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

**CASE NO: 2143/19**

- |     |   |
|-----|---|
| (1) | REPORTABLE: <del>YES</del> / NO                 |
| (2) | OF INTEREST TO OTHER JUDGES: <del>YES</del> /NO |
| (3) | REVISED.  |

19.10.2021

DATE

Electronic

SIGNATURE

In the matter between:

**SAMAD SHABIR**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

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**JUDGMENT**

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**CRUTCHFIELD AJ:**

[1] The plaintiff, Shabir Samad, a major male sues the defendant, the Road Accident Fund ('Fund'), for damages pursuant to a motor vehicle collision, that took place on 26 January 2018 (the 'collision').

[2] The plaintiff claims general damages and damages arising out of his loss of income and loss of earning capacity. The plaintiff's attorneys delivered a notice of intention to amend the amount of the plaintiff's claim shortly before the date of trial. As at the date that the matter came before me on the first occasion, the ten-day period available to defendants to notify an objection to a notice of intention to amend had not yet lapsed. I refused to permit the amendment and the matter stood down before me to 23 September 2021 for finalisation. The postponed date of the hearing was brought to the attention of the Fund.

[3] I heard the submissions of the plaintiff's Senior Counsel in respect of the plaintiff's claim for loss of earnings and earning capacity ('loss of earning capacity'), and general damages. An appropriate order in respect of the claim for loss of earning capacity will follow hereunder.

[4] The issue of the plaintiff's general damages stands to be separated in terms of Rule 33(4) and referred to the HPCSA for a determination on whether the plaintiff's injuries qualify as serious in terms of Regulation 3 of the Road Accident Fund Regulations of 2008.<sup>1</sup>

[5] The question in this matter that requires a judgment, however, is the necessity or otherwise of appointing a curator *ad litem* to the plaintiff in terms of Rule 57 in order to

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<sup>1</sup> *Road Accident Fund v Duma* 2013 (6) SA 9 SCA para 19-20 ('Duma'); *Road Accident Fund v Faria* 2014 (6) SA 19 SCA para 34 ('Faria').

investigate the plaintiff's capacity to manage the award to be paid to him by the Fund consequent on the order to be made herein.

[6] The collision occurred on 26 January 2018 at approximately 02h55 in Verulam, KwaZulu-Natal. The plaintiff was the driver of a motor vehicle travelling on the Jabu Ngobo Road and involved in a head-on collision with another motor vehicle. The insured was travelling from the opposite direction, attempted to overtake a vehicle driving in front of the plaintiff's vehicle and collided with the plaintiff's vehicle.

[7] The merits, as they are colloquially referred to, being the issue of the Fund's liability for the plaintiff's proven damages arising from the collision, were settled at 100% in favour of the plaintiff on 1 October 2019.

[8] The plaintiff sustained bodily injuries including a head injury with a loss of consciousness, whiplash and soft tissue injuries to the neck, a right hip injury, a closed mid-shaft fracture of the right femur and a fracture of the patella.

[9] The reports of the experts included those of a clinical psychologist Stavroula Samouri ('Mr Samouri'), a psychiatrist Dr Mayaven Naidoo ('Dr Naidoo'), and a neurosurgeon, one Dr J H Kruger ('Dr J H Kruger'), that are relevant to the issue of the appointment of a curator *ad litem* and the potential establishment of a trust into which the award should be paid.

[10] Mr Samouri conducted various tests. The plaintiff's results of the mini mental status examination ('MMSE') test revealed severe cognitive impairment. The plaintiff was unable to maintain the necessary attention and concentration for the tasks, unable to recall items from memory and appeared as though he was unsure of himself. He was

not fully orientated to time, person and place. The plaintiff's alertness waivered throughout the testing situation.

[11] The plaintiff's results on the star cancellation test reflected problems with 'divided attention, vigilance and visual tracking'. The plaintiff was unable to complete the requested task within the specified time constraint.

[12] The outcome of the tests performed in respect of the plaintiff's executive and frontal lobe function indicated inadequate scores in respect of CLOX1 and CLOX2 tests. 'Performance on the CLOX1 often predicts a level of independent living'.

[13] The results of the Mazes tests indicated that the plaintiff suffers from 'impairment with planning and decision-making. This also suggests problems with executive functioning'. The outcome reflected impairment of the plaintiff's executive functioning processes and 'significant trouble' with 'verbal and executive control functioning'.

[14] Significant impairment with visual spatial and visual constructive abilities was also evident.

[15] The plaintiff's results of the Draw-A-Person Test reflected that the plaintiff 'feels emotionally vulnerable and insecure ... seems anxious, uncertain with low energy which may be as a result of his anxiety, dependency and insecurity. ... indicates feels of inadequacy and poor self-concept. Evidence of repression is also evident. ..."

[16] Furthermore, the drawing indicated 'low energy levels and a possible childish avoidance of reality'.

[17] The plaintiff's memory function results demonstrated a decline compared to previous levels of functioning. The plaintiff's memory appeared to be significantly compromised. The results of memory tests indicated that the plaintiff struggle to 'pay attention in relatively simple situations'.

[18] The plaintiff's 'comprehension appears to be impaired, he tends to be tangential and does not manage to answer the questions asked at times. Questions needed to be repeated'.

[19] The plaintiff experiences 'high levels of anxiety' pursuant to the collision as well as post-traumatic stress disorder. He suffers from a 'low depressive mood' since the collision.

[20] The plaintiff experiences chronic pain and has to alter his social, physical and emotional behaviour. He uses a large quantity of tablets to assist in managing his pain, which has the potential to further compromise his overall functioning adversely. Mr Samouri stated that the plaintiff's assessments reflected that he will struggle with executive functioning as a result of his emotional functioning and chronic pain.

[21] Furthermore, the plaintiff's tests results reflected that the plaintiff 'sustained a significant drop in cognitive functioning' as a result of the collision. The plaintiff acknowledged to Mr Samouri that his memory was negatively impacted and that he struggles with attention and concentration. Mr Samouri opined that the plaintiff's head injury 'could have resulted in (the plaintiff's) cognitive decline'.

[22] Mr Samouri concluded that the plaintiff's test results together with the plaintiff's clinical interview gave rise to his recommendation that a curator be appointed to assist the plaintiff in managing the award to be paid to him. Mr Samouri noted that the

appointment of a curator may be reassessed at a later stage 'following successful treatments regarding (the plaintiff's) affective functioning. From the test results obtained (the plaintiff) presents with compromised Executive functioning'.

[23] The psychiatrist, Dr Naidoo, referred to evidence of a 'traumatic brain injury'. The collision resulted in 'changes in (the plaintiff's) affective, behavioural and cognitive functioning that need to be accounted for'.

[24] Dr Naidoo concluded that in his opinion the plaintiff is 'a vulnerable individual due to his literacy level and he also doesn't have an adequate understanding of the legal process that he is engaging in. Hence a Curator *Ad Litem* should be appointed. This would also facilitate the protection of any awarded funds in a Trust'.

[25] Dr Kruger stated that the plaintiff suffered a mild traumatic brain injury. The outcome diagnosis included 'cognitive mental problems with loss of short-term memory and lack of concentration, executive mental problems with a change in personality – the patient has closed himself off from the outside world. Chronic pain in various areas of his body'. Pursuant to the collision, the plaintiff experiences cognitive mental problems, loss of short-term memory and lack of concentration. The plaintiff also struggles with executive mental problems, as well as psychological/psychiatric complaints. The plaintiff also experiences chronic pain, chronic subjective suffering and chronic loss of enjoyment of life.

[26] The collision had 'a severe impact on his cognitive mental functioning, his executive mental functioning, his psychological/psychiatric well-being, his physical ability, his physical appearance, his ability to work in the open labour market and to sustain himself financially, his ability to take part in sport and socialise'. Furthermore,

the injuries 'qualify as serious injuries under heading: ... severe long-term mental or severe long-term behavioural disturbance or disorder'.

[27] Dr Kruger opined that 'taking into account the fact that (the plaintiff) sustained a head injury in the accident and currently complains of cognitive mental problems, executive mental problems, psychological/psychiatric complaints', he 'suggests' that an award in the form of a lump sum should be protected in a Trust.

[28] The plaintiff is 46 years old and married to his wife. They are currently undergoing divorce proceedings. Three sons, aged 21, 12 and seven years old respectively, were born of the marriage.

[29] The plaintiff completed Grade 8 during 1991 and holds no other formal qualification.

[30] I was informed by Senior Counsel appearing for the plaintiff at the hearings that the plaintiff did not favour the establishment of a Trust as he has responsibilities in respect of *inter alia* maintaining his children. The establishment of a Trust, if that is shown to be appropriate, will not hinder the plaintiff meeting those responsibilities.

[31] The plaintiff was not assisted by a curator *ad litem* during the trial.

[32] In *Van Rooyen obo N(...) v Road Accident Fund*<sup>2</sup> the Court dealt with a minor. Notwithstanding the *obiter* nature of the Court's comments in respect of major plaintiffs, those comments are of assistance. The Court reaffirmed the distinction between Rule

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<sup>2</sup> *Van Rooyen obo N(...) v Road Accident Fund* (77303/2018) [2021] ZAGPPHC 334 (17 May 2021) ('Van Rooyen').

57(13) and Rule 57(1) of the uniform rules of court, and referred to ‘authority<sup>3</sup> for the fact that a curator *bonis* (and by implication a trust) may be appointed even where a person is *compos mentis* under Rule 57(13)’, if “facts establish an incapacity to manage (the patient’s) affairs due to some defect of body or mind”.<sup>4</sup>

[33] The Court in Van Rooyen noted that ‘as a general proposition it can be accepted that the Court does not usually interfere to appoint a curator where the person concerned is *compos mentis* and furthermore actively opposes any such appointment’.<sup>5</sup>

[34] Furthermore, ‘Absent a declaration of inability on the part of the plaintiff to manage the funds or all of his belongings, a Trust can only be created with the patient’s express prior consent validly given’.<sup>6</sup>

**[35] There is no declaration of inability on the part of the plaintiff herein to manage the funds and the plaintiff opposes the establishment of a trust. Thus, I am not in a position to determine whether or not a trust should be established for the benefit of the plaintiff.**

[36] The plaintiff’s Senior Counsel informed me that the plaintiff had the foresight to request information on whether or not his estranged wife is entitled to receive half of the award resulting from these proceedings given the parties’ marriage in community of property. The plaintiff’s question was proffered as indicating that the plaintiff does not require the assistance of a trust in the management of the award.

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<sup>3</sup> *Van Rooyen id* para 19; *Ex parte Wilson: in re Morison* 1991 (4) SA 774 (T).

<sup>4</sup> *Van Rooyen id*.

<sup>5</sup> *Id*.

<sup>6</sup> *Van Rooyen id* para 20 referring to *Modiba obo Ruca; in re: Ruca v Road Accident Fund* (1261/2013; 63012/13) [2014] ZAGPPHC 1071 (27 January 2014).



[37] The plaintiff, a major who does not consent to the establishment of a Trust in order to protect the anticipated award from the Fund, cannot be deprived of the administration his estate absent his consent or a finding of his inability to manage those funds. As stated in *Van Rooyen*, 'funds can only be protected with the express consent of the adult. This naturally assumes that the Curator *Ad Litem* in those instances has properly discharged him/her of their duties in investigating the competency of the patient'.<sup>7</sup>

[38] The experts' evidence abovementioned indicates, at the very least, difficulties with the plaintiff's executive functioning and a loss of his cognitive functionality, both material factors in managing a large monetary amount. Those deficits may impact adversely upon the plaintiff's management of the award if it is paid directly to him absent the establishment of a Trust.

[39] Notwithstanding the statements of the experts, the outcome of the various tests administered by the experts and the opinions and conclusions drawn by those experts as a result of their interviews with the plaintiff, there is no additional information before me in respect of the plaintiff's ability or otherwise to manage the large monetary award that is expected to be paid by the Fund as a result of the collision.

[40] I take cognisance of the wishes of the plaintiff that he does not want a trust to be established and I am alive to the impact that the establishment of a trust will have on the plaintiff's self-autonomy and rights of freedom and dignity, if a trust is established ultimately.<sup>8</sup>

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<sup>7</sup> *Van Rooyen* id para 23.

<sup>8</sup> *Van Rooyen* id para 21 quoting *Ruca and Barkhuizen v Napier* 2007 (5) SA 323 (CC).

[41] In the circumstances, I intend to order that a curator *ad litem* be appointed in order to conduct an investigation into the need, if any, on the part of the plaintiff for:

41.1 Assistance in managing the funds to be awarded pursuant to the collision; and

41.2 The formation of a Trust on terms to be recommended to a court.

[42] A curator *ad litem* will also be in a position to make recommendations to a Court as to the least intrusive form of trust and the period for which it should operate.

[43] I intend to request the plaintiff's attorney to inform me of the identity of a member of the Pretoria Society of Advocates, suitably experienced and qualified, who consents to the appointment of curator *ad litem* in terms of Rule 57(1), and to inform me of the appropriate powers to be ordered to the curator *ad litem*. In the event that the plaintiff's legal representatives wish to make submissions on matters arising from the appointment of the curator *ad litem*, they are at liberty to do so in writing within ten days of the date of delivery of this judgment.

[44] By virtue of the aforementioned, I grant the following order:

1. A curator *ad litem* is hereby appointed to the plaintiff in terms of Rule 57(1) of the Uniform Rules of Court.
2. The identity of the curator *ad litem* and the powers to be awarded to the curator *ad litem* will be determined pursuant to the process envisaged below:

2.1. The plaintiff's attorney of record is requested to provide me, within ten days of the date of delivery of this judgment, with an affidavit incorporating:

2.1.1. The name of a suitably qualified and experienced advocate practising as a member of the Pretoria Society of Advocates who consents to the appointment as curator *ad litem* to the plaintiff in terms of Rule 57(1) of the Uniform Rules of Court;

2.1.2. Details of the relevant experience held by the advocate referred to in paragraph 2.1.1 above;

2.1.3. Proof of the consent of the advocate referred to in paragraph 2.1.1 above, to the appointment; and

2.2. A statement of the powers to be ordered in respect of the *curator ad litem*.

3. The issue of the plaintiff's general damages is:

3.1. Separated in terms of Rule 33(4) and postponed sine die pending the determination by the HPSCA referred to in paragraph 3.2 below;

3.2. Referred to the HPCSA for a determination on whether the plaintiff's injuries qualify as serious in terms of Regulation 3 of the Road Accident Fund Regulations of 2008.

4. The defendant is ordered to pay to the plaintiff a capital amount of R1 950 265.00 (one million nine hundred and fifty thousand two hundred and sixty-five rand) in respect of plaintiff's loss of earnings and loss of earning capacity together with interest *a tempore morae*, calculated in accordance with the prescribed rate of interest Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund Act, 56 of 1996.
5. Payment will be made directly to the Trust account of the plaintiff's attorneys within 180 (one hundred and eighty days) of the delivery of this judgment:

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|-----------------|----------------------------|
| Holder:         | De Broglia Attorneys       |
| Account Number: | 1096451867                 |
| Bank & Branch:  | Nedbank – Northern Gauteng |
| Code:           | [....]                     |
| Ref:            | S1368                      |

6. The defendant is ordered in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 to reimburse the plaintiff for 100% of the costs of any future accommodation of the plaintiff in a hospital or nursing home, or treatment or rendering of service to him or supplying goods to him arising out of injuries sustained by the plaintiff in the aforesaid motor vehicle accident, after such costs have been incurred and upon proof thereof.
7. The plaintiff's attorney of record shall retain the aforesaid amount, net of the attorney's costs, in an interest-bearing account in terms of section 78(2)(A) of the Attorneys Act, for the benefit of the plaintiff.

8. The plaintiff's attorneys of record shall pay the amount set out in paragraph 4 above together with any accrued interest, over to the trustee of the Trust to be appointed if such a recommendation is made by the curator *ad litem* to be appointed, and, ordered by a court, alternatively to the plaintiff if no such recommendation and order is made.
9. The defendant shall pay the plaintiff's taxed party-and-party costs on the High Court scale, which costs include, subject to the discretion of the Taxing Master, the following:
  - 9.1. The costs of:
    - 9.1.1. Obtaining the expert medico-legal reports delivered in terms of Rule 36(9)(a) and (b);
    - 9.1.2. The qualifying fees of the plaintiff's experts;
    - 9.1.3. Mr Ivan Kramer, actuary, in respect of the preparation of his actuarial report;
    - 9.1.4. The employment of Senior Counsel;
    - 9.1.5. The costs of the curator *ad litem* appointed to the patient;
    - 9.1.6. The costs of the establishment and management of a trust, including the annual costs of the security bond, in

the event that a trust is ordered by a Court pursuant to the report of the curator ad litem.

9.2. The plaintiff shall in the event that costs are not agreed, serve the notice of taxation on the defendant;

9.3. The plaintiff shall allow the defendant fourteen (14) court days to make payment of the taxed costs.

10. There is no contingency agreement between the plaintiff and his attorneys.

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**A A CRUTCHFIELD SC  
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION  
JOHANNESBURG**

***Electronically submitted therefore unsigned***

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 19 October 2021.

COUNSEL FOR THE PLAINTIFF:

Mr G Avvakoumides SC.

INSTRUCTED BY:  
Attorneys.

De Broglio

ATTORNEY FOR DEFENDANT: No appearance on behalf of the Defendant.

DATE OF THE HEARING: 23 September 2021.

DATE OF JUDGMENT: 19 October 2021.