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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **801/2019**

In the matter between:

R[...] **A[...]** **M[...]**
obo R[...] **C[...]** **M[...]**
[Identity number: **0[...]**]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: CRONJÉ, AJ

HEARD ON: 25 APRIL 2023

JUDGMENT BY: CRONJÉ, AJ

DELIVERED ON: 17 MAY 2023

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 12h15 on 17 May 2023.

I INTRODUCTION

- [1] The Plaintiff instituted action against the Road Accident Fund ("the Fund") in his representative capacity as father of R[...] C[...] M[...] ("R[...]"). She was a passenger in one of the insured vehicles and approximately 3 years old. It was pleaded that R[...] suffered a fracture to her left tibia, an injury to her right hand, an injury to the right femur, and a head injury.
- [2] The Plaintiff claimed R200 000.00 for past medical expenses, an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 ("the Fund Act"), past and future loss of earnings and earning capacity in the amount of R2 100 000.00, and general damages of R900 000.00.
- [3] On 23 August 2022, Zietsman AJ granted an order by agreement between the parties that the Fund accepts liability for 100% of R[...]’s proven damages. The Fund would issue the Plaintiff with an undertaking in terms of Section 17(4)(a) of the Fund Act.
- [4] At the trial, I enquired from Ms A Viljoen, for the Plaintiff, about the note made by Daffue, J. on 16 January 2023, stating that the serious injury report was rejected. She conveyed that the HPCSA has not yet formally considered the report and that there was a misunderstanding in this regard. A hearing for this purpose was convened by the HPCSA for 28 April 2023. At date of this judgment the HPCSA already determined that R[...] did not suffer a serious injury. I was informed that the Plaintiff intends reviewing the decision of the HPCSA. This judgment deals with the patrimonial damages only.

- [5] When the matter was to be called, Ms J Gouws, for the Fund courteously informed me that the Fund does not have sufficient legal practitioners to represent it on the day. I continued to hear the evidence.

II THE EVIDENCE

- [6] Ms Viljoen handed up a bundle containing the original signed affidavits of the experts whose reports were already filed. I perused the affidavits and am satisfied that they contain the necessary evidence and are admissible. I compliment Ms Viljoen for assisting me with written Heads of Argument.
- [7] Dr Anton H Van den Bout is an orthopaedic surgeon who examined R[...] on 25 September 2019. He notes that she has small scarring in the hairline on her forehead. From an orthopaedic point of view, there will be no patrimonial damage by way of future loss of earnings or earning capacity. He deferred to a clinical psychologist's opinion in respect of R[...]’s mental functioning. He, however, states that she will for the rest of her life, need painkillers and non-steroid anti-inflammatory medication, for pain and discomfort.
- [8] Dr J H Kruger, a neurosurgeon, states that he examined R[...] on 8 December 2021. R[...] complains of muscle tension headaches once a week that are aggravated by physical activity. She also has pain in the right lower leg, which she only experiences after the accident. She uses over the counter pain medication to manage the pain which gives relief. It is unclear whether she lost consciousness since the accident but according to her father, she was disorientated for a few minutes. He states that it is impossible to ascertain if R[...] had executive mental problems as she was approximately 3 years old at the time of the accident. He defers to the opinion expressed by Ms R Hovsha, a clinical psychologist.
- [9] He states that one would not usually expect cognitive mental problems, executive mental problems or educational problems as a consequence of a

mild traumatic brain injury. In 15% of patients, however, long-term *sequelae* may be present.

- [10] In an Addendum to his report, he pointed out that the hospital records made mention of a bruise on her left cheek and that such bruise confirms a blow to her head.

- [11] Ms Rolene Hovsha, a clinical psychologist with a special interest in neuropsychology, evaluated R[...] on 26 September 2019. She notes that the hospital records showed that R[...]’s Glasgow coma score (“GCS”) was 15/15 on admission. She notes that given the young age of R[...] at the time of the accident, she would not have been able to understand questions relating to orientation and could therefore not have scored 15/15 on the GCS.

- [12] She confirms that R[...] takes over the counter medication for pain. R[...] reports that she suffers from frontal headaches associated with dizziness and blurred vision approximately three times per week. R[...]’s vision is poor, she suffers from tinnitus, her memory is poor as she forgets instructions, she is slower in thought processing, she suffers from receptive language difficulties, she is fidgety and unable to sit still. She also suffers from a travel-anxiety disorder and feels anxious as a passenger in a vehicle when the vehicle is speeding.

- [13] Her mental control was severely impaired. This task involves the ability to sustain attention, recall and understand instructions, process basic numerical information, recall responses and to give an appropriate response. Her error-awareness was poor, as was her ability to monitor and correct errors that she made. R[...]’s judgement, as measured on the comprehension sub-test of the SSAIS, was below the average range for her age as she only obtained a scaled score of 8 with the population’s average being 10. It indicates that she has difficulties in utilizing practical judgement and common sense reasoning as well as a poor ability to appreciate and recall practical information that is utilized in connection with sound and intuitive judgement.

- [14] She has an impaired ability to focus on details and also a below-average visual perception, visual motor-orientation, visual concept formation and motor coordination. In respect of her executive functioning, Ms Hovsha found a severely impaired ability to initiate activities, tasks, or general information. In respect of her emotional functioning, there were feelings of insecurity, inadequacy, inferiority, anxiety, depression, impulsivity, and poor emotional and social adjustment. She notes that if a child has suffered a traumatic brain injury at an early stage, such as R[...] has, all the educational effects may not show up immediately. As she is expected to perform higher-level thinking and more complex cognitive tasks, particularly executive functions, she may experience difficulties, as those areas of the brain responsible for dealing with such tasks, particularly the frontal lobes, are likely to have been damaged in the accident or did not develop properly due to the injury. She concludes that as a result of the deficits, R[...] is unlikely to achieve academically as she would have, had the accident not occurred, and this will affect career options and therefore remuneration in the future. Her career and earning potential have been significantly reduced.
- [15] Ms L de Rooster, an educational psychologist, states that the contents of her report will remain valid for a period of two years, thus until 27 January 2024. Ms De Rooster considered the reports of Ms Hovsha, Dr Van den Bout and Dr Kruger. In respect of psychometric findings, she finds low average cognitive functioning, impaired narrative memory, distractibility and concentration difficulties, poor motivation and difficulty with initiating and monitoring the work, significant signs of anxiety, delayed emotional development and significant scholastic delays. She concludes that R[...] will probably not be able to complete Grade 12 (NQF 4) in mainstream education. Her father's lack of insight and her poor socio-economic circumstances should be taken into consideration. R[...] was repeating Grade 6 (in 2022). Her recommendations are that R[...] will benefit from psychotherapy, a tutor and R[...]’s funds should be protected, as she is a minor.
- [16] Mr Steven van Huyssteen, an industrial psychologist, considered R[...]’s pre-morbid social-economic situation. He opines that R[...]’s pre-morbid socio-

economic situation was probably below average, which would have made it difficult for her to have a post-school education directly after Grade 12. He opines that, disregarding the accident and the injuries sustained, with a Grade 12 qualification she would have entered the non-corporate work sector wherein most people are, according to Statistics SA, employed. In the corporate sector, R[...] would have worked and progressed in her field of education in jobs on the semi-skilled occupation level. Having regard to the accident and injuries sustained, he postulates that R[...]’s entry into the labour market will be delayed by two years as she would have failed school grades and would only be qualified to work in the non-corporate work sector on the unskilled occupational level. Due to her cognitive deficits, she will have a flat career trajectory and therefore will probably earn an income on the median rand value for an unskilled labourer throughout her work career until retirement at age 65.

- [17] Dr L A Fine, a psychiatrist, found that she presents with symptoms of an accident-traffic travel-related anxiety disorder and probable accident-related depression, secondary to the effects of her physical and accident-related injuries. He concludes that with having sustained significant organic brain damage at a very young age to her young and unformed immature brain, it is anticipated that besides causing brain tissue and functional damage, there would be impaired development of the brain and it would be anticipated that she would have some permanent and irreversible damage. The functional effects can be considered permanent and irreversible and leave her vulnerable to development of an array of organically based psychiatric disorders over her future lifetime, which would require treatment.

- [18] Dr A P J Botha, a physician, states that the only factual evidence of craniofacial trauma is that there was evidence of facial bruising, which was a significant finding. There appears to be consensus that she has developed cognitive and psychological symptoms because of a concussive head injury sustained in the accident.

[19] Mr G A Whittaker of Algorithm Consultants and Actuaries CC, dated 6 March 2022, calculated the loss at R3 719 725.00. In her heads of argument, Ms Viljoen submits that a 40% contingency has to be applied to make provision for her social circumstances before and after the accident, and that the base-number of the pre-accident scenario would amount to R3 333 048.00. A 40% contingency deduction was applied to her post-morbid scenario, which the Plaintiff submits is a reasonable contingency deduction, and the claim for loss of income is then stated to be R2 886 462.00.

[20] I am satisfied that the minor's income earning capacity is impaired as a result of the accident. I am of the view that the reports support the claim.

IV AMENDMENT OF THE CLAIM

[21] The Plaintiff argued that an amount of R2 886 462.00 (two million eight hundred and eighty six thousand four hundred and sixty two Rand) should be awarded for patrimonial loss. The summons, however, stated an amount of R2 100 000.00 (two million one hundred thousand rand). The amount calculated by the actuary and the amount which the Plaintiff now seeks, exceed the amount in the particulars of claim.

[22] A Court cannot make an order that exceeds what was claimed in the pleadings and the Defendant was not aware that a higher amount would be claimed. I informed the Plaintiff's attorneys that an amendment to the pleadings will be necessitated if judgement for higher amount is sought. On 2 May 2023, the Plaintiff filed and served a notice of intention to amend the amount. The Fund did not oppose the notice to amend and the amended pages were filed and served on 16 May 2023. It brings the amount claimed in the heads in line with the pleadings.

V THE R[...] C[...] M[....] TRUST

[23] The Plaintiff requested that I make an order that a trust be created into which the monies should be paid. A perusal of the reports of the experts indicate

that there is good reason for entrusting the monies in trust rather than to the father who is 50 years old, has a Grade 10 qualification and appears to be unemployed. I was provided with a draft Deed of Trust for the R[...] C[...] M[...] Trust. The appointment of the trustees and the content of the Deed will be subject to the approval of the Master of the High Court.

VI CONCLUSION

[24] I am satisfied that the Plaintiff proved R[...]’s loss of income and earning capacity in the amount of R2 886 462.00 (two million eight hundred and eighty six thousand four hundred and sixty two Rand).

[25] In respect of the securing and proper administration of monies of minors, I took note of the judgment of the Supreme Court of Appeal in *Road Accident Fund v MKM obo KM and Another; Road Accident Fund v NM obo CM and Another*¹ where the Court made orders regarding the creation of a trust and the payment of monies that are due to minors into a trust. I give effect to those directives in my order.

VI COSTS

[26] Costs should follow the result.

ORDER:

[27] I make the following orders:

1. The R[...] C[...] M[...] Trust is to be registered by the Master of the High Court and the Trustees to be appointed by the Master within three months of this order. The Trust and Trustees shall be subject to the supervision of the

¹ (1102/2021) [2023] ZASCA 50 (13 April 2023)

Master of the High Court and the provisions of the Trust Property Control Act, 57 of 1998.

2. The Defendant is ordered to pay to R[...] C[....] M[...] the amount of R2 886 462.00 (two million eight hundred and eighty six thousand Rand) in accordance with paragraphs 3 and 4 hereunder.
3. Payment will be made directly into the trust account of the Plaintiff's attorneys within one hundred and eighty (180) days from the granting of this order: provided that interest shall start running on the capital amount within fourteen (14) days of the granting of this order, the details of which are:

Holder: Edeling Van Niekerk Incorporated Trust
Name of bank: Nedbank Limited
Account number: 1[...]
Bank and branch: Western Gauteng
Branch, Code: 1[...]
Ref: M[...]
Claim no: 560[...]
Link no: 4[...]

4. Once the Trust is established, Edeling Van Niekerk Incorporated is ordered to pay to the R[...] C[...] M[...] Trust, all monies received from the Road Accident Fund, and held in trust on behalf of R[...] C[...] M[...], within 20 days of receipt of the monies.
5. Edeling Van Niekerk Incorporated are ordered to report to the Registrar of the Free State High Court within 3 months of this order regarding the establishment of the Trust and in addition thereto as soon as the payment of the monies is effected into the Trust as set out in paragraphs 1 and 4 of the order above.
6. Interest shall be paid on the amount of R2 886 462.00 *a tempore morae* calculated in accordance with the Prescribed Rate of Interest Act, 55 of 1975, read with Section 17(3)(a) of the Road Accident Fund Act, 56 of 1996.

7. Defendant pays the Plaintiff's taxed or agreed party and party costs inclusive of correspondent fees on High Court scale which costs will *inter alia* include the following in the discretion of the taxing master:
- 7.1 All costs in obtaining all medico-legal and actuarial reports and addendums as well as the Plaintiff's and minor's travelling and lodging costs in attending medico-legal appoints as well as the travelling and accommodation of Plaintiff's attorney and counsel attending trial on 25 April 2023.
- 7.2 The costs shall include the cost of the following experts:
- (a) Dr D Irsigler – general surgeon report, addendum report and RAF 4;
 - (b) Dr A H Van den Bout – orthopaedic surgeon;
 - (c) Dr J H Kruger – neurosurgeon;
 - (d) Ms Rhovsha – clinical psychologist;
 - (e) Mrs L de Rooster – educational psychologist;
 - (f) Mr S van Huyssteen – industrial psychologist;
 - (g) Mr G A Whittaker – actuary;
 - (h) Dr L Fine – psychiatrist;
 - (i) Dr A P J Botha – physician.
8. The determination of the quantum in respect of general damages is postponed to the pre-trial roll.

PR CRONJÉ, AJ

Counsel for Plaintiff:

Adv A Viljoen

Attorneys for Plaintiff:

Edeling Van Niekerk Attorneys Inc.

McIntyre van der Post Attorneys

Bloemfontein

Appearance for the Defendant:

Ms J Gouws – excused

Office of the State Attorney
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