

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 54221/2014

27/10/2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

ADVOCATE D.S GIANNI

PLAINTIFF

o.b.o

O. S.

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MALI J

[1] Advocate D.S. Gianni was appointed *curatrix ad litem* to the minor child, O. S. ("the minor"). On 16 July 2010 when the minor was 4 (four) and half year of age he got injured in a car accident. The accident was as a result of the collision that occurred between a motor vehicle driven by the insured driver. At the time of the accident the minor was in the company of his mother who passed away in the same accident.

[2] The defendant is an entity established in terms of the Road Accident Fund Act No 56 of 1996, ("the Act") and which is liable for compensation of victims of motor-vehicle accident for personal injuries sustained from such accidents.

[3] The only issue for determination is the amount to be awarded for general damages and the question of costs of the action, including the costs reserved on 5 February 2016 when the trial was postponed.

GENERAL DAMAGES

[4] The parties agreed that no oral evidence was to be led, and that the issue in dispute was to be determined by the court solely on the evidence contained in various experts reports filed by the plaintiff. The defendant did not file any medico-legal reports.

[5] It is common cause that the minor suffered the following injuries:

5.1 Abrasion to his forehead;

5.2 A large laceration to his scalp in the right parietal area, and a second scalp laceration in the occipital area;

5.3 Perforation of his tympanic membrane, with bleeding from his right ear;

5.4 A fracture of the base of his scalp.

5.5 Further fractures to the base of his skull in the anterior and middle cranial fossae areas;

5.6 A haemorrhagic contusion in the left temporal lobe of his brain;

5.7 A fracture of the temporal squama on the right;

5.8 A peri-orbital haematoma on the left.

[6] According to the particulars of claim, as a result of the aforesaid injuries and the *sequelae* thereof, the minor

6.1 Was temporarily / totally disabled and thereafter permanently/ partially disabled;

6.2 Suffered loss of earnings and will in the future continue to suffer loss of earnings and/ or earning capacity;

6.3 Experienced pain, suffering and discomfort.

[7] As a result of the above injuries and the subsequent *sequelae* the plaintiff claims an amount of R1,4 million in general damages on behalf of the minor child. The defendant contends that an amount of R600 000.00 is a fair award in the circumstances.

[8] It is trite law that the amount to be awarded on general damages can only be determined by the broadest considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances.

[9] In **PROTEA INSURANCE COMPANY v LAMB 1971 (1) SA 530 (A) at 534H** and **ROAD ACCIDENT FUND V MARUNGA 2003(5) SA 164 (SCA) at 23**, it is stated that a claim of general damages comprise pain and suffering, disfigurement, permanent disability and loss of amenities of life.

[10] It is not in dispute that by all accounts the minor's developmental history was normal and he did not experience any medical problems prior to the accident. At the time of the accident he was in Grade R at a creche. Subsequently the patient commenced his primary schooling and this has been characterised by poor academic

performance, with him consistently failing and moving onto following grades by way of condoned passes.

[11] According to the report of the Neuropsychologist, Dr Maluleke at page 125 at 5.4.2 the following observations are made:

"O. was a four years old pre-grade scholar (Grade R) at the time of the accident. He did not return to school for the rest of the year recuperating at home without any form of stimulation because he was still lethargic. On his return to school in January 2010 he was placed in Grade 1. There were complaints that he was playful and did not listen to his teacher's instructions. He could not cope with the demands of his school programme and was incompetent. He failed Grade 1 and during his second attempt of Grade 1, he was uncooperative and could not follow his teacher's instructions when writing exercises. His performance in Maths was dismal. He failed grade 1 again, but was condoned to the next class. His school performance remained poor in 2012 and his parents were advised to support and assist him with his schoolwork. He was promoted to the next class at the end of the year. Despite being assisted by his family, his performance remains poor. He can neither recall nor retain information taught at school. Despite his current placement in Grade 3 being the third attempt he has failed his Third Term Exams. He has ambition of pursuing a career in policing."

[12] According to the neurosurgeon, Dr Du Plessis, the injury to the minor's brain and focal brain has compounded effect of the diffuse brain injury which constitutes a "significant brain injury". This implies permanent brain damage with devastating effects in multiple areas.

[13] Dr Berkowitz, a plastic and reconstructive surgeon concludes as follows:

'This little boy sustained a major head injury involving a scalp laceration, a cerebral contusion, a fracture of the right mastoid process and a rupture of the right tympanic membrane. The patient has reached Maximum Medical Improvement. The patient has been left with serious, permanent disfigurements of his scalp as a result of this accident. The writer reserves the right to amend

this report should any further relevant information come to light"

Dr Berkowitz further reported that the scars caused by the permanent disfigurements of his scalp are amenable to improvement by means of surgical revision. The surgical revision will entail hospitalisation of 3 to 4 days and will have further moderate pain and discomfort for a further five to seven days.

[14] The plaintiff's counsel referred to the case of **SEME v ROAD ACCIDENT FUND 2008 (5) A4** in support of an award of R1,4 million. In Seme, the court awarded the plaintiff a 36 year old then who suffered a brain injury a sum of R1000 000 for general damages. The said updated is equivalent to R1, 700 000.00.

[15] Ms Nodada, Counsel for the defendant's contention is that the minor sustained a moderate concussive brain injury and there is no evidence that the plaintiff sustained a brain damage and orthopaedic injuries as a result of the accident. The minor can still manage to do certain things in life. The Counsel's argument is based on the report of the Neuropsychologist, Dr Maluleke. At page 127 of Dr Maluleke's report second paragraph of 5.5.2 the following is stated:

"He can distinguish money and co-operates when sent on shopping errands. He cannot recall a single item and uses a shopping list. His chores include washing dishes and helping with tending the goats which he counts and safely puts in the kraal. He is woken up by his grandmother at 05:45 and can live independent of his family. He has one friend who he relates well with although he occasionally chases him away for no apparent reason. He has good relationships with his family.

[16] Counsel for the defendant referred to case law, notably are the following cases:

15.1 In **Nanile v Minister of Posts and Telecommunications (1990) 4 QOD A4-30 (E)**, a 3 year old boy sustained brain damage. He sustained a compound fracture of the skull in the left frontal area. Massive membrane and haematoma revealed by CT scan some 8 months after initial surgery to drain the haemorrhage. Both hemispheres of brain compromised inhibiting physical movement, spastic

hemiparesis with gross ataxia of right upper limb which was of little practical use to him, no prospect of recovery, intellectual impairment with depletion of cognitive function; compromised vision; 30-50% risk of epilepsy, and he is no longer educable nor will he gain meaningful employment. The court awarded an amount of R35 000, which currently amounts to R202 000.00

15.2 In **Zinto v SA Mutual Fire & General Insurance 1970 2 C&B 6 B4** a boy of 4 years and 7 months sustained a permanent brain damage. Left arm and leg - paresis; residual weakness and clumsiness thereof with a degree of imbalance; small mental deterioration (my underlining); personality, play and behaviour affected. The court awarded an amount of R9000.00 which presently amounts to R567 000.00

[17] All the expert's reports in support of Dr Du Plessis report are indicative of brain damage. The injuries sustained and *sequelae* of the minor have been fully set out above. They are undoubtedly serious. The weight of the experts' evidence is supportive of brain damage which has impacted severely in loss of amenities of life. Dr Du Plessis' report at page 9 paragraph 3 reads:

"The accident has been a watershed event in his life due to the neurocognitive and possible neuro physical sequelae of the accident and the fact that he has lost his mother in the accident. He qualifies for compensation for general damages based on paragraphs 5.1, 5.2 and 5.3 of the narrative test"

[18] In *casu* the nature and the extent of the minor's pain and suffering as well as loss of amenities of life are well documented in various experts reports; for example at page 136, paragraph 7.5 of Dr Maluleke's report the following observations are made:

"He is currently battling to learn at elementary level. The learning disabilities will increase with increasing age and demands and he is likely to end up specialised education system for skills training. His employability has been severely (sic). Advanced activities of daily living have serious compromised (sic)."

[19] The minor's mental capability functions are heavily impacted due to the gross

impairment of the brain. It is apparent that the minor's accident has caused emotional, physical and psychological *sequelae*. It is common cause that he is unemployable in the labour market in future.

[20] I have considered various comparable cases including **MEGALINE V ROAD ACCIDENT FUND [2007] 3 ALL SA 531 (W)** ("Megaline"). In Megaline an 11 year old boy who suffered profound neurological impairments and prominent irreversible disfigurement **was awarded** R1000.000 in general damages. The said amount currently updated is R1, 700 000.00. I have also taken into account the sound warning in **DE JONG v DU PISANIE N.O. 2006(6) SA 547 (SCA)** at paragraph 60 wherein the court having noted the tendency towards increased awards in respect of general damages, re affirmed conservatism as one of the multiple factors to be taken into account in awarding damages. The court concluded that the principle remained that the award should be fair to both sides. It must give just compensation to the plaintiff, but not pour out largesse from the horn of plenty at the defendant's expense.

[21] Having regard to the above I find that an amount of R1 000 000.00 is a fair award to both parties.

COSTS OF 5 FEBRUARY 2016

[22] At the hearing of the case I was informed that the matter was initially set down for hearing on 5 February 2016. Prior to that, however, the defendant conceded the question of liability. On 5 February 2016, at the trial of the matter, the defendant objected to the late receipt of certain reports filed by the plaintiff and as a result the trial was postponed and costs were reserved.

[23] The trial was once again enrolled for hearing on 24 May 2016. After the commencement of the trial the parties reached agreement on the amount of loss of earnings at R4, 356 104,80 and the undertaking in respect of future medical , hospital and related expenses.

[24] In respect of future medical, hospital and related expenses it was agreed that the defendant would furnish the plaintiff with a suitably worded written undertaking in terms

of section 17 (4) (a) of the Act, which merely reinforced a prior agreement in this regard; and in order to dramatically curtail the trial proceedings the parties reached a further agreement in terms of which the defendant admitted the correctness of the contents of all the expert reports filed on behalf of the plaintiff, including the joint minutes.

[25] The defendant was in possession of the reports for a period of 8 (eight) days although the reports were late by two days. The defendant could not show how it was prejudiced with a two day difference to make its decision. It is apparent from the above that the defendant's objection to the late receipt of certain expert reports which resulted to the postponement of the trial has no merits. The defendant is therefore liable for the costs of 5 February 2016.

[26] In the result the following order is issued.

26.1 The curatrix ad litem, Adv D S Gianni, is granted permission to settle the claim in respect of O. S.

26.2 The defendant is to pay the plaintiff the amount of R5 356 104,80 directly into the trust account of Messrs. Savage, Jooste and Adams, being:

Savage, Jooste and Adams Attorneys,

Bank: NEDCOR - ARCADIA

Branch Code: 16-33-45-07

Account Number: [...]

Ref: MR MAKOLE/KB20

25.2.1 the defendant will not be held liable for any interest on the said payments on condition that the payments are made timeously.

25.2.2 in the event of the default of the defendant, interest will be payable on the

full amount owing at that at the rate of 15.5 % per annum as provided for in section 17(3)(a) of the Road Accident Fund Act 56 of 1996.

26.3 The award as pertaining to the minor shall be protected by means of the appointment of a Curator Bonis, to be appointed in the motion court, under the abovementioned case number.

26.4 The award will be kept in an interest bearing account of the plaintiff's attorney of record, until the Curator Bonis' appointment

26.5 The defendant is ordered to pay the plaintiff's party and party costs of the action, on a High Court scale, (including 5 February 2016, 24 May 2016 and 25 May 2016) which costs shall include:

25.5.1 the appointment of the Curator Bonis;

25.5.2 the costs of the following expert reports which are in the possession of the defendant and of which Notice in terms of the Rules has been given, (including the costs of the reports, addenda, RAF4 Serious Assessment Reports, joint minutes, the preparation, reservation and qualifying fees of the experts) as the Taxing Master may, upon taxation, determine:

25.5.2.1 Dr JJ du Plessis

25.5.2.2 Dr P Engelbrecht

25.5.2.3 Dr Berkowitz

25.5.2.4 Dr JS Enslin

25.5.2.5 Dr Mazabow

25.5.2.6 Ms Maluleka

25.5.2.7 Dr Matlala

25.5.2.8 Ms Mokgata

25.5.2.9 Ms Greeff

25.5.2.10 Mr Moodie

25.5.2.11 Algorithm Consultants and Actuaries;

and

25.5.2.12 Archer and Mann Audiologists

25.5.3 the traveling and accommodation costs of the minor and Ms Balibi for attending the medico-legal appointments;

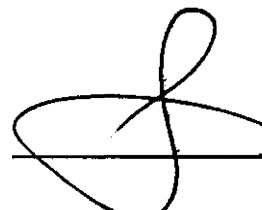
25.5.4 the traveling and accommodation costs of the minor, Ms Lenoge and Ms Balibi for attending Court on 5 February 2016, 24 May 2016 and 25 May 2016

25.5.5 the costs of the application for the appointment of the Curatrix Ad Litem;

25.5.6 the costs of the Curatrix Ad Litem, including her attendance at court and the drafting of the report;

25.5.7 the costs of Senior Counsel.

26.6 The party and party costs are payable within 14 days after receipt by the defendant's attorney of the stamped allocator, where after interest will be charged the appropriate rate per annum from date of the stamped allocator to date of payment.


A handwritten signature in black ink, consisting of a large loop and a horizontal stroke, is positioned above a solid horizontal line.

N.P.MALI

JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: G W Alberts SC

Instructed by: SAVAGE JOOSTE & ADAMS INC

Counsel for the Defendant: B Nodada

Instructed by: TAU PHALANE INC

Date of hearing: 25 May 2016

Date of Judgment: 27 October 2016