

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D6921/2019

In the matter between

**S[...] N[...] M[...] OBO
P[...] N[...] T[...]**

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

ORDER

The following order shall issue:

1. The defendant is directed to pay R6 460 521.60 to the plaintiff for general damages and loss of earnings.
2. Interest is payable on the aforesaid sum at the prescribed rate of interest upon the expiry of a period of fourteen (14) days from the date of this judgment.
3. The defendant is directed to furnish to the plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for 100% of the costs of all future accommodation of the minor child in a hospital or nursing home and all medical treatment or the rendering of a service, or the supplying of goods to the minor child arising out of the injuries he sustained in the motor vehicle collision that occurred on 7 April 2018, after such costs have been incurred and upon proof thereof.

4. The defendant is directed to pay the plaintiff's taxed or agreed party and party costs on the High Court scale to date. Such costs to include but not be limited to:
 - 4.1 the reasonable necessary costs of senior counsel, including senior counsel's reasonable costs for his preparation for trial, such costs to include preparation of written submissions (if any) as well as the reasonable costs of counsel and the attorney for attending upon any necessary consultations with the under-mentioned expert witnesses and the plaintiff;
 - 4.2 the fees and expenses reasonably incurred by the under-mentioned witnesses for, inter alia the preparation of their reports and supplementary reports, deposing to affidavits, joint minutes and RAF4 forms as well as the experts' reasonable qualifying fees, their reasonable reservation fees, and their reasonable fees for attending upon any necessary consultations with the plaintiffs' counsel and attorney to testify at the trial (with the quantum of their fees to be determined by the Taxing Master), namely:
 - 4.2.1 Dr Du Trevou - Neurosurgeon
 - 4.2.2 Professor Lazarus - Neuropsychologist
 - 4.2.3 Andiswa Gowa - Occupational Therapist
 - 4.2.4 Zethu Gumede - Educational Psychologist
 - 4.2.5 Ms K Naidoo - Industrial Psychologist
 - 4.2.6 Arch Actuarial Consulting - Actuary (reports only)
 5. The defendant is directed to make payment referred to in paragraphs 1 and 4 above directly to the Trust account of the plaintiff's attorneys whose details are as follows:

Account name: Moses Naidoo & Associates

Branch: 1[...] Nedbank SA

Type of account: Cheque account

Account number: 1[...]
-

JUDGMENT

Hadebe AJ

Introduction

[1] The plaintiff, in her personal and representative capacity as mother and natural guardian of her minor child instituted action against the defendant claiming delictual damages arising from the bodily injuries sustained by the minor child in a motor vehicle collision on 7 April 2018. At the time, the minor child was nine years and 11 months old.

[2] Before the commencement of the hearing, the parties placed the following on record:

- (a) that the issue of liability had been settled at 100% in favour of the plaintiff;
- (b) that the defendant accepted the RAF 4 assessment report completed by Dr Du Trevou, a Neurosurgeon who came to the conclusion that the minor child's injuries were serious in terms of the narrative test; and
- (c) that the defendant shall furnish the plaintiff with an undertaking certificate in terms of s 17(4)(a) of the Road Accident Fund Act¹ for the minor child's future medical treatment.

[3] In addition, the parties handed up joint submissions in respect of general damages wherein they agreed as follows:

- (a) That the minor child suffered the following injuries:
 - (i) a right anterior cranial fossa base of skull fracture;
 - (ii) a right parietal skull fracture;
 - (iii) a small right temporal lobe cerebral contusion; and
 - (iv) lacerations to the face and scalp that were sutured.
- (b) That in consequence, he was comatose for four days, subsequently his Glasgow Coma Score (GCS) was three out of 15 (3/15) and thereafter improved to eight out of 15 (8/15).
- (c) The minor child was hospitalized for two weeks.

¹ Road Accident Fund Act 56 of 1996.

- (d) The minor child suffers from:
 - (i) lifelong epilepsy;
 - (ii) a post-traumatic brain injury;
 - (iii) vertical gaze paresis related to diffuse axonal injury;
 - (iv) unstable whilst standing;
 - (v) poor co-ordination when sitting.
- (e) That the minor child displayed abnormal behaviour on discharge from hospital.
- (f) The minor child continues to take Ritalin, Risperdal and Epilim which are considered lifelong medications.

[4] The parties further agreed that there was no need to call all the experts who examined the minor child considering the fact that there was an agreement on the injuries sustained by the minor child and sequelae thereof. It was also agreed that the Court will use the actuarial report filed by the plaintiff which has three possible scenarios.

Issues

- [5] The court was called upon to decide on the following issues:
 - (a) the quantum of the general damages suffered by the plaintiff; and
 - (b) the quantum of the loss of earnings.

Evidence

- [6] The parties handed up the following documents which were marked exhibits:
 - (a) index to plaintiff's expert bundle dated 9 May 2023 (Exhibit "A");
 - (b) index to defendant's expert bundle dated 21 September 2022 (Exhibit "B");
 - (c) index to experts' joint minutes dated 21 September 2022 (Exhibit "C");
 - (d) index to defendant's expert bundle dated 9 May 2023 (Exhibit "D");
 - (e) index to joint minutes dated 9 May 2023 (Exhibit "E");
 - (f) index to discovery affidavits dated 9 May 2023 (Exhibit "F").

[7] The plaintiff relied on the evidence of two expert witnesses who testified, namely:

- (a) Ms Zethu Gumede, an Educational Psychologist; and

(b) Ms Kavisha Naidoo, an Industrial Psychologist.

[8] In addition to the aforesaid expert witnesses, the plaintiff relied on her own evidence.

[9] The defendant led evidence of one expert witness, namely Ms Megan Clerk, an Educational Psychologist.

Summary of the evidence of Ms Naidoo - Industrial Psychologist

[10] Ms Naidoo testified that she assessed the minor child and compiled a medico-legal report. She signed the joint minute dated 17 August 2022. When she signed the joint minute, there was no disagreement in relation to the uninjured career prospect of the minor child. The expert for the defendant at the time was Ms Vijayluxmi Pillay, an Industrial Psychologist. Ms Naidoo referred to page 16 of Exhibit “C” where the following is recorded:

‘We agree that, given the joint minute by the Educational Psychologists, Master Thwala would have completed a grade 12 level of education in 2025 and commenced with studies towards a university degree in 2026.

Given his family history background, with continued support from his family, and in view of the greater opportunities available for tertiary education, he would have had the capacity to have completed further studies such as a three-year degree qualification in 2028.’

[11] She further testified that she signed a second joint minute dated 28 March 2023 together with the defendant’s expert Mrs Zaheerah Kakir, an Industrial Psychologist. They agreed on the two possible career paths, i.e. diploma or degree. They recorded the following agreements for pre-accident path:

‘We agree, that the Educational Psychologists differ in their opinion regarding the claimant’s pre-accident educational pathway and therefore the Industrial Psychologists need to provide two scenarios where one is based on the diploma level and another on degree level.

For settlement purposes, we agree, that the average entrance into the open labour market of both postulations and earning ceilings of the diploma and degree entrances be considered.

We agree that P[...] would have been able to work until the normal retirement age of 65 years.’

[12] Under cross-examination, the defendant's counsel questioned the source of the minor child's family history. The expert explained that she obtained the information from the plaintiff.

Summary of the evidence of Ms Gumede – Educational Psychologist

[13] Ms Gumede confirmed that she assessed the minor child on 17 April 2019 and compiled the medico-legal report dated 23 January 2021. She also compiled the joint minutes with two experts of the defendant. She testified that the comprehensive psychometric assessment revealed that the minor child functions within the average range of intelligence. His verbal IQ and non-verbal IQ were within average range but the individual subtest scores vary from very weak to above average suggesting that the aspects of verbal IQ and non-verbal IQ are impaired and compromised.

[14] She also testified that the minor child's cognitive skills and performance on scholastic evaluation indicate severe learning impairments that will always compromise his classroom performance and vocational prospects. His cognitive and scholastic deficits are permanent and there will be no remedial intervention or treatment programme that will effect significant change academically and allow him to benefit age and grade appropriately as he would have pre-morbidly. She stood with her findings on her report that had the accident not occurred, the minor child could have coped with the mainstream school system up to grade 12, and thereafter proceeded to obtain a degree qualification. He would then have been employable in the open labour market as a skilled or professional person. Now that the accident has occurred, he will struggle to cope with the demands of mainstream education to completion (matriculation).

[15] During cross-examination, she explained that the information on the family history was provided by the plaintiff during her interview. She was also requested to give clarity on the remarks appearing in the school report dated 12 October 2017² namely, "promoted, uyaludinga kakhulu usizo ekhaya uphase ngenxa yeminyaka". She was of the view that there was an error as the results appeared to be good and the child was not overaged to be promoted. She indicated that the school report did

² Page 42 of Exhibit "G".

not influence her findings. She maintained that the minor child was a degree candidate.

Summary of the evidence by the plaintiff

[16] The plaintiff testified that she has grade 12 and was employed by Perna Perna Resort as a maintenance clerk until 2021 when she was retrenched as the company closed down. She is currently working as a cleaner/domestic worker due to the non-availability of employment opportunities. The father of the minor child has a grade 12 certificate. He was employed by Grafton Everest as a foreman for 15 years until he was retrenched in 2020 during the Covid - 19 lockdown. He is currently working as a security guard.

[17] During cross-examination, she was requested to explain as to why she let the minor child repeat grade 2 even though he had passed. The plaintiff indicated that she was not happy with the results. She was also requested to explain as to why the experts were not furnished with school reports. She indicated that she was not requested to furnish school reports. However, she did furnish the experts with the school reports that she had in her possession. She was further requested to explain as to why she did not inform Ms Clerk that she did a short course in computer studies. Her explanation was that she did not see it as being relevant at the time. She was referred to various discrepancies and inconsistencies regarding the school reports of the minor child. She conceded that there were inconsistencies, however she stood by her evidence that the minor child only repeated grade 2.

[18] The plaintiff closed her case after leading the evidence of the above witnesses.

Summary of the evidence by Ms Clerk – Educational Psychologist

[19] Ms Clerk assessed the minor child on 24 October 2022. At the time, the minor child was in grade 8. She prepared a report dated 4 November 2022 and signed joint minutes dated 19 January 2023. She testified that after the assessment, she concluded that the minor child was a diploma candidate after considering factors such as the family educational history, best performance assessment and information provided to her. She also testified that the assessment results revealed

that the minor child's global cognitive potential IQ lies within the severely delayed range. His verbal scale falls within the delayed range indicating that his verbal skills, such as verbal fluency, ability to understand and use of verbal reasoning and verbal knowledge is significantly below that of his peers. Neuropsychological and neurobehavioral difficulties will also impact negatively on his ability to learn and negatively impact on his ability to achieve his full residual potential.

[20] She further testified that the minor child has been greatly affected by the accident. Pre-accident, he could have obtained a grade 12 level of education with the possibility of progressing to further his studies to a diploma level of education which is no longer possible.

[21] Under cross-examination, it was put to her that she did not provide reasons for her findings in her report and that she was instructed to assess the minor child for the purpose of advancing the defendant's case. She conceded that the minor child may have enrolled for degree training. However, in her view and based on scholastic history, the minor child is a diploma candidate. She also indicated that the family history was also one of the factors that influenced her to come to her findings.

[22] The defendant closed its case without calling further witnesses.

Loss of earnings

[23] This issue has been narrowed to the extent that the Court is requested to determine whether the minor child would have obtained a diploma or a degree after completing matric had the accident not occurred. There is no dispute on the post-morbid future income.

[24] The parties agreed that an updated actuarial report dated 3 April 2023 was to be used by the Court when making a determination for loss of earnings. The report has the following three scenarios:

- (a) scenario 1- the minor child would have completed a diploma qualification;
- (b) scenario 2- the minor child would have completed a degree qualification; and
- (c) scenario 3 - an average of scenarios 1 and 2.

[25] The parties have accepted the correctness of the mathematical calculations of the aforesaid report.

Submission by the parties

[26] The plaintiff's counsel argued as follows on this issue:

- (a) The previous experts of the defendant agreed in the joint minutes that the degree scenario was appropriate. The defendant instructed new experts who concluded that the diploma was an appropriate scenario.
- (b) The minor child's maths marks for grade 3 were described by both Educational Psychologists as in the superior category. The minor child obtained the aforesaid results prior to the accident.
- (c) The credibility of the evidence of the plaintiff's Educational Psychologist was not damaged during cross-examination.
- (d) The Educational Psychologist for the defendant, in her report, does not give reasons as to why the diploma rather than the degree scenario was the expected outcome. It is contended that Ms Clerk was biased.
- (e) The Court must consider that there are increasing opportunities for children of the injured minor's demographic by the increase of the number of Universities and financial support.
- (f) The issue of obtaining a diploma rather than a degree should be handled by way of appropriate contingency deductions.
- (g) Although the plaintiff's Industrial Psychologist, Ms Naidoo was in agreement with the splitting of the difference between a diploma and degree, this must be ignored as it was for settlement purpose. The trial has run and the suggestion falls away.

[27] The defendant's counsel argued as follows on the issue:

- (a) There are no early school records of the minor child before Court and there is no reasonable explanation advanced by the plaintiff for the reason thereof.
- (b) The Educational Psychologist of the plaintiff insists that the degree scenario is a most possible one whilst the Educational Psychologist of the defendant insists on the diploma scenario.
- (c) Ms Gumede has not taken into account the scholastic and educational background of the minor child's parents and/or family members but has based

her findings solely on the child's performance undertaken by her after the accident.

- (d) Neither expert requested the minor child's school reports from his previous school. The term 3 report cannot be said to be the best evidence without reports for the other terms.
- (e) The report of Ms Clerk should be accepted as her qualifications are not in dispute and she had practical experience extensively as a teacher and a school guidance counsellor. She has also been working with remedial intervention and was employed by the Department of Education. She also practises both as Remedial and Industrial Psychologist.

[28] According to Ms Gumede's report, she did not peruse school reports of the minor child. However, it appears that she was given the information regarding the scholastic history of the minor child by his mother. She concluded her report without having had sight of the pre-and post-accident school reports of the minor child. In my view, the scholastic reports are of most importance to consider when assessing academic potential of the minor child.

[29] Ms Clerk did peruse at least five school reports according to her report. There is only one pre-accident report for term 3. I agree with the defendant's counsel submissions that the evidence of the term 3 report only is inconclusive and cannot be relied on for the minor child's scholastic performance pre-accident.

[30] Based on the evidence presented before me, I am unable to conclude with absolute certainty that the minor child would have obtained a degree or a diploma qualification had the accident not occurred. In my view, a fair and reasonable scenario would be an average of both scenarios under the circumstances.

Contingencies

[31] The plaintiff's counsel argued that a 25% contingency should be applied whilst, the defendant's counsel argued that a 35% contingency should be applied.

[32] I am mindful of the fact that contingency deductions are within the discretion of the Court and depends upon the judge's impression of the case. The contingency

deductions allow for the possibility that the plaintiff may have less than a “normal” expectation of life and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions.³

[33] In *Goodall v President Insurance Co Ltd*⁴ it was held that a contingency deduction of half a percentage per working year, commonly referred to as “a sliding scale” is generally acceptable as the norm.

[34] In the present case, the minor child was nine years and eleven months old at the time of the accident. The Industrial Psychologists are in agreement that had he not been injured in the motor vehicle accident, he would have completed his grade 12 level of education and would have progressed to study at a diploma or degree level. They are also in agreement that after completing his tertiary education, he could have commenced employment at the age of 25 years, essentially giving him approximately 40 years of working life before retiring at the age of 65 years.

[35] Considering all the above-mentioned factors, I am of the view that it would be appropriate to deduct a 20% contingency on the pre-morbid future income.

[36] With regards to the post-morbid future income, the Industrial Psychologists are also in agreement that he has no residual earning capacity. Therefore, no contingency deduction is applicable.

[37] In the circumstances, the total loss is represented by the average between the two scenarios of diploma and degree. The award is R5 260 521.60 after a 20% deduction.

General damages

[38] In determining general damages, the Court is called upon to exercise a broad discretion to award what it considers to be fair and adequate compensation having

³ See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114-115; *Southern Insurance Association v Bailey NO* 1984 (1) SA 98 (A) at 99E-F.

⁴ *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W) at 392G-393G.

regard to a broad spectrum of facts and circumstances connected to the plaintiff. In *Sandler v Wholesale Coal Supplies Ltd*,⁵ Watermeyer JA stated as follows:

‘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 upon the judge’s view of what is fair in all the circumstances of the case.’

[39] The legal position remains unchanged. There is no hard and fast rule of general application requiring a Court to consider past awards. In awarding general damages, the Court must be guided by the “modern approach” as adopted in the case of *Road Accident Fund v Marunga*.⁶

[40] In the present case, it is common cause that the injured minor child was nine years and 11 months at the time of the accident. He suffered a severe diffuse brain injury and other injuries as recorded in Exhibit “F”. Amongst others he suffers from epilepsy for life and remain on anti-epileptic treatment for life.

[41] Counsel for the defendant has referred me to a number of decisions including: *Bikawuli v Road Accident Fund*;⁷ *Sterris v Road Accident Fund*;⁸ *Makupula v Road Accident Fund*.⁹ In all these cases, the injuries sustained were minor permanent brain injuries and none of them resulted in lifelong epilepsy.

[42] Counsel for the defendant further submitted that the minor child suffered a mild concussive head injury. This in contrary to Dr Du Trevou’s diagnosis who recorded that the minor child sustained severe traumatic brain injury.

[43] Relying on the above submissions and cases, defendant’s counsel argued that the fair award for general damages should be R550 000.

[44] Plaintiff’s counsel contended that a fair award for general damages should be R1,5 million and relied on the following authorities: *Cordeira v Road Accident Fund*;¹⁰

⁵ *Sandler v Wholesale Coal Supplies Ltd* 1941 AD 194 at 199.

⁶ *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) para 34.

⁷ *Bikawuli v Road Accident Fund* 2010 (6B4) QOD 17 (ECB).

⁸ *Sterris v Road Accident Fund* 2010 (6B4) QOD 26 (WCC).

⁹ *Makupula v Road Accident Fund* 2011 (6B4) QOD 48 (ECM).

¹⁰ *Cordeira v Road Accident Fund* 2011 (6A4) QOD 45 (GNP).

Torres v Road Accident Fund;¹¹ *Smit v Road Accident Fund*¹² amongst others. Whilst there are certain similarities between some of these cases and the present case, in particular *Smit v Road Accident Fund*,¹³ the facts and the considerations raised therein, however differ from the present case. In any event, they merely serve as a guide to making an award that is fair, just and reasonable.

[45] In considering what would constitute a fair and adequate award for general damages in this matter, I have had regard to the following cases: *Smit v Road Accident Fund*;¹⁴ *Olivier v Road Accident Fund*;¹⁵ *Pietersen (obo J St I) v Road Accident Fund*.¹⁶

[46] In *Pietersen (obo J St I) v Road Accident Fund*,¹⁷ the injured child was four years and seven months old at the time of the accident. He sustained a significant brain injury resulting in daily seizures and cognitive deficits, an inability to pass grade 12 in the mainstream academic environment and a vulnerable candidate in the open labour market. Experts agreed that he ought to be placed in a school for learners with special educational needs. His future earning capacity was compromised. He also suffered injuries to both feet, his buttocks, right shoulder, right side of his face, scalp and occiput and his right forearm. Repeated debridement and split skin graft procedures were necessary, but severe disfiguring scars remained unsightly. The court awarded R750 000 for general damages. The current award is R1 382 000 as per the *Quantum Yearbook*.¹⁸

[47] In the present case, the injuries and sequelae of the minor child have been set out above and agreed to by the parties. They are undoubtedly serious. I am of the view that an award of R1,2 million would be fair and just.

¹¹ *Torres v Road Accident Fund* 2010 (6A4) QOD 1 (GSJ).

¹² *Smit v Road Accident Fund* 2013 (6A4) QOD 188 (GNP).

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Olivier v Road Accident Fund* 2013 (6A4) QOD 216 (GNP).

¹⁶ *Pietersen (obo J St I) v Road Accident Fund* 2012 (6A4) QOD 88 (GSJ).

¹⁷ *Ibid.*

¹⁸ Robert J Koch *The Quantum Yearbook* (2023).

[48] The plaintiff is accordingly entitled to damages in the sum of R6 460 521.60 computed as follows:

- (a) R1,2 million for general damages; and
- (b) R5 260 521.60 for loss of earnings.

Order

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

1. The defendant is directed to pay R6 460 521.60 to the plaintiff for general damages and loss of earnings.
2. Interest is payable on the aforesaid sum at the prescribed rate of interest upon the expiry of a period of fourteen (14) days from the date of this judgment.
3. The defendant is directed to furnish to the plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for 100% of the costs of all future accommodation of the minor child in a hospital or nursing home and all medical treatment or the rendering of a service, or the supplying of goods to the minor child arising out of the injuries he sustained in the motor vehicle collision that occurred on 7 April 2018, after such costs have been incurred and upon proof thereof.
4. The defendant is directed to pay the plaintiff's taxed or agreed party and party costs on the High Court scale to date. Such costs to include but not be limited to:
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 - 4.2 the fees and expenses reasonably incurred by the under-mentioned witnesses for, inter alia the preparation of their reports and supplementary reports, deposing to affidavits, joint minutes and RAF4 forms as well as the experts' reasonable qualifying fees, their reasonable reservation fees, and their reasonable fees for attending upon any necessary consultations

with the plaintiffs' counsel and attorney to testify at the trial (with the quantum of their fees to be determined by the Taxing Master), namely:

4.2.1 Dr Du Trevou - Neurosurgeon

4.2.2 Professor Lazarus - Neuropsychologist

4.2.3 Andiswa Gowa - Occupational Therapist

4.2.4 Zethu Gumede - Educational Psychologist

4.2.5 Ms K Naidoo - Industrial Psychologist

4.2.6 Arch Actuarial Consulting- Actuary (reports only)

5. The defendant is directed to make payment referred to in paragraphs 1 and 4 above directly to the Trust account of the plaintiff's attorneys whose details are as follows:

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Branch: 1[...] Nedbank SA

Type of account: Cheque account

Account number: 1[...]

Hadebe AJ

CASE INFORMATION

DATE OF HEARING : 16 & 17 MAY & 30 JUNE 2023

JUDGMENT DELIVERED ON : 11 SEPTEMBER 2023

COUNSEL FOR THE PLAINTIFF : ADV PILLAY (SC)

INSTRUCTED BY : MOSES NAIDOO & ASSOCIATES

COUNSEL FOR THE DEFENDANT : ADV N. GOVENDER

INSTRUCTED BY : OFFICE OF THE STATE ATTORNEY- KZN