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

CASE NO: 32263/2021 (Y)

In the matter between:

G: K obo

G: T J

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

This judgment has been delivered by uploading it to the caselines digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties. The deemed date and time of the delivery is 14H00 on 29 Spetember 2023.

JUDGMENT

PYE AJ*Introduction*

- [1] On 3 November 2018 the plaintiff and her minor son (TJ) were passengers in a vehicle driven by the plaintiff's husband and TJ's father. The plaintiff is a stay-at-home mother. TJ's father is a truck driver.
- [2] The vehicle in which TJ was travelling was collided from behind by a vehicle which was in turn collided from behind by a truck.
- [3] Arising from the collision TJ sustained an organic brain injury. At the time of the collision he was three years old. During June 2021 the plaintiff as natural guardian of TJ instituted proceedings against the Road Accident Fund ("the RAF") for the injuries sustained by TJ in the accident in terms of the Road Accident Fund Act, 1996 as amended ("the Act").
- [4] The RAF conceded the merits of TJ's claim. It also conceded that the plaintiff was entitled to an undertaking in terms of section 17(4)(a) of the Act.
- [5] What remained in dispute between the parties was the amount to be awarded to TJ for general damages and the amount to be awarded for future loss of income.
- [6] The parties agreed that the expert witnesses called by the plaintiff would be regarded as joint experts. The plaintiff called Dr Fine (psychiatrist), Dr Rossi (an educational psychologist), Mr De Vlamingh (an industrial psychologist), Mr Whittaker (an

actuary), Dr Bingle (neurosurgeon), Dr Ormond Brown (neuropsychologist) and Ms H du Preez (occupational therapist).

- [7] I do not intend to traverse all the evidence of the various experts. I will attempt to identify salient aspects of certain of their evidence which I regard as germane to the findings that I make in this matter. This is not to say that I have not taken into account the evidence of all the experts.
- [8] After the accident, TJ presented as unusually quiet. He then had a seizure and lost consciousness. The evidence of the experts was that the loss of consciousness was a cardinal sign of brain injury. TJ was taken by ambulance to the Charlotte Maxeke Hospital where he underwent a CT scan. Shortly before arrival at the hospital TJ regained consciousness. The evidence of Dr Bingle was that TJ suffered from a parietal bone depression, a skull fracture and underlying extradural bleeding. Dr Bingle described the head injury as a “significant traumatic” brain injury. TJ’s injury was described by Dr Fine as an organic brain injury. TJ received Epilim as a precaution for epilepsy. He also received pain medication. He was admitted as a patient and discharged two weeks later.
- [9] On 23 December 2018 TJ had another epileptic event and was taken to the Germiston Hospital where he was admitted for two days and was given a two-month script for Epilim. It was common cause between all the medical experts that the epileptic fits that TJ experienced were caused as a result of the brain injury that he sustained and not because TJ suffered from Epilepsy.
- [10] The plaintiff gave evidence that after the accident TJ had to be potty trained again. He also suffered from a speech impairment and could only communicate by hand gestures. He seemingly lost the premorbid speech milestones that he had achieved. The plaintiff said

that TJ was unable to communicate or understand instructions that had not been an obstacle to him pre-morbid.

[11] There was also a marked decline in TJ's school performance. He presented as disruptive and aggressive towards his peers. He was unable to write his name or carry out simple cutting exercises. His teachers gave evidence that he was not on par with his peers and that he demonstrated an inability to retain what he had learned. The teachers observed that he had traits of ADHD which was confirmed clinically by the neuropsychologist and the educational psychologist.

[12] At the time of the hearing TJ was nine years old and had only been able to achieve the level of grade two. TJ's teachers and all the experts agree that TJ needs to attend a remedial school where his special needs can be addressed.

[13] The plaintiff's evidence was that there had been a marked change in TJ's behaviour post the motor vehicle collision. His speech has degraded and she struggles to explain things to him which he had understood in the past. She said that TJ often cries for no apparent reason being an issue that was not present before the accident.

[14] When Dr Ormond Brown first saw TJ he was five years old. He presented as a hyperactive boy with attention deficit disorder. He was easily distracted and seemed to get bored quickly. The plaintiff confirmed to Dr Ormond Brown that TJ was unable to multitask and was required to perform a single event at a time. The plaintiff remarked that TJ lacked common sense and did not grasp things that most children seem to be able to grasp. She also remarked that post the accident TJ had become difficult to discipline.

[15] Post the accident, TJ is very aggressive and beats other children. Dr Ormond Brown remarked that TJ had lost his fine sensory motor

skills. Dr Ormond Brown said that TJ had major problems associated with visual spatial perception. He is unable to accurately process visual spatial information relating to line orientation, angular relationships and geometric symmetries. TJ is unable to copy simple geometric shapes and his performance on the relevant tests fell into the abnormally impaired range. Dr Ormond Brown concluded that there were multiple symptoms of a brain injury.

- [16] Dr Ormond Brown remarked that TJ manifested dysmetria which is a sign of cerebellar dysfunction.

- [17] On tasks that measure the capacity to sustain concentration and resist distraction, TJ's performance consistently fell into the abnormally impaired range. He also displays an abnormally impaired memory capacity and scored below average in his ability to comprehend instructions.

- [18] TJ's executive brain function is also significantly impaired. He demonstrates high levels of perseveration which Dr Ormond Brown indicated was a hallmark of frontal lobe function. TJ's capacity to inhibit compulsive responses was profoundly compromised. TJ also demonstrated an undeveloped sense of the minds and intentionality of others.

- [19] Dr Ormond Brown confirmed that TJ's current neuropsychological status represented the final outcome of his brain injury. In the future there would be changes due to growth and development but these would not represent recovery and the effects of the brain injury would remain permanently. The gap between TJ and his peers will gradually widen as the years pass.

[20] Dr Ormond Brown expressed the opinion that TJ would have a lifetime of emotional problems. His outcomes will be greatly worsened if he does not get proper treatment. Given that TJ's brain injury is a frontal lobe injury, there will be a significant impairment of his executive brain functioning.

[21] As an adult TJ is likely to present with deficient abstract reasoning skills. He will continue to have an impeded memory and will demonstrate poor interpersonal skills. TJ will have difficulty forming emotional relationships and maintaining relationships later in life. TJ will remain vulnerable to impulsive and inappropriate behaviour and the workplace will prove to be a challenging environment. He will struggle to keep steady employment. TJ will struggle to engage in social situations and will likely struggle with anger and anxiety leading to conflicts and isolation. Dr fine confirmed that TJ has an increased risk of mental health issues like depression and anxiety which will further isolate him and further contribute to an inability to establish and maintain relationships.

General damages

[22] I now deal with my award for general damages. Life for most functional people entails extended and sustained periods of personal growth. The ability to develop friendships and emotional relationships is the hallmark of a healthy life. Marriage or life partnerships and the ability to function in the workplace all contribute to sound mental health and make the vicissitudes of life easier to bear. TJ faces a life where he will be deprived of normal personal growth. To exacerbate matters, his injuries are not physically visible. Empathetic responses to TJ's plight by third parties will only be possible with a detailed explanation of TJ's condition. Dr Ormond Brown sadly expressed the opinion that TJ is likely to live a lonely life. He will also be

disadvantaged in the workplace in that his opportunities will be limited to manual activities in an unskilled position.

[23] In the matter of the *Minister of Safety and Security v Seymour*,¹ the court said the following:

“[17] *The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that. ...*

[18] *The dangers of relying excessively on earlier awards are well illustrated by comparing the award in [May v Union Government 1954 (3) SA 120 (N)] to the award that was made in Maphalala v Minister of Law and Order [unreported WLD of 10 February 1995] Whether the award in May was excessive, or the award in Maphala was niggardly, is beside the point. I use them only to illustrate that the gross disparity of the facts in each case is not reflected in the respective awards, and neither is those circumstances a safe guide to what is appropriate.”*

[24] In arriving at an award of general damages, I have had particular regard to the judgment in *Rabie v MEC for Education, Gauteng*² and the authorities referred to therein. I consider an award in favour of TJ of R1 750 000.00 for general damages to be fair and reasonable in the circumstances.

Future loss of earnings

[25] I now deal with TJ's future loss of earnings.

¹ 2006 (6) SA 320 (SCA) at 325-326

² 2013 (6A4) QOD 227 (GNP)

[26] It was common cause between the parties that TJ will not be able to function and progress in a mainstream school. He will continue to struggle at school. His restricted scholastic ability limits his work potential and earnings. Ms Du Preez expressed the opinion that should TJ be able to secure any employment after leaving school the position would most likely entail very low unskilled physical work, where the nature of the work is repetitive and not dependent on high speed or high level planning and reasoning.

[27] Dr Rossi believes that TJ would have passed Grade 12 and obtained a vocational certificate (NQF5) or diploma (NQF6) but for the accident. Having observed the tenacity of the plaintiff to push TJ to his full potential and the willingness on her part to make sacrifices for his future I am confident that the latter milestones are realistic if not conservative. I therefore will award damages on the assumption that TJ would have achieved an NQF6 qualification but for the motor collision.

[28] The uncontested evidence of the actuary Mr Whittaker was that based on a total package of Paterson C4 level at age 45, TJ's future loss of income can be explained as follows:

28.1	Premorbid value of income:	R8 425 515	
	less contingencies deduction 25%:	<u>R2 106 379</u>	
	Total:		R6 319 136
28.2	Postmorbid value of income:	R1 756 126	
	Less contingency deduction 40%:	<u>R 702 450</u>	
	Total:		<u>R1 053 676</u>
	Net future loss of income as at		
	August 2023		<u>R5 265 460</u>

- [29] I agree with the actuary's assessment of the contingencies and accordingly make an award of future loss of earning to TJ in the sum of R5 265 460.
- [30] It was furthermore common cause between the parties that any judgment amount awarded in favour of TJ should be placed in a trust to be formed and the terms thereof were contained in a draft order which was consented to by the plaintiff and the RAF.
- [31] The draft order did not however take into consideration the observations made by our courts in **Dube N.O. v Road Accident Fund** 2014(1) SA 577 (GSJ) and **In re: Protection of Certain Personal Injury Awards Pretoria Society of Advocates and Others, (Amici Curiae)** 2022(6) SA 446 (GP).
- [32] I then drew the aforesaid judgments to the attention of the parties and remarked that the draft order sought by the plaintiff does not accord with the findings in the judgments.
- [33] The plaintiff then reverted with an amended draft order that incorporated a trust deed that had been drafted taking into account the requirements of the aforesaid judgments. The draft deed of Trust is incorporated in the order that I make in these proceedings.

Order

(1) I accordingly grant judgment in favour of the plaintiff in her capacity as guardian of T J G against the defendant for:

1.1 payment of the sum of R1 750 000;

1.2 payment of the sum of R5 265 460;

1.3 payment of interest on the aforesaid amounts at the rate of 11.25% per annum calculated 180 days from the date of this judgment to date of final payment;

- (2) The amounts awarded in terms of this judgment to the plaintiff shall be retained in a trust ("the trust") governed by the provisions of the Trust Property Control Act, 1988 of which T J G shall be the sole beneficiary.
- (3) Payment by the defendant shall be made only into a trust account of the plaintiff's attorneys to be invested and held by them in a separate interest bearing account in terms of section 86(4) of the Legal Practice Act, 28 of 2014 pending the establishment of the trust and the opening by the trustees of a bank account;
- (4) Payment shall be made into the trust account of the plaintiff's attorney with the following account details:
- Name of account holder: A Rautenbach Attorneys
Bank name: First National Bank
Account No: [...]
Branch Code: [...]
Type of account: Trust account
Deposit reference: [...]
- (5) On the establishment of the trust and the opening of a bank account of the trust the plaintiff's attorneys shall pay the full amount invested in trust, including the accrued interest, into the trust's bank account.
- (6) The trust shall be established on the terms and conditions of the draft trust deed attached to this judgment and marked **X**.

(7) The defendant shall pay

- a. the reasonable costs of the creation of the trust and the appointment of the trustees.
- b. The remuneration of the trustees in administering the amount paid to the trust in terms of this judgement
- c. the reasonable cost of the furnishing of security by the trustees

(8) The trustees shall provide security to the satisfaction of the master in terms of section 6(2)(a) of the Trust Property Control Act 57 of 1988.

(9) The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to pay to the plaintiff T J G's future accommodation in a hospital or nursing home or the treatment of or rendering of services to or the supply of goods to the plaintiff or T J G or related expenses arising out of the injuries sustained in the motor vehicle collision on 3 November 2018 after such costs have been incurred and upon the provision of proof thereof to the defendant.

(10) The defendant shall provide the plaintiff with the aforesaid undertaking within 1 month of the grant of judgment herein.

(11) The defendant shall make payment of the plaintiff's agreed or taxed party and party costs including the costs of counsel.

(12) The defendant shall pay the reasonable travelling and accommodation costs incurred to ensure the plaintiff's attendance to all medical legal appointments and include the

qualifying, reservation and preparation fees if any of the following experts:

- a. Dr T Pringle (neurosurgeon);
- b. Dr J C Rossi (educational psychologist);
- c. Dr L Fine (psychiatrist);
- d. Dr D Ormond Brown (clinical psychologist);
- e. Dr H du Preez (occupational therapist);
- f. Dr D de Vlamingh (industrial psychologist);
- g. Mr G Whittaker (actuary).

(13) The defendant shall pay the plaintiff's taxed or agreed costs within 1 month of such taxation or agreement.

(14) The plaintiff and the plaintiff's attorneys of record are declared to have entered into a contingency fee agreement that complies with the Contingency Fees Act.

**PYE AJ
ACTING JUDGE OF THE HIGH
COURT**

Date of Hearing: 23 August 2023

Date of Judgment: 29 September 2023

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