

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No.: 25789/2019

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

12.06.23

In the matter between:

L C P OBO A P PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

Summary: *Minors - duty of court* - Courts as upper guardians of minors have an oversight role to play in instances where damages were suffered by and are claimed on behalf of minors against the Road Accident Fund.

JUDGMENT

KHWINANA AJ
INTRODUCTION

[1] The plaintiff, Ms L C P instituted action proceedings in her representative capacity as the biological mother and natural guardian of the minor, against the defendant for damages in terms of the Road Accident Fund Act 56 of 1996, pursuant to a motor vehicle collision.

[2] The plaintiff claims past medical expenses at R 500 000.00, Future loss of earnings at R 6 000 000.00, and General damages at R 1 000 000.00.

- [3] The issue of liability and future medical expenses has been previously resolved. The issue that has to be determined is past medical expenses, loss of earnings, and general damages. The plaintiff has filed an application in terms of Rule 38(2) which I have considered and granted.

BACKGROUND

- [4] The Plaintiff is L C P, an adult female person who is suing in her representative capacity as the biological mother and natural guardian of A P born 09 October 2007 (a minor) residing at 3 Wildner Street Heidelberg, Gauteng Province.
- [5] The plaintiff's counsel brought an application in terms of Rule 38(2) which allows the use of the affidavits that have been prepared by medico-legal experts. I have considered the application and I granted the plaintiff's counsel to use the affidavits by his experts.

INJURIES SUSTAINED

DR STEVEN C. DAVIS

CARDIOTHORACIC SURGEON

- [6] The doctor relied on the RAF 1 form and hospital records with regard to the injuries. He says the minor was conscious on arrival at the hospital and her Glasgow Coma Scale was recorded as 15/15. She complained of back pain and had a laceration on the left frontal area of her forehead. She was inserted an intravenous line. She was treated with analgesics. She was admitted at the hospital. The patient was referred for X-rays. A CT scan of the brain was performed as well as X-rays of the spine. A L4 fracture of the Lumbar spine was recorded on the hospital records.

- [7] The minor was hospitalised at Chris Hani Baragwanath hospital and transferred to Sunshine hospital on 23 August 2017. A CT scan was performed it showed a wedge compression fracture of the body of L3. The scan was reported as otherwise normal. She underwent a laparotomy on 24 August 2017. A bowel laceration was identified and repaired. The patient underwent a further laparotomy 6 days later apparently for bowel obstruction. She was managed in ICU for two weeks. She was admitted for 28 days.
- [8] She underwent two (2) laparotomy procedures. She injured her forehead, back and abdomen. She remained acute for approximately 1 month after the accident and moderate pain persisted for 2 weeks. She received pain medication from the hospital. She experiences pain daily, takes painkillers, and uses a back brace intermittently when pain is severe. She requires a special mattress. She has persistent abdominal cramps. She suffers from intermittent urinary retention. She suffers from panic attacks since the accident at least 1 to 2 per month.
- [9] The expert opines that the plaintiff will require sick leave if the pain persists and her productivity may be limited. Her life expectancy is normal.

DR JP MARIN

ORTHOPEADIC SURGEON

- [10] The thoracic spine demonstrates no spondylolisthesis on the lateral projection. She has a vertebral body height loss involving the L3 vertebral body with features of a fracture involving posterior element of the L3. There is a slight grade anterolisthesis of L2 on L3. The CT scan revealed no focal

intracranial pathology, no intracranial or contusion present and there is chronic sinusitis right maxillary antrum. She has a flexion-type fracture of L3 involving three columns. She rates her pain at 6/10.

11] She has been diagnosed with a burst fracture of L3 with 40% anterior loss of height resulting in residual pain, left-sided radicular symptoms and the possibility to develop post-traumatic osteoarthritis of the lumbar spine. The doctor opines that she be treated conservatively with analgesics failing which facet joint block in theatre. He says if that does not assist she will have to be hospitalised for five days for intensive conservative treatment and Rhizotomy in theatre. The plaintiff might have to undergo posterior lumbar laminectomy and discectomy. She will also require lumbar fusion instrumentation.

[12] The doctor opines that the plaintiff will be able to work light duty and a period of five to ten years' early retirement should be allowed.

DR STEYN

UROLOGIST

[13] He stated that the minor complained of occasional cramps in the lower abdomen and that she suffers from urinary urgency. He opines that bladder complaints are inconsistent, and he is not 100% convinced that it is due to the accident.

DR BERKOWITS

PLASTIC SURGEON AND RECONSTRUCTIVE SURGEON

[14] He recommended surgical revision of the scarring on the minor's forehead and abdomen.

DR LABUSCHAGNE

NEUROSURGEON

- [15] He classified the minor's head injury as mild traumatic brain injury with residual symptoms and chronic headaches. The minor presented mild residual memory, concentration disturbances and behavioural changes.

DR NAIDOO

NEUROLOGIST

- [16] He diagnosed the minor with possible acute concussive head injury based on reported alteration in the level of consciousness and reported neuropsychological/neurocognitive symptoms.

MR DUTTON

CLINICAL PSYCHOLOGIST

- [17] He diagnosed the minor with adjustment disorder with prolonged duration and PTSD. He opines that the minor has a possibility to develop avoidant personality disorder in the future.

MR NHLAPO

CLINICAL PSYCHOLOGIST

- [18] He diagnosed the minor with adjustment disorder with depressed mood, panic disorder and chronic pain.

MS DU PLESSIS

EDUCATIONAL PSYCHOLOGIST

- [19] He opines that the minor presents with significant psycho-emotional, social and behavioural difficulties which will inadvertently hamper her cognitive

performance and ability to cope with the demands and expectations of formal school.

NONZALISEKO ARM

OCCUPATIONAL THERAPIST

- [20] She recorded that the minor presented with a euthymic mood she was very pleasant and came across as an extroverted young girl that communicated eloquently. She says the minor was motivated to do tasks but with time she waned and fluctuated with time. However, was distractible during comprehension and that affected her ability to follow instructions. She scored 20/30 on SLUMS cognitive test which indicates a significant neurocognitive deficit.
- [21] The Berry VMI was administered to test the minor's visual motor integration skills. Her score was within the average range indicating normal visual motor integration. The minor will benefit from guidance to explore alternative hobbies. The expert opines that behavioural limitations are bound to affect her learning ability.

INDUSTRIAL PSYCHOLOGIST

FM RENNIE

- [22] She postulated that the minor child will achieve grade 12 and study further until the diploma/degree. She postulated two scenarios of obtaining a diploma or a degree. The IP opines that the minor will be able to work until the age of 55-60 years if she works light duty in a friendly environment. She opines that a period of 5-10 years earlier retirement should be considered.

DR BERGER

OPHTHALMOLOGIST

- [23] The doctor opines that the minor did not have direct eyeballs/ orbital injuries. He did not find ophthalmological sequelae from the motor vehicle accident.

L GROODTBOOM

NEURO PSCHOLOGIST

- [24] She opines that the minor's neurocognitive prognosis is dependent on psychological and physical intervention. She does not rule out the possibility of lingering long-term mild cognitive as a result of the head injury sequelae. She opines her prognosis is favourable.

- [25] He has postulated that the minor child will obtain a degree and the income has been projected as follows:

Future earnings	R 14 006 889	R 9 046 624
Minus Contingency 20/40% - R	2 801 378	R 3 618 650
Future loss of earnings	R 11 205 511	R 4 527 974 R 5 777 737

THE LAW

- [26] 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.¹ It must be noted, a physical disability which impacts the capacity for an income does not, on its own, reduce the patrimony of an injured person. It is incumbent on the

¹ *Prinsloo v Road Accident Fund* **2009 5 SA 406** (SECLD) at 409C-41A

plaintiff to prove that the reduction of the income earning capacity will result in actual loss of income.²

[27] The actuarial calculations are based on proven facts and realistic assumptions regarding the future. The Actuary guides the court in making calculations. The court has a wide judicial discretion and therefore the final say regarding the calculations. The actuary relies on the report of the Industrial Psychologists, who would have obtained information from the plaintiff and any other relevant source. In *Bee v Road Accident Fund*³ the younger the victim the longer the period over which the vicissitudes of life will operate and the greater the uncertainty in assessing the claimant's likely career path.

[28] The court, in the case of *Road Accident Fund v Guedes*⁴ 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)

[29] Nicholas JA⁵ stated the following at p.113 paragraph G-H

"Any enquiry into damages for loss of earning capacity is of its nature speculative. because it involves predictions as to the future. 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.

It has opened to it two possible approaches.

One is for the judge to make a round estimate of an amount that seems to him to be fair and reasonable. This is entirely a matter of guesswork, a blind plunge into the unknown.

² *Rudman v Road Accident Fund* [2003 \(2\) SA 234](#) (SCA) at para 11, *Union and National Insurance Co*

³ 2018(4) SA 366 SCA para 116

⁴ 2006(5) SA 583

⁵ *Southern Insurance Association LTD V Bailey* NO 1984(1) SA 98

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. 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”.

[30] It is now well-settled that contingencies, whether negative or positive, are an important control mechanism to adjust the loss suffered to the circumstances of the individual case in order to achieve equity and fairness to the parties. There is no hard and fast rule regarding contingency allowances. Koch in *The Quantum Yearbook* (2011) at 104 said:

*“General contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, saved travel costs, loss of employment, promotion prospects, divorce, etc. There are no fixed rules as regards general contingencies.”*⁶

ANALYSIS

[30] The minor child’s future loss of earnings or capacity to earn has been actuarially calculated. I am aware that the minor child will need an understanding employer in order to take into account her cognitive limitation at work in the future. It is evident that the minor is no longer performing as before the accident. The industrial psychologist and the occupational

⁶ Gwaxula v Road Accident Fund (09/41896) [2013] ZAGPJHC 240 (25 September 2013)

therapist opine that the minor child is therefore likely to suffer a future loss of earnings. The calculation will entail the difference between his pre-accident earning potential and her post-accident earning potential.

[31] The minor child will be able to do light duty as per the experts. She is likely to obtain a diploma or a degree. She will not be able to compete with abled bodies as she has been compromised. I am therefore mindful that the minor child will be an unequal competitor in the open labour market compared with her healthier peers and that she will not be able to perform functions efficiently and effectively as compared to her counterparts. The injuries sustained from the accident will hinder her career and future employability. The minor has suffered a medically justifiable loss of earnings or work capacity as a direct result of the accident.

[32] In considering the claim for the minor the child's background and family history plays a pivotal role. However, may I hasten to say that I do not believe that the history of the family limits anyone that is determined to achieve. The factors that I have also taken into account are:

[32.1] The fact that both parents of the minor child have studied until grade 10.

[32.2] The father of the minor child is working as an unqualified fitter, the mother works as a sales consultant and the half-sister is working part-time.

[32.3] Prior to the accident, she was an above-average learner.
The possibility exists that she would be able to obtain a diploma or a degree.

- [32.4] That the Actuary postulated loss of earnings these were considered from Paterson's figures relating to corporate survey earnings which may not be applicable to the minor child.
- [32.5] Her pre-accident and post-accident life expectancy remains unchanged.
- [32.6] That she will be able to work until 55-60 however a period of 5-10 early retirement must be considered.
- [32.7] That she suffered a wedge compression fracture of the body of L3 and will need further medical attention in the future.
- [32.8] That she might develop post-traumatic osteoarthritis of the lumbar spine.
- [32.9] That the minor child has developed behavioural changes that got her into trouble at school, fights with her younger sister and is irritable.
- [32.10] Children are likely to be healed of their injuries.

[33] I have cumulatively considered all the facts in particular the second scenario as alluded to by actuary. I find that the balance of probabilities favours awarding compensation for loss of earnings or earning capacity to the plaintiff on behalf of the minor child in the amount of R 5 000 000.00.

PAST MEDICAL EXPENSES

[34] The plaintiff has submitted vouchers that amount to R 13 317.20 for past medical expenses. I am satisfied that the said claim must succeed as the vouchers depict

the name of the minor, dates and the procedures that were conducted on the minor.

GENERAL DAMAGES

[35] In *RAF v Maasdorp*⁷ the plaintiff suffered a severe L5/S1 listhesis and a slight slip of the vertebrae at L3/L4. In 2002 the plaintiff was awarded R110 000 in general damages, which converts to the present value of R260 000.

[36] In *Sandler v Wholesale Coal Suppliers Ltd*⁸ Watermeyer JA held:

"The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending on the Judge 's view of what is fair in all the circumstances of the case."

[37] In *RAF v Marunga*⁹ the Supreme Court of Appeal confirmed the dictum of Broom DJP in *Wright v Multilateral Motor Vehicle Accident Fund*¹⁰:

"I consider that when having regard to previous awards one must recognise that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of the changes in the society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than those in most other countries."

[38] In *Connolly v Road Accident Fund*¹¹ the plaintiff sustained a compression fracture to L3 in his back and a rupture of the disc. In 2012 the award was R180 000 which converts to the present value of R245 000.

[39] It is common cause that the minor has suffered L3 fracture and currently experiences pain which she rated at 6/10. She will have to undergo different

⁷ 1971(1) SA 530 AD at p535 H - 536 A

⁸ 1941 AD 194 at 199

⁹ 2005(5) SA 457 (AD)

¹⁰ 1923 AD 234 at 246

¹¹ (6090/2007) [2012]2 AWCHC 105 (8 February 2012)

medical procedures to alleviate her pain. She will have to take pain medication for most of her life if not lifetime.

[40] Having considered all the evidence, factors, and circumstances relevant to the assessment of damages and having regard to past awards and the more modern approach of the Supreme Court of Appeal as expressed in the *Marunga case*¹² I find that an amount of R550 000.00 will be reasonable and fair to both the plaintiff and the defendant.

[41] I have noted that the draft order does not address where the funds are to be deposited despite that at the trial counsel alluded to the formation of a trust which was in line with the expert's medico-legal reports. I have requested counsel to prepare supplementary heads to address the issue as to where the funds of the minor child will be paid. Counsel has promptly responded and submits that the Plaintiff in this matter is the biological mother and natural guardian of the minor. He says this is confirmed in the particulars of claim various other documentation and affidavits uploaded onto Caselines. The plaintiff has deposed to an affidavit wherein she confirmed it was fully explained to her by instructing her attorney that the opinion of the experts was the formation of a trust to protect the funds awarded to her daughter.

[42] She confirmed that her instructing attorney fully explained the operation of a trust, the requirements to register the trust, the control of the money paid to the trust, the inner workings of the trust, the time it takes to register the trust, and that the trust will dissolve upon her daughter attaining the age of majority. She confirmed that she was not desirous for a trust to be registered on behalf of her

¹² Supra

daughter and gave instructions that provisions for a trust in the draft order not be made.

[43] She further confirmed that instructing attorney explained to her that pursuant to the instructions not to register a trust the above Honourable Court would require information regarding the financial stability and employment history of both herself and her husband (as the biological parents of the minor). She confirmed that their joint income is sufficient to fund their lifestyles and all their financial obligations, including the care and maintenance of their minor children. She confirmed that they do not need to supplement their income by using any of the funds awarded to the daughter and that they (as parents) would seek reputable financial advice regarding the investment of the funds on behalf of the minor.

[44] She confirmed that the funds will be properly invested and protected to be utilized when necessary on behalf of the minor's education and development. Counsel further states that when the matter was again on trial on 1 March 2023 this aspect was again fully canvassed with the Plaintiff and the biological father of the minor and the Plaintiff gave instructions again not to protect the funds by way of a trust and that the situation remains exactly the same as set out in her affidavit in May 2021. He says It is worth noting that the minor was born on 9 October 2007 and is currently 16 years old and not far from reaching the age of majority.

[45] Counsel submits in the subsequent heads of argument submitted says that the Instructing attorney has fully complied with his obligations towards the minor and the above Honourable Court in comprehensively discussing what will happen to

the funds awarded to the minor with the Plaintiff and biological father. There are absolutely no salient facts that would indicate that it would be imprudent or reckless to allow the funds to be paid to Plaintiff, who confirmed under oath financial stability and that the funds will be properly invested and utilized on behalf of the minor.

[46] It is respectfully submitted that on the strength of the Plaintiff's affidavit and instructions that the above Honourable Court can make the proposed order in which the funds will be paid to the Plaintiff. As stated, the Plaintiff's attorney of record has comprehensively dealt with this aspect and has appraised himself with the relevant facts pertaining to the financial stability and needs of the minor's parents."

TRUST / GUARDIAN FUND

[47] 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.

[48] The guardian's fund consists of all moneys¹³:

48.1 In the guardian's fund at the commencement of the new Act; or

48.2 Received by the Master under the new Act or in any law or in pursuance of an order of Court; or

48.3 Accepted by the Master for any known or unknown person.

¹³ Section 86 (1), 1 (a), 1 (b) & 1 (c).

[49] I have considered what had been canvassed by the counsel for the plaintiff.

Counsel has only dealt with the issue of the creation of a trust. The qualifications of the mother have been alluded to as a sales consultant and a that she passed grade 10. The mother of the plaintiff says that they will not need the funds. I do not think a trust is the best option as an application will still have to be made in the high court which can take a while. A trustee will have to be appointed which attracts costs and fees for the trustee.

[50] I do not agree with the counsel that just because the mother of the plaintiff has deposed to an affidavit that she will invest the funds that should be enough reason to have the funds given to the plaintiff. There are factors to consider prior to giving the fund to the mother. There is no justification why the guardian fund should not be considered. The minor child is sixteen years of age and the guardian fund is the best place wherein her funds can be kept without charging a fee and borrowing funds in a trust.

[51] I, therefore, order that the funds that will be due to the minor child be paid into the guardian fund.

[52] In the result, I make the following order:

- a. Past Medical expenses R 13 317.20
- b. Future Loss of Earnings R 5 000 000.00
- c. General Damages R 550 000.00
- d. That Funds be due to the minor child be paid into the guardian fund;
- e. Part and Party Costs

Order

Draft order marked 'X' as amended is made an order of court.

ENB KHWINANA
ACTING JUDGE OF NORTH GAUTENG
HIGH COURT, PRETORIA

APPEARANCES:

Counsel for the Plaintiff : ADV CR VAN ONSELEN

Instructed by : NEL VAN DER MWERWE & SMALMAN INC.

Date of Hearing : 02 MARCH 2023

Date of Further heads of argument: 05 JUNE 2023

Date of Judgment : 12 JUNE 2023