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IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – BISHO)

CASE NO.: 718/2019
Matter heard on: 25th October 2022
Judgement delivered on: 11 November 2022

In the matter between: -

S[....]1 J[....] **Plaintiff**
obo S[....]2 J[....]

and

ROAD ACCIDENT FUND **Defendant**

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO

REVISED.

JUDGMENT

SMITH J:

[1] The plaintiff's minor child sustained injuries in a motor vehicle collision which occurred on 7 May 2016 at Qumza Highway, Mdantsane. The plaintiff issued summons against the Road Accident Fund (RAF) on behalf of the child, and the

parties subsequently agreed to an order in terms of which the RAF must pay to the plaintiff 100% of whatever damages she may prove arising from the accident.

[2] The parties also agreed on general damages in the sum of R500 000, and the defendant has tendered an undertaking as contemplated in s 17 (4) (a) of the Road Accident Fund Act, 56 of 1996, in respect of the minor child's future hospital and medical expenses.

[3] The only issue that remains for determination is the future loss of income and the contingency to be applied to it. On 27 October 2022, the parties filed a further pre-trial minute recording their agreement that the court will only be required to determine the percentage of general contingency that should be applied to Dr Koch's quantification of the future loss of income, which is the sum of R4 336 169.

[4] Mr. *Clark*, who appeared for the plaintiff, relying on *Bailey v Southern Insurance* 1984 (1) SA 98 (See also; Koch Quantum Yearbook (2022), at page 121), submitted that there is no reason why the general contingency of 25% should not be applied to the minor child's claim for future loss of earning. Mr. Gona, who appeared for the RAF, on the other hand, has submitted that a contingency of 35 to 45%, pre-morbidly and 15% post-morbidly, would be fair and reasonable.

[5] The reports and opinions of the plaintiff's experts are undisputed. The orthopaedic surgeon, Dr Olivier, determined that the child sustained a head injury in the accident. A scan demonstrated the presence of a diffuse axonal injury. Although he was of the opinion that from an orthopaedic point of view the accident did not result in long term sequelae, the diffuse axonal injury did result in long-term sequelae, namely compromised attention and ability to concentrate.

[6] The plastic surgeon, Dr Solomons, found that the scar on the child's scalp is easily visible and cosmetically disfiguring. He was of the opinion that when applying for a job, prospective employers may assume that he had been in a fight.

[7] The clinical psychologists, Ms Hill, has confirmed that the brain injury resulted in secondary attention deficit and that the child will probably not pass Grade 12.

[8] The industrial psychologists, Mr Pretorius, has presented two pre-morbid scenarios with an equal probability. In the first scenario, the minor child would have obtained a Grade 12 and in NQF5 qualification and progressed from Paterson B2 to C2 over the course of his career. In the second scenario, the child would have obtained a Grade 12 and an NQF5 qualification and progressed from Paterson B3 to C4 over the course of his career. He was of the opinion that post-morbidly, the minor child will not pass Grade 12 and will be employed in the informal sector at the unskilled level.

[9] The actuary, Dr Koch, has determined the child's claim for future loss of income in the above mentioned sum, but has left the determination of contingencies to the court.

[10] It is trite that the percentage of a contingency discount cannot be assessed on a calculated basis. It is largely arbitrary and will always depend upon the judge's impression of the case. In *De Jongh v Gunther and Another* 1975 (4) SA 78 (W), at 85F, Nicholas J, as he then was, cautioned that, '[I]n the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art of or science of foretelling the future, so confidently practiced by ancient prophets or in soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office'. It should also be borne in mind that not all contingencies or vicissitudes of life are negative or harmful.

[11] It has become customary for the court to apply the so-called 'sliding scale' to contingencies, which entails half a percent for every year to retirement, namely 25% for a child, 20% for a youth and 10% in middle age. (*Goodall v President Insurance Company Limited* 1978 (1) SA 389 (W)). The minor child in this case was born on 19 May 2005.

[12] Even though it would be wrong to apply the above-mentioned sliding scale as a matter of course without any regard to the circumstances of the case under consideration, it does provide a rational basis on which the court can base its

assessment of an appropriate contingency. That standard has developed over a number of years and is based on solid reasoning and experience.

[13] Mr Gona has not been able to advance any reason as to why the court should deviate from that contingency, neither could I find any grounds for applying a higher contingency .

[14] I am accordingly of the view that a 25% contingency should be applied to the minor child's claim for future loss as determined by Dr Koch namely, R3 252 126.75 (R4 336 169 x 75%).

[15] In the result the following order issues:

15.1. The defendant shall pay the plaintiff the sum of R3 252 126.75 in respect of the minor child's loss of income within 180 calendar days of date of this order;

15.2. The defendant shall pay the plaintiff the sum of R500 000 in respect of the minor child's general damages within 180 calendar days of date of this order;

15.3. The defendant shall pay the plaintiff interest on the above sums at the prevailing prescribed legal rate from 14 calendar days of date of this order to date of final payment;

15.4. The defendant shall furnish the plaintiff with an undertaking as contemplated in section 17 (4) (a) of the Road Accident Fund Act 56 of 1996 for 100% of the costs of the future accommodation of the minor child in a hospital or nursing home or treatment of or rendering of a service to the minor child or supplying of goods to the minor child arising out of the injuries sustained by the minor child in the motor vehicle accident of 7 May 2016 after such costs have been incurred and on proof thereof;

15.5. The defendant shall pay the plaintiff's costs of suit on the High Court tariff, which costs shall include:

15.1.1. The qualifying expenses, if any, of orthopaedic surgeon Dr P A Olivier, plastic surgeon Dr D Solomons, clinical psychologist Ms P Hill, industrial psychologist Mr Pretorius and actuary Dr R J Koch;

15.1.2. Counsel's fees including but not limited to an advice on evidence, preparation for trial consultations (one day), preparation for case management conference, drafting of confirmatory affidavits (one hour per affidavit), memorandum to the defendant re settlement, drafting of answering affidavit, drafting of heads of argument, and day fees;

15.1.3. Mr R Berg's sketch plan and photographs.

15.2. The defendant shall pay the plaintiff interest on the costs of suit at the prevailing prescribed legal rate from 14 calendar days of date of *allocatur* to date of final payment.

15.3. The defendant shall make payment of the above sums into the following trust bank account of the plaintiff's attorneys of record:

NAME OF ACCOUNT	:	I C CLARK INC.
BANK	:	ABSA BANK
ACCOUNT NO.	:	[....]
BRANCH CODE	:	632 005
REF	:	J05765

JE SMITH

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff	:	Mr. Clark
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