IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 61028/20

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

30.05.23

In the matter between:

ADVOCATE S. SAYED N.O. Plaintiff

(CURATOR AD LITEM OF O M)

And

ROAD ACCIDENT FUND Defendant

JUDGMENT

M AJ

INTRODUCTION

[1] Adv Sayed N.O., who was duly appointed curator *ad litem* as per Court Order dated 3 June 2022 (hereinafter referred to as 'the plaintiff') claims on behalf of O M. O M was seven years old when he was injured in a motor vehicle collision on 26 June 2017, at Makwassi, Wolmaransstad, North-West Province, as a result of which he sustained serious injuries and suffered consequent damages as per the particulars of claim. The

mother of the minor child confirms that the minor was a pedestrian when the accident occurred.

[2] The issue of the defendant's liability is settled on the basis that the defendant shall pay the plaintiff 100% of her proven or agreed damages, which flow from the injuries sustained. The defendant made an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1966 (The Act). The issue of quantum has been referred for trial.

[3] The curator *ad litem* instituted an action in this court for a claim for loss of earnings in a sum of R5 186 116,00, respectively, against the defendant.

[4] In support of her claim, the plaintiff placed its reliance upon the evidence and reported Dr. P Englebrecht, the Orthopaedic Surgeon; Dr. J.A. Smuts, the Neurologist; Dr. T P Moja's report and addendum; the specialist Neurosurgeon, M Sissison, a Clinical Psychologist, Dr. M Naidoo, the Psychiatrist, I Jonker, a Counselling Psychologist report and addendum, Dr. J Seabi, an Educational Psychologist, Dr. W Ophthalmologist, Dr. G M Fredericks, Disability, Impairment Assessor, K Cumming, the Occupational Therapist, B Maritz, Industrial Psychologist and G W Jacobson, Actuary.

[5] Both parties attended the pre-trial conference. However, the defendant did not file expert reports. The defendant was properly served with a Notice of set-down, but they failed to appear in court; as a result, the defendant was unrepresented.

[6] The plaintiff tendered evidence in rule 38(2) 1 and argued that the interest of Justice allowed the court to proceed with the matter. The issue to be determined by the court is the future loss of earnings and the contingencies applicable to it.

Medical history of disability

[7] Hospital records from Nic Bodenstein Hospital, Wolmaransstad, and Tshepong

Hospital Klerksdorp, mention that O was a pedestrian when she was overrun by a taxi. She was taken to Nic Bodenstein Hospital on 26 April 2017 but was only seen by the doctor on 27 June 2017 and later discharged. Clinical records indicate the following injuries: Head Injury, Bruises/ Swelling of the head, and Laceration of the right ankle. On 29 June 2017, O's condition changed; he started developing fits and was transferred to Nic Bodenstein Hospital, where he was admitted for neuro observation. A CT scan of the brain was requested, but no abnormalities were found on the brain. O's mother indicates that the hospital provided anti-epileptic medication for a period of 1-month post-discharge from the hospital.

[8] Dr. T P Moja (Neurosurgeon) examined O on 23 November 2022, and his findings were that O sustained a traumatic brain injury of at least moderate severity, compounded by secondary brain injury from epileptic seizures. He suffers from residual neuro-cognitive and neuro-behavioural problems and epilepsy-related organic brain dysfunction. O developed post-traumatic seizures three days after the accident. He continues to suffer from epileptic seizures. He has no history of epilepsy before the accident. Treatment is recommended to address seizures and headaches.

[9] Ms. I Jonker (Neuropsychologist) consulted O on 24 November 2022, and the following was noted: O has been experiencing symptoms of an attention deficit and hyperactivity disorder and features of a post-traumatic stress disorder. The accident has resulted in long-term neuropsychological difficulties, seizures, and physical problems, negatively affecting his self-esteem, interpersonal functioning, quality of life, future education, and employability. O has been experiencing ongoing cognitive challenges across most cognitive domains tested. He will require an educational environment for children with special needs. Psychotherapy is recommended. These sessions should be regarded to be palliative rather than curative.

[10] Dr. J Seabi (Educational Psychologist) examined O on 31 November 2022; the following was noted: In the absence of the accident, it is estimated that O's intellectual

ability was probably within the low average range. He could have progressed through the mainstream school system and obtained a higher certificate. Post-accident, O presents with physical difficulties, emotional difficulties (including symptoms of post-traumatic travel-related anxiety and symptoms of depression), social difficulties, and cognitive difficulties. He could not cope with all the scholastic tests in the current assessment. He presents with significant features of attention deficit and hyperactivity disorder (ADHD). O's psycho-educational profile results from pre-existing vulnerabilities, head injury, psychological problems, and persistent post-traumatic stress symptomatology exacerbated by physical limitations. His prognosis for emotional recovery is poor, and, if anything, his emotional symptoms may deteriorate further with time. The accident has left O with ongoing pains, intermittent nose bleeding, and severe uncontrolled seizures. His vulnerability to being teased and bullied by other learners has increased. Given the accident in question, O's highest level of education will likely be Grade 7, with support.

[11] Dr. P Englebrecht (Orthopaedic Surgeon) reported very little if any, loss of work capacity from an orthopaedic perspective. Due to the impact on the head, soft tissue neck injury should be allowed. Major sequelae after the accident, sequelae of head injury, not only psychological sequelae, but the patient also developed epilepsy after the accident. The patient to be seen by a neurologist or neurosurgeon also have to be evaluated by a psychologist, including a neuropsychologist and an educational psychologist. Indications are of loss of work capacity, again, mostly due to psychological sequelae of an accident.

[12] Dr. J A Smuts (Neurologist) reported a concussive head injury. The resulting negative effects are most likely to be cognitive and learning disability. He has epilepsy due to a head injury.

[13] Dr. N Naidoo (Psychiatrist) reported that O likely developed post-traumatic epilepsy secondary to a head injury (Sep 2020; pt.12; pt.12.6). He presents with changes in affective, behaviour, and cognitive functioning. He presents with symptoms suggestive of hyperkinesis. His risk for neuropsychiatric sequelae is increased.

[14] Mr. M Sissison (Clinical Psychologist) states that a head injury and seizures will contribute to a decline in cognitive functioning in the long term. Head injury and seizures place him at risk for developing various organically based psychiatric syndromes and co-morbid psychiatric disorders.

[15] B Maritz (Industrial Psychologist) compiled the report on 18 January 2023 and concluded that O was involved in an accident on 26 June 2017 and sustained numerous injuries. He experiences various difficulties and complaints, influencing his educational potential and future employability. Before the accident, O was repeating Grade 01 at Phakedi Primary School, and he was able to return to school, pass, and progress to grades two and three, which he passed without any difficulties. O is repeating Grade 04 at Boskuil Combined School, having experienced a two-year delay. Following a conservative approach and the opinion of the Educational Psychologist, had it not been for the accident, it is postulated that the plaintiff would have been able to obtain his National Senior Certificate and further his education towards an NQF Level 05 tertiary qualification. It is not foreseen that he would have completed Grade 12 before the age of approximately 21 years old (2030), since he already failed one year prior to the accident and would have most likely failed one or two more years before attaining his National Senior Certificate. This would have resulted in the plaintiff's highest level of education being comparable to an NQF Level qualification.

[16] The traditional principle and rationale guiding remedy for loss of earning capacity were expressed in *Dippenaar* v*Shield Insurance Co Ltd*[1] by Rumpf JA where he held that:

> *"In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate, and the loss or impairment of that capacity constitutes a loss if such loss diminishes the estate."*

[17] The approach to determining loss of earnings and applicable contingencies was

recently explained by the Supreme Court of Appeal in *Road Accident Fund v Kerridge*[2] wherein it said:

> *"Any claim for future loss of earning capacity requires a comparison of what a claimant would have earned had the accident not occurred with what claimant is likely to earn thereafter. The loss is the difference between the monetary value of the earning capacity immediately prior to the injury and immediately thereafter. This can never be a matter of exact mathematical calculation and is, of its nature, a highly speculative inquiry. All the court can do is make an estimate, which is often a very rough estimate, of the present value of the loss."*

[18] The courts usually use actuarial calculations in an attempt to estimate the monetary value of the loss. These calculations are obviously dependent on the accuracy of the factual information provided by the various witnesses. In order to address life's unknown future hazards, an actuary will usually suggest that a court should determine the appropriate contingency deduction. Often a claimant, as a result of the injury, has to engage in less lucrative employment. The nature of the risks associated with the two career paths may differ widely. It is, therefore, appropriate to make different contingency deductions in respect of the pre-morbid and the post-morbid scenarios. The future loss will therefore be the shortfall between the two once the appropriate contingencies have been applied.

[19] G W Jacobson (Actuary) analysed the plaintiff's loss of income difference between the value of his income but for the accident and the value of his income having regard to the accident. He was informed that O repeated Grade 1 after the accident, and after the accident, he repeated Grade 4. A deduction was made for unforeseen contingencies such as sickness, unemployment, errors in the estimation of future earnings and life expectancy, earlier retirement, and general hazards of life. The contingency deduction of 20% applied for future loss of income but for the accident of R6 482 645, this resulted in a net of R5 186 116 after a 20% contingency deduction.

[20] Contingencies are arbitrary and also highly subjective; for this reason, the trial court has wide discretion in determining appropriate contingencies.

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[1] 1979 (2) SA 904 (A) par 9

[21] Some general rules have been established in regard to contingency deductions, one being the age of a claimant. The younger a claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate, but as regards the future loss of earnings, they include, inter alia, a downturn in the economy leading to a reduction in salary, retrenchment, unemployment, ill health, death, and the myriad of events that may occur in one's everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in a pre-morbid scenario, generally awarded higher contingencies the younger the age of the claimant. This, of course, depends on the specific circumstances of each case but is a convenient starting point. In quantifying the monetary value of the loss of earning capacity, the court must remember that the case depends on its own facts and circumstances and the evidence placed before the court by the plaintiff.[3]

[22] In *Goodall v President Insurance,*[4] the Court adopted the approach of the so-called sliding scale of ½ % per year to retirement age in the 'but for' scenario - i.e., 25% for a child, 20% for youth, and 10% for middle age. In the 'but for' scenarios, the Road Accident Fund usually agrees to deductions of 5% for past loss and 15% for future loss - the so-called "normal contingencies."

[23] O was in repeating Grade 1 at the time of the accident. He passed grades two and three despite being home for most of the year due to the global pandemic. After the accident, he repeated Grade 4 in 2022 after displaying various difficulties at school.

[24] Having considered all the evidence, it is my view that but for the accident, the plaintiff would have attained a National certificate. Therefore, I find the contingency of 25% is most appropriate when calculating the plaintiff's loss of earnings.

[2] 2019 (2) SA 233 (SCA) par 40-44
[3] Unreported case P obo LP v Road Accident Fund (1675/19) (2022) ZAGPJHC 1001 (7 December 2022) by Flatela J
[4] 1978 (1) SA 389 (W)

[25] In the circumstances, the following order is made:

1. The defendant is liable for 100% of the plaintiffs' proven damages.
2. The defendant is ordered to furnish the plaintiff with an undertaking, in terms of Section 17 (4) (a) of the Road Accident Fund Act 56 of 1996, for the costs of the administration of the proposed trust, future accommodation in a hospital or a nursing home or treatment of rendering of a service or supplying of goods to the inured after such costs have been incurred and on proof thereof, relating to the injuries sustained by the plaintiff on 26 June 2017.
3. The plaintiff's claim, in respect of General Damages, is separated in terms of the provisions of Rule 33(4) and postponed *sine die*.
4. The defendant pays the plaintiff an amount of R4 861 984, 00 (Four Million Eight Hundred and Sixty-One Nine Hundred and Eighty-Four) In full and final settlement of the plaintiff's claim for Loss of Earnings, payable to the Plaintiff's attorneys of a record trust account with the following details:

   Account Holder: Ehlers Attorneys

   Bank Name: […]

   Branch Code: […]

   Account Number: […]

5. The defendant shall be liable for interest on the amount mentioned above, at the prevailing rate of interest, as determined from time to time, in terms of the Prescribed Rate of Interest Act, 55 of 1975, as amended, per annum, from and including 30 days after the date of order, up to and including date of payment thereof.
6. The defendant is ordered to pay the plaintiffs taxed or agreed party and party costs on a High Court scale, subject to the discretion of the taxing master, which costs will include, but will not be limited to the following:
   6.1. The reasonable taxed fees for consultation with the experts mentioned below, together with the delivery of expert bundles, including traveling and time spent traveling to deliver such bundles, preparation for trial, qualifying and reservation fees (if any and on proof thereof), including the costs of

all consultations (inclusive of telephonic consultations) with Counsel and Plaintiff's party and party costs of all consultations between the Plaintiff's and Defendant's experts, as well as the costs of the reports, addendum reports, joint minutes, and addendum joint minutes and full-day fees for court attendance (if at Court) of the following experts:

6.1.1. Dr P Engelbrecht - Orthopedic Surgeon;

6.1.2. Dr Smuts - Neurologist;

6.1.3. Dr. Moja - Neurosurgeon;

6.1.4. M Sissison - Clinical Psychologist;

6.1.5. Dr M Naidoo - Psychiatrist;

6.1.6. Joker - Neuropsychologist;

6.1.7. Dr. Weitz-Ophthalmologist;

6.1.8. Prof Seabi - Educational Psychologist;

6.1.9. Dr. Fredericks - Disability and Impairment Assessor;

6.1.10. Kelly Cummings, Occupational Therapist;

6.1.11. B Maritz - Industrial Psychologist;

6.1.12. G Jacobson - Actuary

6.2. Costs for Accommodation and transportation (as per the prescribed AA rates) of the injured as well as a family member to the medical-legal examination(s) arranged by Plaintiff and Defendant (If any).

6.3. The costs for Accommodation and transportation (as per the prescribed AA rates) of the injured and a family member to attend a Trial consultation in preparation for the day of the Trial.

6.4. The costs for the plaintiff's attorney traveling to (as per the prescribed AA rates) and spending time traveling to pre-trial conferences and attendance at pre-trial conferences by the plaintiff's attorney.

6.5. The costs for preparation of plaintiff's bundles of documents for trial purposes and the traveling costs (as per the prescribed AA rates) and time spent to deliver these bundles and loading same on CaseLines.

6.6. The costs for preparation of plaintiff's bundles of documents for experts, as well as the traveling costs (as per the prescribed AA rates) and time spent to deliver these bundles.

6.7. The costs and fees of the curator ad litem, including but not limited to any consultations deemed necessary, including but not limited to consultations with trustees, the Masters office, the Plaintiff's attorney, family members of the injured, medical experts, and any other experts deemed necessary, as well as the drawing of reports and daily fee for 14 February 2023 and 26 April 2023.

6.8. The costs for preparation of plaintiff's bundles of documents for the curator ad litem, as well as the traveling costs to deliver these bundles.

6.9. The costs of Adv Jaco Bam briefed and appearing for trial, including but not limited to the following:

6.9.1. Preparation for Trial;

6.9.2. Consultations with Plaintiff's Attorney in respect of Preparation for Trial;

6.9.3. Drafting heads of argument; and

6.9.4. Day fee for 14 February 2023 and 26 April 2023.

6.10. All of the listed Experts completed the costs of the Affidavits for the plaintiff to proceed on a Default Judgement basis.

6.11. The costs of an inspection in loco by the plaintiff's attorney.

6.12. The costs of appointing an assessor to investigate merits.

7. The defendant is ordered to pay the plaintiff taxed and agreed on the party and party costs within 14 days from the date upon which the accounts are taxed by the Taxing master and agreed between the parties,

8. The defendant shall be liable for interest on the costs aforementioned, at the prevailing rate of interest, as determined from time to time, in terms of the Prescribed Rate of Interest Act, 55 of 1975, as amended, per annum, from and including 15 days after the date of the allocator, up to and including the payment date.

9. The proposed Trustees are ABDUL QADIR OSMAN IDENTITY NUMBER: […] of SAQSBY WEALTH MANAGEMENT (PTY)LTD […]07 and ROBERT WESSEL ROBBERTSE IDENTITY NUMBER:[…] Attached is the draft trust instrument, marked annexure "X."

10. The trustees shall provide security by the requirements of the Master of the High Court. The plaintiff's attorneys, Ehlers Attorneys, are authorized to pay from the abovementioned funds held in trust the costs to set security to the Master of the High Court by the trustees of the trust to be created, which costs, in turn, shall be refunded by the defendant to the plaintiff on proof of payment thereof.

11. The plaintiff's attorneys of record, Ehlers Attorneys, shall appoint a company specializing in Road Accident Fund trust registrations to attend to the creation of the *inter vivos* trust to protect the awarded funds for the exclusive benefit of the injured. It is noted that such a company has the authority to act as the trust's founder.

12. The remuneration of the trustees shall be in accordance with the trust instrument attached hereto.

13. The defendant will be liable for the costs and expenses for creating and managing the trust, which form part of s 17(4)(a) of the Road Accident Fund Act. Such costs will include the trustees' fees as set out in the trust. The instrument, attached hereto and mentioned in paragraph 11

14. The plaintiff's attorneys, Ehlers Attorneys, shall keep the monies received as set out in paragraph 2 of this order in their Attorney's trust account and will only be allowed to pay such monies over to the trustees of the trust to be created in terms of paragraph 8 of this order, once the Master of the High Court has issued the necessary letters of authority to the trustees.

15. The plaintiff's abovementioned attorneys are, however, authorized and ordered until the trustees are able to take control of the capital sum and to deal with the same in terms of the trust deed to pay from the capital amount:

    15.1. Any reasonable payments to satisfy any of the plaintiff's needs that may arise and that are required to fulfil any reasonable need for maintenance treatment, care, aids, or equipment that may occur in the interim;

    15.2. The attorney and client fees and expenses of the Plaintiff from the abovementioned funds held in their Attorney's trust account

16. The client signs a valid Contingency Fee Agreement.

K M,

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, PRETORIA

Date of hearing: 26 April 2023

Date of judgment: 30 May 2023

APPEARANCES

Applicants' council Advocate Ross Bowles

Instructed by Savage, Jooste & Adams INC

Respondents' Unrepresented