IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – PORT ELIZABETH

CASE NO: 1405/2008
DATE HEARD: 08/06/10
DATE DELIVERED: 13/07/10

In the matter between

NOMTHANDAZO GLORIA NOLOKWE **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

TSHIKI J:-

A) INTRODUCTION

[1] On the 6 May 2004 the Plaintiff's son Zukisani, born on 19 July 1995, was injured in a motor vehicle accident from which he sustained serious injuries. At the time of the accident Zukisani was doing grade 3. Consequent upon the injuries sustained the plaintiff sued the Defendant for compensation for damages sustained by her minor son as well as the special damages for expenses she had incurred for her son's injuries.

B) ISSUES

[2] At the time of the trial the parties had settled all the other damages except for one issue which is whether, in addition to the contingencies already taken into account by the actuary, there was a need for the court to consider ordering further contingency deductions relating to early mortality.

Mr Frost appeared for the Plaintiff and Mr Jooste for the Defendant.

C) EVIDENCE

[3] The only witness called was Dr Richard Holmes the industrial psychologist who testified on behalf of the Plaintiff. His evidence is, *inter alia,* that on 25 February 2009 he consulted with and examined Zukisani to consider a number of aspects pertaining to the minor child's expected further schooling, future employment, lifestyle and general adjustment. His medico legal reports as well as those of, *inter alia*, Ian Meyer a clinical psychologist, Ansie Van Zyl an Occupational therapist, Dr R.J Keeley and Nilen Kambaran were received by consent as evidence.

[4] According to Dr Holmes the amount reflected in the actuarial report by Nilen Kamberan has already taken into account all the contingencies and for that reason no further contingencies of whatever source or nature should further be considered at this stage. He further stated that the actuarial methodology and assumptions used in the report as well as the figures and results thereof were agreed to by both parties. Dr Holmes testified further that they have used, as a basis, well founded scientific surveys. When considering Zukisani's circumstances they had to take into account, *inter alia*, all the factors more importantly the fact that he was injured at a very young age, and they have considered appropriate the use of both the national as well as the most relevant geographical salary/remuneration progression curves.

[5] In considering the Anticipated Future Income Potential, given the understanding that Zukisani's cognitive and socio- emotional deficits would not improve and that he is likely to encounter increasing difficulty in coping with his school work as he progresses to a higher grade, it is likely that he might not progress beyond Grade 12 education. Therefore, entry to the job market would be at a low-skilled level and that advancement to a semi- skilled level would be severely restricted, if not precluded. The salary/ remuneration tables used by Dr Holmes would be relevant to the circumstances of Zukisani. The tables also take into account as appropriate the awarding of a significantly higher post-accident contingency deduction. This is so given Zukisani's orthopaedic injuries, demonstrated and measured post-accident neurocognitive impediments and his continuing socio-emotional difficulties. Therefore, the actuary in Exhibit F (Actuarial Certificate Of Value Loss Of Earnings) has applied a 40% contingency reduction in the figures from January 2016 to the time when Zukisani would be thirty (30) years and a deduction of 25% from thirty (30) years to retirement.

[6] Dr Holmes specifically informed the Court that in the assessment of prospective loss the actuarial report exhibit F has already taken into account of possible future events which might have caused the loss or part of a loss which may influence the extent of the loss. According to him any application of further contingencies would bring about hardships and would, therefore, be unfair to Zukisani's award of damages for future loss of earnings.

[7] During cross examination of Dr Holmes by Mr Jooste the witness confirmed that they use the natural and geographical surveys and that the Eastern Cape figures are utilised into the National figures with a view to come to the result which would take consideration of the fact that in the more rural places the figures would be low. The figures displayed in the table also make allowance of all the possibilities including the fact that unemployment could be the result of a person who is capable of employment but cannot find a job. No amount of cross examination could discredit his evidence and I have no reason to reject it.

[8] After the evidence of Dr Holmes both parties closed their cases. Mr Frost has urged the Court to find in favour of the Plaintiff by relying on the uncontested and uncontradicted evidence of Dr Holmes as well as the contents of the exhibits including exhibits F and G (as amended).

[9] Mr Jooste has argued that Dr Holmes is no expert in contingencies and, therefore, his evidence could not be of assistance to the Court. He argued further that the Plaintiff cannot deal with everything pumped into the basket of contingencies which Dr Holmes did not deal with in detail.

[10] What is relevant here is future contingencies. It is customary and, therefore, necessary that in the assessment of prospective loss, a Court has to take into account possible future events which may affect or influence the extent of the loss. In this case, if I agree with Mr Jooste, I have to determine probably future events and circumstances prognostically in order to assess the present value of Zukisani's

expectancies[1]. When the plaintiff claims his or her damages the money claimed, which also includes future loss of earnings, has to be paid at the finalization of the case. It means that the damages paid would also include in monetary terms damages for what he would have to earn in 20- 30 years to come. This depends, however, on the age of the person on behalf of whom the Plaintiff is claiming. It may happen that a few days after the payment of the damages the injured person dies of suicide or of a motor accident or any cause. That money would definitely have to be paid into the injured person's estate and will be inherited by people who never suffered any damages. It is for that reason that the Court when awarding damages for future loss of income has to take into account the contingencies. Visser et AL[2] above state as follows:

> 'Contingencies include any possible relevant future event which might have caused the damages or part thereof or which may influence the extent of the plaintiff's damage. In a wide sense contingencies are described as "the hazards that normally beset the lives and circumstances of ordinary people[3]. These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life, and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions"[4].

[11] In my view, when the Court considers the application of contingencies in a given case it has to have in mind that not all contingencies are adverse and not all vicissitudes are harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In

[1] See Visser et AL on Visser And Potgieter's Law of Damages, 2nd ed. Para. 6-7.1 page 125.
[2] At page 128 para 6.7.3
[3] Southern Ins Ass Ltd v Bailey 1984(1) SA 98 (A)
[4] See Southern Ins Ass Ltd v Bailey above at 116 H

some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad[5].

[12] According to the only available evidence and contrary to Mr Jooste's argument, the above contingencies which are applicable in every given case were taken into consideration when the amount due to Zukisani was calculated. Evidence by Dr Holmes to this effect has not been refuted nor is there any other evidence to the contrary. Mr Jooste has argued that Dr Holme's evidence that everything has been taken into account is vague as it does not specify what is it that has been considered. I do not agree with him. It was Dr Holme's evidence that all contingency deductions which ought to be considered in cases of this nature have been taken into account. This is how I understood his evidence. He went on to suggest that if there are any contingency considerations other than those already deducted it would be a duplication which would be an unfair reduction to the Plaintiff's damages. I agree with him.

[13] In the result I am of the view that in the present case there is no need for additional contingency deduction for consideration by this Court. The manner used in calculating the deducted contingencies does not appear to me to be oppressive to the Defendant. On the contrary, if anything, it amounts to 65% and, therefore, leans in favour of the Defendant.

[14] In the result I make the following order:

[5] Per Windeyer J in the Australian case of Bresatz v Przibilla (1962) 36 ALJR 212 (HCA) at 213 quoted in Southern Insurance Association v Bailey NO 1984 (1) SA 98 AD at 117 B – D.

14.1 Defendant is ordered to pay Plaintiff the sum of one million six hundred and seventy eight thousand nine hundred and six rand (R1 678 906 – 00) being damages for future loss of earnings. Defendant shall further pay interest on the sum of R1 678 906 – 00 at the rate of 15,5% per annum from 14 days after the date of delivery of this judgment.

14.2 Defendant shall pay Plaintiff's costs of suit, as taxed or agreed, on a party and party scale together with interest thereon at the legal rate of 15% per annum as from a date fourteen days after taxation or agreement. Such costs are to include;

15.2.1 The qualifying expenses, if any, of Mr Ian Meyer, Ms Ansie Van Zyl, Dr R.G. Holmes, Dr R. Keeley and the Actuary Nilen Kambaran.

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P.W. TSHIKI

JUDGE OF THE HIGH COURT.

Appearances:

For the Plaintiff: Adv Frost instructed by Roelofse Meyer - Port Elizabeth

For the Defendant: Adv Jooste instructed by Friedman Scheckter - Port Elizabeth