

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

Case No:2018 /29269

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
<u>27 February 2024</u>	
DATE	SIGNATURE

IN THE MATTER BETWEEN:

**A[...] M[...] obo
V[...] M[]]**

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

SIWENDU J

[1] The sole issue before the Court concerns the calculation of the future loss of earnings and the contingency deduction to be applied to a claim launched on behalf of a minor child.

[2] The plaintiff, brought the action against the Road Accident Fund (RAF) in her capacity as the mother of the minor child. The minor child, V[...] was minor born on 29 May 2007. V[...] was severely injured in a motor collision on 8 February 2015. She was a pedestrian and 6 years old at the time. The RAF conceded liability and settled the general damages in the amount of R 650 000. It provided the usual undertaking for future medical expenses.

[3] I need not chronicle the injuries sustained and their sequelae as they are and common cause between the parties. Dr Goosen observed that V[...] suffered a significant brain injury at a critical stage of her brain development. Development of some functions were arrested at the time of the accident. New deficits will continue to manifest in the future as the need increases with ongoing development (sleeper effect). It was accepted that a head injury on a child of tender years can impede the formation and development of the brain. V[...] suffers from regular headaches that often start with a feeling of a burning sensation. The headaches become so severe that her vision becomes blurry, often with nosebleed and nausea.

[4] It is common cause based on V[...]’s performance at school that she demonstrated an average to above average intelligence pre-accident. Although it was postulated, V[...] would function in a mainstream schooling environment with assistance, it was also anticipated she would repeat certain grades. This has not been the case. As at the hearing, she has not been transferred to a remedial learning environment.

[5] The joint minutes filed by the Educational Psychologists, M. Mantsena McGill - Scott agreed that with appropriate placement, support and curriculum selection, V[...] is likely to pass Grade 12 — NQF 4. She should be able to achieve an NQF 6 certificate, being a Diploma or advanced certificate. Her school reports until the end of Grade 5, reflected that most of her marks fell into the Level 4 or 5 range. (Level 4 — Adequate Achievement: 50- 59 and Level 5 — Substantial Achievement: 60-69). Her term and final averages in Grades 6 and 7 were consistently in the 70's, (Meritorious Achievement). These results indicate average to above average performance results.

[6] They observed and agreed that although V[...]’s intellectual and cognitive potential is within the average range, her verbal abilities are inadequate as she struggled with abstract language, comprehension as well as sequential reasoning. Besides her concentration and socio-emotional profile, her attentional and memory skills need to be addressed. They state that given these vulnerabilities, the age when the accident occurred and the nature of the head injury sustained, it is important that V[...] is educated in a supportive and efficient environment so that her residual potential can be fulfilled, and her well being guarded by the relevant professionals. Both parties agree that there has been an impairment with sequelae.

[7] The parties agree that her uninjured income would have been R12 690 091. The plaintiff applied a 24% contingency to the uninjured income resulting in a loss of R 9 644 469. The plaintiffs propose a 39% contingency deduction to the injured loss of income. The dispute centres on the 5% differential and the net loss of R 3 768 00.

[8] As between the parties; baring the differential, all the underlying assumptions were agreed and appeared common cause. However, at the hearing, the RAF contended it disagrees with “the method of the calculation” of the claim. The RAF challenged V[...]’s post-morbid capacity not to qualify and complete a degree. This centres on the sequelae and effects of the injuries on her educational performance and prospects. The RAF contends that a 5% differential between the pre- post-morbid scenarios should be applied to the loss.

[9] Ms McGill Scott filed an addendum report on 6 February 2024 and revised her opinion to consider V[...]’s progress from the date of the previous assessment in 2018 up to Grade 11. In her opinion V[...]’s average to above average performance suggested that she would have obtained a degree. However, she points to a “sleepers effect” common with children who have suffered a brain injury at a young age. She found that V[...]’s cognitive functioning, working memory and information processing speed has reduced. Once academic work becomes complex in higher grades, her work may suffer. Once academic work becomes complex in higher grades, her work may suffer. She struggled in Grade 8. There was concern with her grades and she was given assistance by way of extra classes and tutorials in Grade 9. Her marks improved and remained constant in Grades 10 and 11.

[10] A sticking point is that V[...] wants to pursue a Degree in Technology (computer and logistics). She dropped Core Maths for Maths Literacy in Grade 10. In Ms McGill Scott's opinion, V[...] would need 90% pass for Maths Literacy to secure an admission for a Degree in Technology "probably for Computer Applications Technology which is different from Computer Studies which involves programming." The conclusion is that she is unlikely to achieve these marks. The likely scenario is that she would complete a Diploma – NQF 6 qualification at a TVET College.

[11] The RAF cannot be faulted for the about turn since the Plaintiff revised her position which is now reflected in the addendum by Ms McGill- Scott. The contention by the RAF is that V[...]’s grades reflect that her matric results will qualify her for entry at a tertiary institution to read for a degree. This is despite the neurocognitive and neuropsychological difficulties. The RAF submits that the 90% Maths Literacy pass mark requirement for admission into the degree of her choice is not supported by researched university entry requirements. It is conjecture. The reason why V[...] dropped Core Maths for Maths Literacy was not investigated. The RAF's stance is that the pre and post - accident outcomes are the same. V[...] will attain a matric pass which qualifies her for a degree. She could read for any other degree.

[12] The Court is guided by the now trite principles in *Road Accident Fund v Guedes*¹ which reinforces the principles in *Southern Insurance Association v Bailey*² that there is no mathematical formula to the determination and the enquiry is by its nature involves a prediction into the future, which is by its nature, speculative. On this score, the RAF referred the Court to the decision in *MB obo Minor v Road Accident Fund*³(MB). The Court applied a 10% differential to the 23.5% pre-accident scenario and 33.5% to the post accident scenario. Similarly, in *LYP obo Road Accident Fund*⁴(LYP) where there was a higher contingency deduction of 30% pre-accident and 40% post - accident.

¹ 2006(5) SA 583 (SCA) para 8

² 1984 (1) SA 98 (A) at 113 F - 114 A

³ (12707/2017) [2021] ZAGP9JHC 567

⁴ (92141/2015) [2022] ZAGPPHC 248

[13] No similar cases are alike. Although V[...] had to obtain extra lessons, she has not required specialised remedial education to date. Despite predictions, she has not failed at school. Whether but for the accident she would have excelled or comfortably passed Core Maths is not substantiated. It is not fully explained how her mathematical performance relates to her vulnerabilities and inadequate verbal abilities, abstract language, comprehension as well as sequential reasoning identified by the experts. However, the “sleeping effect” is indicated because of the Traumatic Brain Injury (TBI). It is likely that V[...]’s progress once she enters tertiary education could be delayed. Speculative as contingencies are, the right support suggested by the experts should mitigate effects.

[14] In this case, it is appropriate to apply a differential of 10% to the loss. When the 5% differential was applied, the loss was R 3 768 000.00. A differential of 10 % results in a net amount of R3 286 323.36 (Three Million Two Hundred and Eighty-Six Thousand Three Hundred and Twenty-Three Rands and Thirty Six Cents) for the loss.

[15] Accordingly, I make the following order:

1. The Defendant is liable for 100% of the Plaintiff’s proven or agreed damages.
2. By Agreement between the Parties the Defendant shall pay the Plaintiff the net amount of R650 000.00 (Six Hundred and Fifty Thousand Rand) in settlement of the plaintiff’s claim for General Damages.
3. After having heard counsel for the Parties, the Defendant shall pay the Plaintiff the net amount of R3 286 323.36 (Three Million Two Hundred and Eighty-Six Thousand Three Hundred and Twenty-Three Rands and Thirty-Six Cents) in settlement of the Plaintiff’s claim in respect of Loss of Earnings. Payment of the shall be made to the Plaintiff’s Attorneys of Record, by payment into their trust account with the following details:

RENE FOUCHE INC

STANDARD BANK – TRUST ACCOUNT

ACC. NR: [..]

BRANCH CODE: [...]

REF: [...]

4. The Defendant shall pay to the Plaintiff the capital amount referred to above together with interest a tempore mora calculated in accordance with the Prescribed Rate of Interest Act 55 of 1975, on any amount outstanding after the expiry of 180 days, failing payment within 180 days, read with Section 17(3)(a) of the Road Accident Fund Act 56 of 1996.
5. The Defendant shall within 14 days of receipt of the order register the matter on the so called RNYP list.
6. The Defendant shall furnish to the Plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for **100%** the costs of the future accommodation of V[...] M[...] in a hospital or nursing home or treatment of or rendering of a service to the V[...] M[...] or supplying of goods to the V[...] M[...] arising out of the injuries sustained by him in the motor vehicle collision which occurred on **08 February 2015**, after such costs have been incurred and upon proof thereof, the Undertaking shall also including the costs of the creation and administration (which include the costs associated with the yearly audit of the trust and the provision of the security by the trustees)
7. The statutory undertaking referred to in paragraph 6 supra, shall be delivered by the Defendant to the Plaintiff's Attorney of Record within 60 (sixty) days of the date of this Order.
8. Attorneys Renè Fouchè are ordered to cause a trust document to be created in accordance with the provisions of the Trust Property Control Act, Act 57 of 1988 and on the provisions as provided for in the trust deed, a copy of which is annexed hereto as annexure "X".
9. The costs of the furnishing of security by the Trustee and obtaining an annual security bond to meet the requirements of the Master of the High Court in terms of Section 6(2) of the Trust Property Control Act, No 57 of 1988 as amended, subject that same does not exceed the tariffs as set out in the trust deed.

10. Attorneys Renè Fouchè are to pay the capital amount received, after deductions of their fees and disbursements as agreed to or taxed into the aforesaid Trust account.

11. The trust instrument shall make provision for the following:

11.1 That V[...] M[...] is the sole beneficiary of the trust.

11.2 Three trustees will be appointed to administer the trust.

11.3 That the trustees shall be Ms Enid Schoeman in her capacity as nominee of the Thembela Trust Administrators who is hereby authorised to act as trustee or failing is, such an employee of Thembela Trust Administrators as they may nominate. The trust beneficiary nominated Ms. Karen Du Buisson as her trustee;

11.4 The duty of the trustee(s) to disclose any personal interest in any transaction involving the trust property;

11.5 That the ownership of the trust property vests in the trustee(s) of the trust in their capacity as trustees;

11.6 Procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Honourable Court;

11.7 That the trustee(s) be authorised to recover the remuneration of, and costs incurred by the trustee(s), in administering the undertaking in terms of Section 17(4)(a) of Act 56 of 1996 in accordance with the certificate of undertaking to be provided by the Defendant;

11.8 The suspension of the Plaintiff's contingent rights in the event of cession, attachment or insolvency, prior to the distribution or payment thereof by the trustee(s) to the Plaintiff;

11.9 That the amendment of the trust instrument be subject to the leave of this Honourable Court;

11.10 The termination of the trust upon the death of the Plaintiff, in which event the trust assets shall pass to the estate of the Plaintiff.

11.11 That the trust property and the administration thereof be subject to an annual audit.

11.12 The amendment of the trust instrument subject to the leave of this Honourable Court.

11.13 The trustee(s) shall, in consultation with V[...] M[...] and/or his direct family utilise such income of the trust as may be identified for the maintenance of V[...] M[...].

12. That the trustee(s) are to provide security to the satisfaction of the Master as set out in paragraph 9 and the Trustee nominated by the trust beneficiary does not need to provide security;

13. The remuneration of the trustees and administration costs of the shall be recovered from the RAF in terms of the Section 17(4)(a) Undertaking.

14. The Defendant shall pay the Plaintiff's Taxed or agreed Party and Party costs of suit on the High Court Scale to date of this order, such costs including but not limited to:

a. The costs of the reports (including RAF 4 Forms and addendum reports, if any) of Mr Lottering, Dr. C. Kahanovitz, Dr. A. Peche, Ms Scott, Ms. Dreyer, Dr. L. Fine, Dr. O Guy, Dr. J. Goosen, Ms. Hovsha, Dr Polakow, Prof. L.A. Chait, Ms. A. Reynolds, Dr. T. Bingle, Mr. L.J. Van Tonder, and Ms. N. Kotze.

b. The qualifying, and preparation costs, including affidavits of experts (if any);

c. Costs of senior-junior Counsel (where so employed) , Advocate Anton Louw, for trial preparation and on trial for 15 February 2024, 16 February 2024, 19 February 2024 and 20 February 2024 in respect of the trial;

d. The costs of the actuarial reports, inclusive of the amended reports, of Mr. G Whittaker (Algorithm Consulting Actuaries);

e. The costs of attending to an Inspection in Loco;

f. All reserved costs, if any, are hereby unreserved;

g. Plaintiff's reasonable travelling expenses to and from medico-legal appointments in respect of the experts of the Plaintiff and the defendant and consultations at trial.

15. In the event the costs are not agreed, the Plaintiff's attorney shall serve a Notice of taxation on the Defendant and/or the Defendant's attorneys of record. The Defendant shall be granted a period of 180 days' post taxation to pay the taxed costs.

This judgment is handed down electronically by circulation to the Applicants and the Respondents' Legal Representatives by e-mail, publication on Case Lines and

release to SAFLII. The date of the handing down is deemed to be 27th February 2024.

NTY SIWENDU
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 20 February 2024

Date Judgment delivered: 27 February 2024

Appearances:

For the Plaintiff: Adv A Louw

Instructed by: Rene` Fouche` Incorporated.

For the Defendant: Mr Mtshemla (State Attorney)