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**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 4484/2016

- (1) REPORTABLE: / NO
(2) OF INTEREST TO OTHER JUDGES: /NO

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DATE

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SIGNATURE

In the matter between:

**M. T. A.
OBO M., K.**

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MIA, AJ

- [1] The plaintiff, T. A. M., is acting in her capacity as guardian of her minor daughter K.M., who was born on [...] 2004. The minor child was 8 years old when the collision occurred on 6 April 2013 at approximately 15h20 at the intersection of the Golden Highway and Welgevonden Road Evaton, Vanderbilpark. The plaintiff was a passenger in the vehicle

when the collision occurred between motor vehicles with registration numbers [X...] driven by Mr David Maredi and a motor vehicle with registration number [C...], driven by Mr Victor Sifiso Sambo. She instituted an action for damages against the defendant in terms Section 2 of the provisions of the Road Accident Fund Act, Act 56 of 1996 ("the Road Accident Fund Act") arising from injuries that she sustained as a result of the collision.

- [2] The issue of liability and quantum were separated at a pretrial hearing. The issue of liability (merits) was conceded 100% in favour of the plaintiff. The defendant also undertook to furnish an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act in respect of future hospital and medical costs. The issues which remained unresolved between the parties and which I am required to determine are those of the quantum of the plaintiff's general damages and the plaintiff's loss of earnings. The plaintiff claimed R1 500 000 as general damages and R5 000 000 for loss of earnings.

- [3] The matter came before me on the basis that neither of the parties would lead oral evidence. The parties agreed that the contents of the various medico- legal reports obtained on behalf of the parties and joint minutes compiled by the overlapping experts obtained would serve as proof of the injuries and their sequelae. The neurosurgeon experts agree that the plaintiff suffered a mild concussive brain injury with an associated laceration and a haematoma of the forehead. They agree that she suffers with post traumatic headaches which must be compensated for. They agree also that she has a visible ugly scar on her forehead on the left side which qualifies for non-pecuniary loss due to it being visible and ugly. Whilst she did not suffer neurophysical deficits, she experiences cognitive functional problems and personality changes. This has had a major neuropsychological impact on her mental status. They found further that she suffers from post-traumatic stress disorder and has depressive disorder symptoms.

[4] The clinical psychologists accepted the neuropsychological profiles and the accompanying impairments including the plaintiff's problems with psychomotor speed, memory and executive skills. Problems were also identified with regard to verbal reasoning, error proneness when completing arithmetic computations and visual spatial organisation and integration. In addition the clinical psychologists noted that the plaintiff has become socially withdrawn and has poor self-concept and self-regulation problems that manifest as reduced control of her temper and irritability and aggression towards other children and increased e-987ating. The symptoms of a depressive disorder and persistent Post Traumatic Stress Disorder symptoms were present. The aforementioned appear to be resultant from the brain injury and the trauma and physical pain she experienced. The plaintiff's psychiatrist Dr Larry Grinker noted that following even a mild head injury such as sustained by the plaintiff, individuals are at risk of developing a range of organically based psychiatric syndromes and comorbid psychiatric disorders which include mood disorders and impulse control.

[5] The industrial psychologists opine that the depressive disorder and posttraumatic stress disorder may have an impact on her educational potential in that it may reduce her potential and her future occupational functioning. They refer to the educational psychologists findings who agree that post the accident she will

“be able to complete Grade 12 but that her achievement will probably be lower and that she would only be able to secure an endorsement to continue with a Higher Certificate/Diploma (NQF level 5/6) as it is expected that the impact of the cognitive difficulties would become more visible in the senior phase where more emphasis is placed on her own effort.”

They envisage that she ought to be able to cope with work of a Light to Medium category. Her psychological, behavioural and cognitive profile however may render her vulnerable as an employee in the future within the open labour market. They agree that

“regardless of employment she will remain a vulnerable individual in employment as well as in the open labour market.”-

- [6] In view of the above findings Mr Strydom, appearing for the plaintiff, submitted the plaintiff's position must be viewed in the context of the South African labour market which currently experiences a 27 % rate of unemployment. In the event that the plaintiff does complete Grade 12 and succeeds in completing a Higher Certificate or Diploma she will firstly face difficulties finding employment as her educational performance is no longer the same as prior to the accident. He referred to Ms Hattingh the speech/language pathologist and audiologist who found that the plaintiff had central auditory processing difficulty which resulted in a slower pace of work. Ms Hattingh also found that she struggled to sustain auditory focus and had auditory discrimination difficulties that affected her understanding of information. The plaintiff's mother also reported to various experts that her daughter appeared to experience difficulty hearing.
- [7] Mr Strydom submitted that the plaintiff would not cope with the pressures of her employment with the neuropsychological, behavioural and cognitive difficulties she experiences. He submitted further that it was foreseeable that the pressures arising during employment may aggravate her condition resulting in further frustration. She may either leave her employment or be dismissed but ultimately may change employment frequently to avoid the pressures resulting in a poor work history and a poor work profile and would be an unsuitable candidate for employment as compared to the many other persons she will be competing against for the same position.

LOSS OF EARNINGS

- [8] On the basis of the joint minute of the industrial psychologists, two post morbid scenarios were envisaged. The first scenario, without intervention and support, was that the plaintiff will complete a higher certificate and work for two years in contract positions earning within the

Paterson A1 level basic salary. Thereafter it is envisaged she could progress from Paterson A3 to Paterson C1 by age 40 to 45 following the straight line approach. It is envisaged that she will only earn inflationary salary increases.

- [9] The second scenario which envisages intervention and support as well as therapy envisages that the plaintiff could complete a diploma. They note however that given her psychological, cognitive, emotional and behavioural vulnerabilities they consider the plaintiff has a risk of reduced career growth potential and she may only reach a career peak of a level LL/KJ Paterson C1 according to the plaintiff's experts and HVE/DJ Paterson C3 according to the defendant's experts but agree on a Paterson C2 as the middle ground.¹ The experts agree regardless of employment that she will remain a vulnerable individual. They agree that this reduced career earning potential should be compensated for and that her continued vulnerability should qualify her for a higher than usual contingency deduction.
- [10] The foregoing translated into an actuarial calculation by the plaintiff's actuary Gerard Jacobson Consulting Actuaries considered two scenarios in terms of which the loss of earnings of the plaintiff was calculated on the basis of two possible scenarios. The first scenario postulates the plaintiff's loss of income where she obtains a 3 year diploma after completing Grade 12. The second scenario postulates a case where the plaintiff obtains a 3 year degree having completed Grade 12. The actuaries worked on a 25% contingency however Mr Strydom submitted and the defence did not dispute that 20% was the more appropriate percentage to deduct in the circumstances.
- [11] It was projected that the plaintiff's premorbid income post grade 12 with a Diploma would be R7 238 685, applying a 20% contingency deduction results in an amount of R5 790 948. The plaintiff's post-morbid income

¹ Ibid,p18, para 8.2

was projected at R 3 815 219. Applying a 40 % contingency yielded a figure of R2 289 131. This results in a future loss of income of R3 139 883. In the second scenario the plaintiff's pre-morbid income post Grade 12 with a degree is projected at R 9 416 106, applying a 20% contingency results in a figure of R7 532 884. Her post morbid income is projected at R 3 815 219. A 40% contingency applied results in a figure of R2 289 131. In the final calculation Mr Strydom submitted that it would be equitable to the plaintiff that her pre morbid income be determined by taking the average of the degree and diploma scenarios after the 20% contingency deduction. This would be the average of two amounts R5 790 948 and R7 532 884 which yields a figure of R6 661 837 being the pre morbid projected income.

[12] In respect of the loss of earnings Ms Hlabyage submitted that paragraph 8.1 of the industrial psychologist's reports was more applicable and realistic when applied to the present circumstances that the plaintiff would complete a Diploma or Higher Certificate. The defendant had no difficulty with the application of the second scenario where the defendant with interventions obtained a degree and or obtained a Diploma or Higher Certificate. The defendant accepted that a higher contingency was applicable which Ms Hlabyage submitted was adequately catered for in the event that the Court applied a 30% contingency. She referred the court to their actuarial calculation from GW Jacobson Actuaries (Pty) Ltd where the pre morbid income with a Diploma amounted to R 7432 294. Applying a 20 % contingency having regard to the plaintiff's age resulted in an amount of R5 945 835. Her post morbid income based on the plaintiff achieving a Higher certificate per the actuarial report amounted to R 5246 340. Applying a 30% contingency resulted in an amount of R 3 672 438. The difference thus results in the plaintiff's loss being R 2 273 397.

[13] Ms Hlabyage referred to the second scenario projection in the actuarial calculation which was based on the plaintiff achieving a diploma pre and post the accident. In the latter scenario the premorbid income was R

7432 294 with a 20% contingency resulting in the amount of R5 945 835. The post morbid income was projected at R5 581 909 applying a 30% contingency resulted in an amount of R3 907 336. The difference results in a future loss of income being R2 038 499.

[14] In considering the experts views regarding the plaintiff's future prospects, her ability to work in the open labour market is clearly fraught with difficulty due to her being vulnerable and regardless of her employment it is envisaged she will encounter difficulties and remains 'a vulnerable individual'. I accept the experts' opinions that this will impact her earning potential and that she should be compensated for this reduced earning potential. This reduced earning potential and her continued vulnerability on the various grounds referred to above thus qualify her in my view for a higher than usual contingency deduction.

[15] In my view the first scenario which projects that the plaintiff will achieve a Higher certificate or Diploma is more realistic in view of her psychological, cognitive, emotional and behavioural vulnerabilities and how it may impact on her learning abilities according to Ms Hattingh whose report is not contested. The scenario wherein the plaintiff obtains a three year diploma with intervention appears to be optimistic in view of the experts' findings and taking into account that she has Post Traumatic Stress Disorder which has not been treated to date. She will be dealing with therapy as well as increased academic challenges as she proceeds to higher academic levels with limited time and it is not clear that she will have adequate support and intervention. The defendant conceded that a higher contingency was applicable with regard to the post morbid contingency. I am persuaded that 30% adequately addresses the complexity of the impact that her vulnerability exposes her to in the long term and the difficulties the plaintiff will be subjected to. I have noted that a 70% contingency referred to by Mr Strydom was applied in similar matters. However I am not persuaded that I should apply a contingency

as high as 50 % as submitted by Mr Strydom notwithstanding the 70% contingency referred to in *Msimanga v RAF*.

- [16] In *Msimanga* above Baqwa AJ (as he was then) applied a 70% contingency because it was accepted that the plaintiff was functionally unemployable and the experts in the matter were of the view that the plaintiff in *Msimanga* above would not reach the Patterson C levels. In the present matter there was agreement that the plaintiff would reach Patterson level C2. In addition, in *Msimanga* above there was the additional factor that the plaintiff would suffer seizures whereas in the present matter the plaintiff's risk of suffering epileptic seizures fall within the normal range as for the rest of the population and has not increased as a result of the collision. Consequently I have applied a 30% contingency to the post morbid income and accepted the defendant's calculation on the second scenario where the premorbid income was R 7432 294 with a 20% contingency resulting in the amount of R5 945 835. The post morbid income was projected at R5 581 909 applying a 30% contingency resulted in an amount of R3 907 336. The difference results in a future loss of income being R2 038 499.

- [17] I am mindful that merely following the trend to grant high awards slavishly does not take cognisance of the view of Holmes J in *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (D) at 287E–F that:

“[T]he court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense.”

I am also cognisant of the view expressed in *Hulley v Cox* 1923 AD 234 at 246:

“we cannot allow our sympathy for the claimants in this very distressing case to influence our judgment”.

[18] Mr Strydom at the outset referred to the decision of *Southern Insurance Association v Bailey* NO 1984 (1) 98 AD. Two approaches were identified in the above matter that can be used to determine future loss of earnings at pp113 to 114C-D, by Nicholas JA:

“One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guess work, a blind plunge into the unknown. The other is to try to make an assessment by way of mathematical calculations, on the assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent.”

GENERAL DAMAGES

[19] I turn now to the general damages which is claimed in the amount of R1 500 000.00.

[20] Mr Strydom submitted that the amount of R1000 000.00 was a reasonable amount even though the plaintiff claimed the amount of R1500 000.00. By way of comparison he referred to a number of decisions to illustrate that the amount was indeed reasonable he referred to *Msimanga v RAF* where in 2011 the amount was R800 000.00. was awarded to a minor. This amount was agreed to between the parties unlike in the present matter where the amount is not agreed. In the unreported judgment of *Nhlapo v RAF* Bhikha AJ stated at paragraph [22] that:

“The award for general damages is to compensate for pain and suffering, discomfort, disfigurement and loss of amenities of life”.

An award of R800 000.00 was made where the plaintiff suffered a brain injury with severe sequelae. There was significant trauma to the head and a degloving injury requiring multiple operations. In *Ramatsebe v RAF* Victor J awarded a minor with a head injury the amount of R800 000.00 in 2011.

[21] In all the matters referred to by Mr Strydom the awards were to plaintiffs younger or about the same age as the plaintiff when the collision occurred. They all suffered some kind of brain injury with sequelae that were similar or more serious. Many of the cases overlapped in that the long term impact on the plaintiffs affected their cognitive, psychological and behavioural functioning and resulted in depression and a reduced quality of life. They were unhappy and not sociable and were socially isolated or marginalised as a result their injuries or the scarring due to their injuries. In the present matter the plaintiff sustained a cut on her forehead which was sutured. She developed a haematoma and was admitted to hospital for three days to drain the wound. As a result the plaintiff has an ugly scar on her forehead. The plaintiff also suffers from Post Traumatic Stress Disorder. The plaintiff's injuries however did not appear to be as serious as those referred to in the cases referred to by the plaintiff.

[22] Ms Hlabyage submitted that the plaintiff only qualified for compensation for the scar under general damages. She submitted further that the neurosurgeons did not indicate that she qualifies for general damages and thus the only damages applicable were the damages for the minor disfigurement of her face as a result of the scar which she submitted ought to be awarded in the amount of R200 000.00 having regard to the case of *Mohloboli v Ralethohlane and Another* 654 QOD 1 FSHC where the plaintiff sustained a minor head injury and was awarded R145 000. She referred also to *Macle v RAF* 2015 7E4 QOD 1GNP where the plaintiff sustained a mild concussive injury and was awarded R 359 000.00. In *Fawkes v Guardian Co. Ltd* 1951 194 QOD 293 E the plaintiff suffered jaw and facial disfigurement and was awarded an amount of R213 000.00. In *Schmidt v Nel* 1961 194 QOD 290 O the plaintiff with a permanent scar was awarded the sum of R210 000.00. Ms Hlabyage submitted that based on the above case law an amount of R210 000 to R213 000 was applicable for the scar and R400 000 in total as a cumulative amount for general damages was appropriate. Thus the order in total ought to be R400 000 plus R2 038 499 bringing the total award to R 2438 499.

[23] Having regard to the case law, referred to by Mr Strydom the plaintiff's scars will remain unless treated by a plastic surgeon. She suffers Post Traumatic Stress Disorder which is on-going and this impacts her quality of life. The cases referred to by the defendant are instructive herein. I have indicated that the injuries in *Msimanga* above appear to be more serious in nature than the present matter. I have taken into account the physical injury as well as loss of amenities of life as a result of depression and am satisfied that the amount of R 400 000 is a reasonable amount for general damages.

[24] In view of the above the sum awarded is thus an amount of R400 000 for damages and R2 038 499 for loss of earnings which results in a total award of R 2438 499. The amended order attached marked X, is duly incorporated into the judgment, with the insertion of the amount of R 2438 499.

S C MIA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the plaintiff	:	Mr Strydom
Instructed by	:	AF Van Wyk Attorneys.
On behalf of the Defendants	:	Adv Hlabyage
Instructed by	:	Moloto Stofile Attorneys
Date of hearing	:	28 May 2018
Date of judgment	:	18 June 2018