 19 November 2014 and compiled joint minutes thereof. They stated that their minutes are based on their individual reports, interviews and other documents. These documents included

[6] See page 1 of their joint minutes of the discussions held between 14 and 19 November 2014.

reports by other experts employed by the parties, RAF 1 report, hospital records and Ms Thwala's school reports. The latter is actually specified as progress report and progress report of Duck Ponds High School.[7]

[11] LVR and AS as industrial psychologists agreed that, Ms Thwala was 9 years old at the time of the accident in December 2005. However, LVR minuted that she was told that Ms Thwala was in grade 4 at the time of the accident, whereas AC was told she was in grade 3. They further agreed that considering the opinions of educational psychologists, Ms Thwala would have passed matric around the age of 18 in 2014; obtained a 2 to 3 years diploma before she entered the labour market at a B3/4 median (2016/2017) and progressed to a ceiling Paterson grade C3/4 median around the age of 45 years in 2041. They further agreed that Ms Thwala would have worked until age 65 years in 2061.

[12] The industrial psychologists agreed that the available expert opinion suggest that the accident and its *sequelae* have to date severely altered Ms Thwala's pre-accident educational and employment potentials and the likely projectable earnings. They also agreed that given Ms Thwala's personality profile, she would only be able to work under supervision and in a structured environment. AS is of the opinion that Ms Thwala is now only considered to secure unskilled type of work and noted the occupational therapists view that although she would be able to perform a physical type of work, she would struggle to secure and retain employment in the open labour market due to her psychological vulnerability. LVR accepted AS opinion in this

[7] *Ibid.*

regard. They concluded by finding that, Ms Thwala would have in all likelihood entered the open labour market at a remuneration of around R29 600.00 per annum and reached a career ceiling with an amount of R50 000.00 per annum at the age of 45 years. She has not suffered a past loss of earnings, as she is still attending school, but should be compensated for her future loss of income with an increase in her post-morbid contingency deduction for being less competitive and vulnerable in the open labour market and for the delay in entering same due to her school post-morbid failures.[8] They recommended an actuarial calculation.

Actuarial Reports

(a) Plaintiff's Actuarial Report

[13] As stated above, it is common cause that Ms Thwala suffered and will in the future suffer a loss of income or earning capacity. The only determination to be made is how much is her loss given the postulations and opinions by the experts, especially the industrial psychologists. The convenient aspect of this matter is the consensus amongst the specialists. I discuss next the views and calculations of the actuaries.

[14] Mr Gerard Jacobson delivered a report dated 21 November 2014 on instructions from the plaintiff. After consideration of the industrial psychologists' reports and joint minutes referred to above he applied a contingency deduction of 15% on the value of Ms Thwala's income but for the accident and 25% on the value of the income having regard to the accident. He has taken into consideration the

[8] See paragraphs 3.4 to 3.6 on pages 4 and 5 of the joint minutes.

agreements by the experts that a higher post-morbid contingency deduction be applied to account for Ms Thwala being less competitive and a vulnerable employee in the open labour market. It does not appear that he has also considered the other element of the motivation for a higher post-morbid deduction made by the industrial psychologists. They added that Ms Thwala should be compensated "*for the delay in entering the open labour market due to her post-morbid failures at school*".[9]

[15] Mr Jacobson set the amount of Ms Thwala's net future loss, after applying the contingency deductions stated above, at **R4 578 639.00**.

(b) Defendant's Actuarial Report

[16] The defendant filed a report by True South Actuaries dated 24 November 2014. These actuaries also stated that they have had the benefit of the individual industrial psychologists' reports and their joint minutes for their opinions.

[17] True South Actuaries discussed the methods and influences to their conclusions, including consideration of contingencies, but curiously did not apply or assume any contingency deductions to their results.[10] In the end, their calculations were as follows: an amount of **R6 078 638.00** is suggested for Ms Thwala's pre-morbid loss of income and an amount of **R1 004 793.00** for post-morbid loss of income. The total of the two amounts is **R5 073 845.00**.

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[9] See paragraph 3.6 on page 5 of the joint minutes of the industrial psychologists.
[10] See pages 3 and 4 of the actuarial report of True South Actuaries dated 24 November 2014.

[18] Therefore, there is a difference of **R495 206.00** between the net future loss as suggested by the plaintiff's actuaries (in an amount of **R4 578 639.00**) and the gross amount (**R5 073 845.00**) suggested by the defendant.

Submissions and Analysis of the Actuarial Opinions

[19] It is submitted on behalf of the plaintiff that a 25% contingency be applied to the gross amount of R5 073 845.00 suggested by the defendant's actuaries. The result will be an amount of **R4 413 247.55**, which it is submitted is not far apart from amount of R4 578 639.00 as suggested by the plaintiff's actuaries. I tried making calculations based on this suggestion, but I came to a different figure. Perhaps, the submission should have been for a 15%/25% contingency deductions and not just 25%, which comes to the amount of R4 413 247.55. This submission is echoed on behalf of the defendant.

[20] The submissions on behalf of the defendant are that the amount of R4 578 639.00 suggested by the plaintiff's actuaries be averaged with the figure of R4 413 247.55 (being the gross amount of R5 073 845.00 as suggested by the defendant's actuaries less 15%/25% contingency deductions), with the result being the award of an amount of **R4 495 943.00** to the plaintiff. Counsel for the plaintiff actually mentioned at the trial that this figure is acceptable to the plaintiff, although the concession seems conspicuous by its absence from the written heads of argument. Be that as it may, the difference between the amount of R4 413 247.55,

suggested by the plaintiff and the average amount of R4 495 943.00 is only R82 696.00.

Conclusion: Loss of Income

[21] It is trite that opinions by experts constitute a valuable guide to the courts. This being so, the involvement of the court in the exercise to determine a fair and reasonable award cannot be reduced to a mere rubberstamp of the opinions of the experts. The learned authors of ***Visser & Potgieter Law of Damages*, Potgieter, JM; Steynberg, L and Floyd, T.B (3 ed) (2012)** at page 467, fortify this view as follows:

"An actuary is an expert witness whose opinion is merely part of all of the other evidence before this court, to be given greater or lesser weight according to the circumstances of the case. The calculations and evidence of an actuary often plays an important role."

[Footnotes omitted]

[22] Professor Klopper in his seminal work in the ***Law of Third-Party Compensation* (3 ed) (2012)** (at page 177) also states authoritatively that:

"Of course, the actuarial report is only used as a base and does not in any way bind, the court's inherent discretion to asses such damages."

[Footnotes omitted]

[23] I should not be construed to be jettisoning expert opinion in favour of my own. This will be very calamitous. I remain grateful to the views of the experts referred to above and expressed in the filed reports. However, as I stated above, I am of the view that, a contingency deduction higher than 25% should have been applied on the value of the income having regard to the accident. This is taking into consideration the agreements by the industrial psychologists that, further from compensating Ms Thwala for "*being a less competitive and vulnerable employee in the open labour market* " there should also be compensation to Ms Thwala "*for the delay in entering the open labour market due to her post-morbid failures at school*".[11] However, even if this has been considered by the actuaries, in my view, a 30% contingency deduction should have been applied on the value of the income having regard to the accident. This would bring about a variation in the calculations by the experts discussed above. The plaintiff's actuaries included a table reflecting a broad range of other contingency deductions but for the accident and I find solace in the fact that 30% is also indicated thereon. It reflects an amount of **R4 631 094.00**.

[11] See paragraph 3.6 on page 5 of the joint minutes of the industrial psychologists.

[24] Therefore, I consider an amount of **R4 631 094.00** to be fair and reasonable compensation for plaintiff's future loss of income. An order in this regard will be made, which will incorporate an undertaking in terms of section 17(4)(a) of the Road Accident Fund 56 of 1996 for future costs of medical expenses. Costs will also follow the outcome.

Appointment of Curator Bonis or Establishment of a Trust

[25] Ms Sayed, the appointed *curator ad litem* filed a very comprehensive report and made brief oral submissions at the trial. I am really grateful for these. In her report she states that although Ms Thwala has already attained majority, she has vulnerabilities and risks, necessitating the continuous need for assistance in the management of her funds, particularly considering her learning disabilities. Her monies awarded in terms of this judgment may be exposed to abuse and mismanagement. She advises that the appointment of a *curator bonis* and or establishment of a trust are the options to safeguard Ms Thwala's interests, although she is swayed by the benefit of a trust.

[26] I also had the benefit of reading a report dated 07 October 2014 compiled by the Master of the North Gauteng High Court, Pretoria signed by M de Klerk. It makes very interesting comparisons between the institution of a *curator bonis* and the concept of a trust. I am reassured by the continuous statutory accountability and oversight embedded in the institution of a *curator bonis*. It may well be so, that a trust

constitute a better vehicle from another point of view. I would request the continued assistance of Ms Sayed regarding the appointment of a *curator bonis.*

Order

[27] I reflect the main aspects of the order made herein below and the ancillary aspects thereof will be as appearing in the draft order "B" and initialled for identification. Draft order "A" reflects the agreement reached between the parties and is reflected here only for completeness and record purposes. Therefore, the order is as follows:

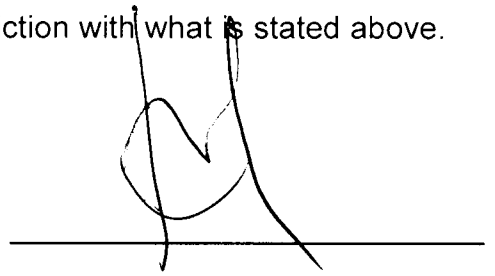
(a) that, the defendant is ordered to pay the plaintiff damages in respect of loss of income in an amount of **R4 631 094.00**;

(b) that, the defendant, by agreement reached between the plaintiff and the defendant, is ordered to pay to the plaintiff an amount of **R500 000.00** in respect of general damages;

(c) that the defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of the costs of future accommodation in a hospital or a nursing home or treatment of or rendering of a service or supplying of goods to Nonkululeko Fortunate Thwala after such costs have been incurred and on proof thereof, relating to the injuries sustained by Nonkululeko Fortunate Thwala, injured on the 22 December 2005.

(d) that, defendant is ordered to pay costs of trial herein on High Court party and party scale, either as agreed or taxed, including costs stated specified in draft orders "A" and "B".

(e) that, the rest of the orders are as contained in draft orders "A" and "B" initialled by me and of the same date as this judgment, to the extent that there is no duplication or contradiction with what is stated above.



K.LA.M. MANAMELA

Acting Judge of the High Court of SA: Gauteng Division, Pretoria

APPEARANCES	:	
For the Plaintiff	:	Adv. M Dixon
Instructed by	:	Ehlers Attorneys Centurion, Pretoria
Curator ad Litem	:	Adv. S Sayed
For the Defendant	:	Adv. K. Potgieter
Instructed by	:	Mothle Jooma Sabdia Incorporated Pretoria