

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

CASE NO: 88449/16

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED No

Date: 31/01/2024

SIGNATURE

In the matter between:

L[...] L[...] obo K[...]

PLAINTIFF

And

And ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KHWINANA AJ

INTRODUCTION

[1] The plaintiff L[...] L[...] is an adult male who has instituted a claim on behalf of her minor child K[...] L[...] against the defendant pursuant to a motor vehicle accident on 28 SEPTEMBER 2014 wherein the minor child was a pedestrian.

[2] The defendant is the Road Accident Fund, a schedule 3A public entity, established in terms of section 2(1) of the Road Accident Fund Act 56 of 1996, with its service office situated at 3[...] I[...] Street, Menlo Park, Pretoria, Gauteng Province.

[3] The issue of merits has been previously settled at 100% in favour of the Plaintiff. General damages claim is postponed sine die. The Quantum is still in dispute in respect of loss of earnings.

[4] I am ceased with the determination of quantum on the loss of earnings only.

INJURIES SUSTAINED

[5] The minor child sustained a head injury with abrasions on the scalp and bilateral femur fractures.

TREATMENT RECEIVED

[6] The surgical reduction of the skeletal fractures was performed titanium elastic nail system of the right femur, and the implants were later removed.

SYMPTOMS AND SEQUELAE

[7] They are painful thighs, recurrent headaches, short-term memory and poor concentration.

FUTURE MEDICAL TREATMENT

[8] The plaintiff will require further management of the headaches which also require analgesics.

LOSS OF EARNINGS

PRE AND POST-MORBID EARNING POTENTIALS

ORTHOPAEDIC SURGEON DR KUMBIRAI

[9] He says the minor child has a mal-united left and right femur. He has scars. He has full range motion of the left and right knee and hip joints. He has no pain. K[...] was born normal with no physical disabilities. He recorded his whole-person impairment at 12%.

NEUROSURGEON DR SEGWAPA

[10] He recorded that the minor child sustained direct trauma to the head. He was not unconscious after the accident. He did not suffer any neurophysical or neurocognitive impairments.

- [11] The Post-Morbid Earning Potential From a Neuropsychological perspective, it is likely that the injuries sustained have an impact on K[...]’s educational performance capacity. This will certainly affect his scholastic functioning.
- [12] According to the Neuropsychologist, he presents with mild emotional dysregulation related to the trauma and the sequelae of the injuries sustained. K[...] is emotionally vulnerable.
- [13] K[...] has not repeated any grades, there is a report that he is experiencing academic difficulties as reported by his grandmother. It has been noted that his cognitive vulnerability is more prone to making errors and costly mistakes.

EDUCATIONAL PSYCHOLOGIST DR MATLALA

- [14] The education psychologist opines that all factors must be taken into consideration K[...] has mild neurocognitive deficit which will likely result in educational difficulties. Post-accident, he experienced headaches, painful legs, poor concentration, and forgetfulness which affected his ability to excel in academic work. The expert concluded that K[...] will need some medical and learning support to help him pass Grade 12 and continue with Diploma (NQF level 6). He was emotionally stable. He was not at school at the time of the accident as he was 3 years old. The parents of K[...] are both graduates which increases his chances of possibly having adequate cognitive abilities.

INDUSTRIAL PSYCHOLOGISTS MS SANDRA MOSES

- [15] The industrial Psychologists opines that from a physical perspective, when he reaches physical maturity, he may be suited for the medium work category with restrictions on tasks requiring constant positional tolerance. He will need resting breaks due to pains noted on mal-united bilateral femur fractures. He will peak at B4 Paterson. He will not reach level of a team leader or supervisory level. The minor child aspires to be a chef.

OCCUPATIONAL THERAPIST MS PHASHA

- [16] The Industrial Psychologist and the occupational therapist acquiescence that K[...] will be an unattractive candidate in the labour market in contrast to his peers. The injuries sustained and the sequelae are indicative that the minor child has a loss of earning capacity. It is also opined that K[...] will need an understanding employer who will accommodate his overall profile with difficulties in performing work timeously. He will benefit from supervision.

CLINICAL PSYCHOLOGIST MR KALANE

- [17] The clinical psychologist opines that his assessment findings indicate that K[...] presented a decline in functioning capacity which will affect him adversely in the future. He is cognitively vulnerable and prone to making errors and costly mistakes. He opines that the minor child when reaching physical maturity must do medium work with restrictions on tasks requiring positional tolerance mobility/agility skills. He will be timed and psychologically challenged.

ACTUARIAL CALCULATION MUNRO FORENSIC ACTUARIES

- [18] There is no past loss of earnings. Munro forensic actuaries provided an actuarial report wherein they opine that 25% pre- morbid and 35% post-morbid on future loss is fair and reasonable, for loss of earnings, which led us to amount of R 3 209 390.00.

LEGAL MATRIX

- [19] It is trite that to claim loss of earnings or earning capacity, a patient must prove the physical disabilities resulting in the loss of earnings or earning capacity and actual patrimonial loss. See *Rudman v Road Accident Fund*¹ There must be proof that the disability gives rise to a patrimonial loss, this in turn will depend on the occupation or nature of the work that the patient did before the accident or would probably have done if he had not been disabled. See *Union and National Insurance Co Limited v Coetzee*².

¹ 2003 (2) (SA 234) (SCA).

² 1970(1) SA295 (A) AT 300A.

- [20] It is accepted that earning capacity may constitute an asset in a person's patrimonial estate. If loss of earnings is proven the loss may be compensated if it is quantifiable as a diminution in the value of the estate. The law in this regard is trite as is demonstrated in a very useful exposition of the law related to a claim for diminished earning capacity as it was held in *Prinsloo v Road Accident Fund*.³
- [21] In the case of *Burger v Union National South British Insurance Company*⁴ [": "A related aspect of the technique of assessing damages is this one; it is recognized as proper in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said to have been proved, on a preponderance of probability, that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind".
- [22] It is accepted that earning capacity may constitute an asset in a person's patrimonial estate. If loss of earnings is proven the loss may be compensated if it is quantifiable as a diminution in the value of the estate. It must be noted, that a physical disability that impacts on the capacity to an income does not, on its own, reduce the patrimony of an injured person. It is incumbent on the plaintiff to prove that the reduction of the income earning capacity will result in actual loss of income.

ANALYSIS

- [23] I recognize the pivotal role of an actuary in weaving the tapestry of financial foresight. Their expertise in actuarial calculations, rooted in concrete facts and educated guesses about the future, is a cornerstone in our court's decision-making fabric. I must steer the ship of judgment through these calculations, but ultimately, the buck stops with the court. As the court I hold the reins of judicial discretion and bear the responsibility of scrutinizing the assumptions underpinning the actuary's work.

³ 2009 5 SA 406 (SECLD) at 409C-410 A. 67.

⁴ 1975] 3 All SA 647 (W) at p 650

- [24] However, it's important to remember that the actuary's work is only as strong as its foundation. They rely heavily on the reports from industrial psychologists, who themselves are building on the bedrock of information provided by the plaintiff. I'm mindful that this chain of dependency can be a house of cards – if one-layer falters, the whole structure can teeter.
- [25] In *casu* the minor child who was not schooling at the time of the accident and who wants to become a chef. This minor child is still in lower levels of education and the information submitted is that he has been passing his grades and has never been retained in any grade.
- [26] The learned author Dr R.J. Koch in *The Quantum of Damages Year Book* states at page 118 that the usual contingencies which the Road Accident Fund accepts is 5 % on the past income and 15 % on the future income. The aforesaid is only a guideline, but it indicates the general approach adopted by the defendant in similar matters. The learned author continues on page 118 to suggest (based upon the authorities of *Goodall v President Insurance* and *Southern Insurance Association v Bailey N.O*⁵. that as a general rule of thumb, a sliding scale can be applied, i.e. “1/2% per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in middle age.”
- [27] The court, in the case of *Road Accident Fund v Guedes*⁶ at paragraph [9] referred with approval to *The Quantum Yearbook*, by the learned author Dr R.J. Koch, under the heading 'General Contingencies', where it states that:
- “...[when] assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court...” [my emphasis]

⁵ (1984) 1 All SA 360 (A)

⁶ *Road Accident Fund v Guedes* (611/04) [2006] ZASCA 19; 2006 (5) SA 583 (SCA) (20 March 2006)

[28] I uphold the principle that the foundation of an award for future loss of earnings or earning capacity must be firmly rooted in solid medical evidence and supported by corroborative facts. It's imperative that there's a sturdy ground of reasonability when determining a specific figure for such an award. When we embark on this journey of calculation, it's like navigating a two-step dance. First, we must envision the road not taken – calculate what the individual's earnings could have been in a world where the accident was averted. This is our 'but-for' scenario. Then, we pivot and assess the current landscape – what the plaintiff's earnings are now in the wake of the accident. The gap between these two scenarios – the earnings that could have been and the earnings that are – is the measure of loss we seek to quantify. This process isn't just a number-crunching exercise; it's a meticulous and thoughtful exploration of what might have been versus what is, ensuring justice is not only done but seen to be done.

[29] The importance of applying actuarial calculations and its advantages was discussed in the case of *Southern Insurance Association v Bailey* NO⁷ the court referred with approval to the case of *Hersman v Shapiro and Company* Stratford J where the following was said:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.'

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss."

⁷ 1984 (1) SA 98 (A)

It has open to it two possible approaches.

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 guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of 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. But the Court cannot for this reason adopt a non possumus attitude and make no award.” However the plaintiff’s claim in the summons is R 3 000 000.00 for loss of earnings which is not similar to the actuary’s calculation. It is imperative to mention that this court must consider that which is fair and reasonable for both parties. I am satisfied that the sum of R 3000 000.00 is fair and reasonable under the circumstances.

[30] These includes such matters as the possibility that the plaintiff may in the result have less than normal expectations of life and that he may experience periods of unemployment’s by reason of incapacity due to illness or accident or labour unrest or general economic conditions. The amount of any discount may vary depending on the circumstances of a case⁸.

[31] The rate of experience substantial difficulties to impress prospective employers. It was noted in the joint’s minutes of the industrial psychologists that promotion depend on several factors, supply and demand for specific categories of labour, availability of promotional opportunities or better prospects and job performance. A great circumspection which underpins all factors involved need to be applied with a broad consideration of what the industrial psychologists has reported.

⁸ van der Plaats v South Africa Mutual Fire & General Insurance Company Limited 1980 (3) SA 105 (A) at 114-5.

- [32] K[...] seems suited for medium sedentary type of work with limited mobility and regular breaks. He will be kept on sympathetic basis and will not be able to compete with other abled bodies in the workplace. This type of work is tantamount to a sympathetic type of work which does not exist in real business environment.
- [33] There was no submission by the plaintiff for the appointment of a *curator ad litem* or the creation of a trust. I do not believe that the objects would be achieved if the plaintiff was entrusted with the administration of the award. On the 30th January 2024 I caused that counsel submit further heads of argument regard being heard that funds can be deposited into a Guardian Fund.
- [34] Counsel replied immediately that aforesaid funds be protected by means of payment into a trust in the name of the minor child. He however did not furnish reasons. The other available option is the possibility to deposit the award into the Guardians Fund.
- [35] The guardian's fund was created by section 91 of the Administration of Estates Act 24 of 1913 ("the previous Act") and in terms of section 86 (1) of the Administration of Estates Act 66 of 1965 ("the new Act"), continued in existence after the previous Act was revoked by the enactment of the new Act.⁹
- [36] The guardian's fund consists of all moneys in the Guardian's Fund at the commencement of the new act; or received by the Master under the new act or in any law or in pursuance of an order of court; or accepted by the Master of the High Court.
- [37] I am of the view considering the interest to be earned and monthly claims that may be required for the maintenance of the minor child, that the award would

⁹ Nyambe Petros Sibanda o.b.o R[.....] S[.....]

be better protected in the Guardian's Fund as opposed to such large sums being in possession of the plaintiff or in a trust.

[38] I have considered the draft order and have amended it accordingly.

ORDER

In the result, I make the following order:

1. That the defendant is liable to make payment to the plaintiff in the amount of **R 3 000 000.00.(Three million rand only)** for the plaintiff's claim of damages of loss of earnings/earning capacity arising from the injuries sustained by the minor child as a result of a motor vehicle accident which occurred on the 28th September 2014, which amount shall be payable before or within 14 days of this order into the plaintiff's attorneys of records trust account as follows:

ACCOUNT NUMBER: SEBATSANA ATTORNEYS NAME OF
ACCOUNT: NEDBANK ACCOUNT NUMBER: 1[...]
BRANCH CODE: 1[...]
BRANCH NAME: L[...] (JHB)
REFERENCE NUMBER: 1[...]

2. That the defendant shall pay the plaintiff's party and party costs on High Court Scale as taxed or agreed, which costs shall be subject to the master's discretion :

2.1. All reasonable costs for court attendance on the 27th October 2023, pre-trial attendance, preparation, research and perusal of medico legal reports.

2.2. Costs for a senior-junior Counsel.

2.3. The plaintiff's travelling costs to and from all medico- legal appointments, including accommodation costs for attending such appointments for both plaintiff and the defendant.

2.4. Costs for all travelling expenses incurred in respect of the plaintiff s' claim.

2.5. The reasonable costs in respect of the preparation of all the medico legal reports and addendum of such medico legal reports if any.

2.6. Costs for all Medico–legal reports furnished to the defendant as well as the reservation and qualifying fees for such experts if any.

3. That the plaintiff shall afford the defendant 14 court days to make payment of such costs.

4. Should the defendant fail to make payments timeously such an amount will bear interest at a rate of 7%.

5. After the deduction of the attorney and client fees (whichever is applicable in law and shall not exceed 25% of the Capital amount), the net amount of the award shall be paid into and administered by the Guardians Fund.

6. The proof of payment thereof is to be filed with the Registrar of the High Court Gauteng Division, Pretoria within two weeks of receipt of monies into the plaintiff's attorney's Trust Account.

KHWINANA ENB
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

COUNSEL FOR PLAINTIFF:	ADV Z. S RASEKGALA
DATE OF HEARING:	27 OCTOBER 2023
DATE OF JUDGMENT:	31 JANUARY 2024