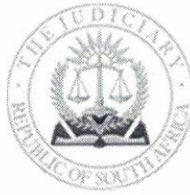


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 53151/2016

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
.....	12/4/2019
T.E. MAFAFO	DATE

In the matter between:

MAKAE THABO obo T

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MAFAFO, AJ

INTRODUCTION.

- [1] The Plaintiff, in his representative capacity as the biological father of (*"the minor child"*), T. born on 20th February 2002, instituted an action against the Defendant, a juristic person in terms of the provisions of Act 56 of 1996 as amended (*"the RAF Act"*) pursuant to a collision between the minor, who was a pedestrian and the driver of the motor vehicle (*"the insured driver"*) on the 03 November 2009 as result of which the minor sustained injuries.
- [2] The minor was 7 years old at the time of the accident and currently 17 years old.
- [3] In the particulars of claim, it was alleged that the said collision was caused by the negligent driving of the insured driver which resulted in the minor sustaining severe head injury which is expected to be of a permanent nature.
- [4] At the commencement of this trial, the parties had settled merit at 100% in favour of the Plaintiff and it was agreed by the parties that the Defendant would furnish the Plaintiff with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act to cater for future medical and related expenses.
- [5] The issue of and loss of earning capacity was also resolved between the parties.
- [6] The parties agreed to create a trust wherein a trust deed shall be used as a vehicle for the protection of the minor child's funds.
- [7] It is common cause that the minor child had been staying with the grandmother since his mother died in 2012.
- [8] Both Counsel for the parties confirmed that the aforesaid settlement agreement shall be incorporated and merged into the Court's judgment.

- [9] It was further agreed by the parties that neither party shall lead oral evidence, instead the parties shall rely on the opinions of various medico-legal experts and relevant case law.

THE FACTS.

- [10] The Plaintiff's minor child who was 7 year old boy when he was run over by a speeding motor vehicle on the 3rd November 2009 while he was crossing the street. The grandmother reported that he was taken by ambulance to hospital in Sterkspruit. He was later transferred to Pelonomi hospital. The minor child was hospitalized for 27 days, 5 days in ICU due to severe head injuries.
- [11] Pre-accident, it was reported to the Industrial Psychologist that the minor child enjoyed good health and he enjoyed playing soccer.
- [12] Dr. Smith reported on the hospital records that the minor was semi-conscious and very restless. Both eyes were closed and the injured eye was dressed.
- [13] At the time of his discharge from hospital the physiotherapists reported that his Glasgow Coma scale was 15/15 but he was still not capable of talking.

COMMON CAUSE FACTS.

- [14] In his opening address, Counsel for the Defendant placed the following on record as common cause:-

- 14.1 The injuries sustained and the sequelae thereof;
- 14.2 The contents of the expert's reports;
- 14.3 The joint minutes of overlapping experts and
- 14.4 Further that the minor child is indeed entitled to general damages.

ISSUE FOR DETERMINATION.

- [15] Consequent to the aforesaid settlement agreement, the only unresolved issue between the parties and which I am required to determine is the determination of a fair and reasonable amount for compensation in respect of pain and suffering, discomfort, disability, disfigurement and loss of amenities of life which the Plaintiff is entitled to.

INJURIES SUSTAINED AND THE SEQUELAE THEREOF.

- [16] The minutes of the overlapping neurosurgeons, Dr L.L Lankerster and Dr Muballe, read as follows:

The minor child sustained a severe head injury which included:

- 16.1. "Traumatic brain injury with initial Glasgow Coma of 4/15;
- 16.2. C.T scan demonstrates cerebral oedema, subarachnoid haemorrhage, multiple contusions of left occipital and temporal lobes;
- 16.3. Multiple skull fracture which include:
 - 16.3.1. Fracture of left frontal bone and superior –orbital rim;
 - 16.3.2. Fracture of left parietal bone;
 - 16.3.3. Fracture of left occipital bone;
 - 16.3.4. Base of skull fracture, including mastoid."

- [17] The Neurosurgeons further agreed and stated on their joint minutes signed and dated 29 March 2019 that:

“Since being injured he has experienced difficulty with schooling and deterioration in his cognitive functions, has already been confirmed by a Clinical Psychologist.

These cognitive deficits were confirmed in 2013 and they are therefore, likely to be of a **permanent nature**, with the result that this prospects with regard to the education level he achieves and his subsequent choice of career, have been compromised.”

- [18] According to the Ophthalmologist, the minor child sustained the following injuries on his eyes:

18.1 ‘Episodic swelling of the left eyelids with longstanding aches, as a result of motor vehicle accident’;

18.2 Facial asymmetry with elevated facial scars on the left side of the face.

- [19] In addition to the head injury, Dr. Lankerster reported on page 17 of his report that “He also sustained contusion to both lungs and this required treatment with daily physiotherapy.”

- [20] The Educational Psychologist, Ms. Human reported on page 12 of her report that during his intellectual functioning assessment, he found that “ there was a disparity between verbal and non -verbal scales which suggests that there is left hemisphere damage to the brain which is consistent with poor academic performance, learning disabilities and poor reading”

[21] The Educational Psychologist went on to report that the minor child's performance suggests that he is intellectually impaired.

[22] Educational Psychologist further recommended a special school placement for the minor child while awaiting special school placement, the minor should receive remedial support.

SUBMISSIONS.

[23] Counsel for the defendant submitted that an amount of between R 550 000 to R 600 000.00 would be fair and just but If the Court wants to be generous, and amount of between R 850 000- R 900 000.00 would be reasonable. Reference was made to the following decided cases:

23.1. **Marsden v National Employers General Insurance Company 1991(4) QOD 56 (W) 56 (W)**, Where an adult female was awarded an amount of R 586 000.00 in today's terms. She sustained severe head injury with damage to left frontal lobe.

23.2. **Ford v New Zealand Insurance Co Ltd 1954 (1A) QAD 150 (E)**, Plaintiff sustained a depressed fracture of the skull over right ear and cerebral contusion, causing serious injury to the brain Awarded R 610 000.00 in today's terms.

23.3. **Bopape v President Insurance Company Ltd 1990(4) QOD 43 (W)**, The Plaintiff was awarded R 489 000.00 in today's terms. He sustained severe brain injury resulting in severe neurological deficits.

23.4. **Pretorius v Mutual and Federal Insurance Company Ltd B4-1**

Court awarded R 242 000.00 for head injury consisting of severe cerebral contusion resulting in significant brain damage.

24.5. **Sibanyoni v Mutual and Federal Insurance Company Ltd 1995 (4B2) QOD 12 (SCA)**, Court awarded R 65 000.00 for head injury in today's terms.

[25] Counsel for Plaintiff submitted that an amount of R 1 600 000.00 was fair and just and referred me to the following case law:

25.1. **Penane v Road Accident Fund Case No: 06/7702 (unreported)**, Counsel for Plaintiff submitted that the correct approach is to view the injuries and sequelae separately as held by the court in Penane v Road Accident Fund referred to above. Head injury was awarded R 450 000.00;

25.2. **Petersen (obo) J ST) v RAF 2012 (6) QOD 88**, Court awarded a 5 year old who sustained moderate brain injury with permanent significant neuropsychological deficits with degloving injuries and scarring R 750 000.00 current value, R 1 146 000.00;

25.3. **Dlamini v RAF 2012 (6) QOD 68 (GSJ)**, Severe brain injury of a 37 year old with fractured mandibles. Court awarded R 850 000.00 current value being R 1 280.000.00;

25.4. **Zarrabi v RAF 2006 5 QOD C B4-231 (T)**, Court awarded R 600 000.00 current value is R 1 714 000.00 for severe brain injury with severe cognitive and psychological sequelae an orthopaedic injuries; and

25.5. **Minnie v Nhlapo v RAF August 2010 QOD (GSJ)**, Trauma of the head resulting in various cognitive deficits R 800 000.00 current value R 1 284 000.00

[26] I had due regard to all cases referred to above and I found the Dlamini and Zarrabi case referred to by Counsel for the Plaintiff to be useful but only to give guidance.

[27] I find the injuries sustained by the minor in casu, together with the sequelae thereof profound compared to case law relied upon by Counsel for the Defendant.

LEGAL PRINCIPLES.

[28] It is trite law that in assessing general damages with reference to awards made in previous cases, each case must be adjudicated upon on its own merits.

[29] Nugent J held in **Minister of Safety and Security 2006(6) 320 (SCA)** that:

“The assessment of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no other value than that.”

[30] In **Sandler v Wholesale Coal Supplies Ltd 1941 AD at paragraph 199**

It is stated that:

“In considering that question it must be recognized that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any

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

[31] **In Safika v Minister of Police (330/2/2012)(2018) ZAECMHC 37 (31/7/18)**

Toni A.J stated:

"In assessing damages, reference to prior awards is useful and to assist the Court in determining what would be fair and reasonable compensation in each case, the Court considers the facts, the circumstances, of the case, the injuries sustained by the Plaintiff, including their nature, permanence, severity, and impact on the Plaintiff's life. However each case must be determined on its own merits."

[32] In **Pitt v Economic Insurance Co Ltd Holmes J 1957 (3)SA 284 (D)at 287E-F** stated that:

"the Court must take care to see that its award is fair, to the Plaintiff but it must not pour largesse from the horn of plenty at the defendant's expense"

[33] The same view was expressed in **De Jongh v Du Pisane N.O 2005 (5) SA 547** at paragraph 60.

[34] In **Hulley v Cox** Innes J held:

"We cannot allow our sympathy for the Claimants in this very distressing case to influence our judgment."

[35] It is equally trite that no two cases are always similar; it is difficult to find a comparable matter that is on all fours in respect of the facts.

GENERAL DAMAGES.

[36] I now turn to general damages. General damages account for pain and suffering, disability, disfigurement and loss of amenities of life.

[37] In casu, there is no doubt that the minor child suffered fatal injuries as a result of the accident and he will continue to suffer pain in future.

[38] The sequelae thereof are well documented in the joint minutes of the Neurosurgeons and in the medico-legal reports of various experts.

[39] The minor was hospitalized for 27 days, 5 days in intensive care unit. The pain and suffering, discomfort, disfigurement and loss of amenities of life suffered by the minor child is common cause between the parties.

[40] It is reported by the Physiotherapist that when the minor was discharged his Glasgow Coma Scale was 15/15 but he was still not capable of talking.

[41] It was unequivocally stated by the Neurosurgeons and various medico-legal experts that the minor child sustained traumatic brain injury plus multiple skull fractures and an injury to the eye further that the injuries sustained are of a **permanent nature.**

[42] I also took into consideration that the minor child suffered the following neuropsychological deficits:

- 42.1. Poor abstract reasoning;
- 42.2. Poor concentration;
- 42.3. Inattentiveness;
- 42.4. Poor self- monitoring;
- 42.5. Personality alterations;
- 42.6. Impulsiveness and
- 42.7. Slowed cognitive processing amongst others.

[43] Neurobehavioral deficits:

- 43.1. Bizarre behavior;
- 43.2. Short temperedness;
- 43.3. Moodiness;
- 43.4. Forgetfulness;
- 43.5. Irritability and
- 43.6. Poor social skills.

[44] Neurocognitive deficits:

- 44.1. Intellectual impairment
- 44.2. Deterioration in cognitive functions.

[45] Dr Lankerster, the Neurosurgeon stated on page 16 of his report date 17/01/2014 that:

“The head injury he sustained was a severe head injury and as it is now, 5 years after the injury, it is unlikely that he will experience any significant improvement in his ability to cope at school.”

[46] It cannot be disputed that the minor suffered endured a great deal of pain and suffering. He suffers from a regular pain from headaches and dizzy spells as recorded by the Clinical Psychologist.

[47] At the time the minor child was hospitalized, he was temporarily disabled; his movement and enjoyment of amenities of life were curtailed.

[48] The Clinical Psychologist has reported on page 22 of her report that:

"From a psycho-social perspective, indications are that T has been compromised as he can no longer play physical sport." The accident has resulted in permanent emotional and social sequelae in terms of T's functioning"

ASSESSMENT OF GENERAL DAMAGES.

[49] In assessing general damages I considered the following:

- 49.1. The age of the minor child pre and post the accident;
- 49.2. The circumstances of the case;
- 49.3. Injuries sustained including permanent nature thereof;
- 49.4. The sequelae thereof including the emotional, social and physical sequelae and
- 49.5. Previous comparable awards.

[50] In addition to case law referred to by the Counsel for the parties, I took cognizance the following cases:

- 50.1. Megalane N.O v Road Accident Fund (2007 3 ALL SA 531 (W), wherein the court awarded an amount of R 1000.00 for general damages in 2015 in respect of an 11 year old boy . The court held that the loss of amenities was profound.
- 50.2. Dlamini v Road Accident Fund ZAGPPHC 646 (2015)
- 50.3. Matthys v Road Accident Fund 2013 (6a4) QOD273 (GNP)
- 50.4. Lebesa Mamohlomi obo T ZAGPPHC 1170 (10 August 2017)
- 50.5. M v Road Accident Fund ZAGPJHC 438 (18 June 2018)
- 50.6. Road Accident Fund v Marunga (144/2002) [2003] ZASCA 19; [2003] 2 All SA 148 (SCA) (26 March 2003)

[51] Having considered all that I mentioned herein, it is my considered view that a fair and just amount for compensation in respect of general damages is R 1 7000.00 (One million seven hundred thousand rand)

ORDER.

[52] I now make the following order:

1. The defendant is held liable for 100% for damages suffered by the minor child as a consequence of the motor vehicle collision;
2. The defendant is ordered to furnish the Plaintiff with an undertaking as contemplated by s17(4)(a) of The Road Accident Fund;

3. In addition, the undertaking shall include the costs of the creation of the trust referred to in paragraph 8.1 below, the costs of annually obtaining a security of bond as required and the costs of a trustee in respect of the administration of a trust, limited to the costs recoverable by a Curator bonis in accordance with the statutory tariffs published from time to time;
4. The Plaintiff's Attorney of record shall retain the aforesaid amount in terms of section 86 Legal Practice Act 28 of 2014 for the benefit of the Plaintiff's minor child, pending the creation of the trust and the issuing of the letter of authority. From the said amount, an amount of R 100 000.00 (one hundred thousand rand) shall be paid to the Plaintiff, not to the trust;
5. The defendant shall pay R 1 7000.00 as general damages for pain and suffering, disfigurement, disability, discomfort and loss of amenities of life;
6. The defendant shall pay the Plaintiff a sum of in respect of I R 1 285 902.00 (one million two hundred and eighty five thousand nine hundred and two rand) in respect of loss of earnings capacity;
7. The total amount payable to the plaintiff by the defendant is R 2 985 902.00 (Two million nine hundred and eighty five thousand nine hundred and two rand);
8. The Plaintiff's Attorney of record shall pay the amount set out in 7 above, less the amount referred to in paragraph 4 above, together with any accrued interest, over to the trustee of a trust. In respect of which trust the following shall apply;

- 8.1 Trust shall be created in accordance with the trust deed.
- 8.2 The Trustee shall:
- 8.2.1 be obliged to render security to the satisfaction of the Master of the High Court;
 - 8.2.2 be entitled to administer on behalf of the patient, the undertaking referred to in paragraph 2 above and to recover the costs covered by such undertaking on behalf of the trust for the benefit of the Plaintiff; and
 - 8.2.3 At all times administer the trust to the sole benefit of the patient.
9. The Deed shall not be capable of being amended without the leave of court;
10. The trust shall terminate upon T M attaining the age of 21 and the remaining net shall be distributed to him upon such date;
11. The Defendant shall pay the High courts of the Plaintiff, including:-
- 11.1 The costs of attendance upon the obtaining of payment of the full capital amount referred to in paragraph 7 above and;
 - 11.2 The preparation, qualifying and reservation fees of experts, including costs of obtaining experts reports in respect of the Plaintiff and the costs consequent upon the preparation of joint minutes; and

- 11.3 The Plaintiff's travel and accommodation costs to attend the Defendant's and own experts;
- 11.4 Costs of all Plaintiff's experts report, addendum reports and joint minutes and;
- 11.5 The costs of Junior- Senior Counsel's appearance;
- 11.6 Any and all previously reserved costs, which are declared costs in the cause and
- 11.7 The Plaintiff and subpoenaed witnesses are declared necessary witnesses.
- 12. The Plaintiff shall in the event that costs are not agreed, serve the notice of taxation on the Defendant's Attorney of record;
- 13. The Plaintiff shall allow the Defendant 14 days to make payment of the taxed costs;
- 14. Payment referred to in paragraph 7 above, shall be made directly into the Plaintiff's Attorney's trust account within 14 days and
- 15. The draft order marked "X" is hereby made an Order of the Court.



T.E MAFAFO (MS)
ACTING JUDGE OF THE HIGH COURT, PRETORIA

Representations:-

Counsel for the Plaintiff : Adv. Leballo

Instructed by : **Badi Loliwe Attorneys**

Counsel for the Defendant : Adv. T.M Malatjie

Instructed by : **Maponya Incorporated**

Hearing Date : 05 April 2019

Judgment Date : 12 April 2019

D/10

X

12/4/2019

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

BEFORE THE HONOURABLE MADAM JUSTICE MAFAFO, AJ
12th APRIL 2019

CASE NO. 53151/16

In the matter between:

MAKAE THABO obo T MAKAE

PLAINTIFF

-and-

ROAD ACCIDENT FUND

DEFENDANT

DRAFT ORDER

HAVING HEARD COUNSEL FOR THE PARTIES, the following order is made:

1. Defendant shall pay Plaintiff the amount of **R 2 985 902.00**
(TWO MILLION NINE HUNDRED & EIGHTY FIVE THOUSAND NINE HUNDRED AND TWO RANDS)

which amount shall be paid on or before 14 days from date of this order to the Plaintiff's **BADI LOLIWE ATTORNEYS**, in settlement of the Plaintiff's claim, by direct transfer into their trust account, the details of which are as follows:

BADI LOLIWE ATTORNEYS

Bank:	FIRST NATIONAL BANK
Branch code:	250-130
Account no:	62351234366
TYPE:	TRUST CHEQUE

2. The Defendant is not liable for interest on the aforesaid payment if timeously made; ; Plaintiff will be entitled to recover 10,25%
3. The net proceeds of the payment referred to in paragraph 1 above shall, after deduction of the Plaintiff's attorney's legal fees, be payable to a Trust in favour of **THASELLO MAKAE**, to be established within 6 (SIX) months of the date of this order, which Trust will:
 - 3.1 Be created on the basis of the provisions as more fully set out in the Draft Trust Deed attached hereto marked Annexure "**A**";
 - 3.2 Have as its main objective the control, management and administration of the capital amount on behalf and for the benefit of **THASELLO MAKAE**
 - 3.3 Have, as its Trustee, **MAHALIA MOLEFE** of Absa Trust Ltd, with powers and abilities as set out in the Draft Trust Deed and as furthermore confirmed in the letter by ABSA dated **12 APRIL 2019** and attached hereto marked annexure "**B**".
 - 3.4 Should the aforementioned Trust not be established within the aforementioned 6 (SIX) month period, the Plaintiff is directed to approach this Court within 1 (ONE) month thereafter in order to obtain further directives in respect of the manner in which the capital amount is to be utilized in favour of the injured;
 - 3.5 Until such time as the Trustee is able to take control of the capital sum and to deal with same in terms of the Trust Deed, the Plaintiff's attorneys are authorized and ordered to:

- 3.5.1 Invest the capital amount in an interest bearing account in terms of Section 86(4) of the Legal Practice Act, 2014 to the benefit of the minor, with a registered banking institution pending finalisation of the directives referred to in paragraph 3.4 above;
- 3.5.2 Make any reasonable payments to satisfy any of the needs of the injured that may arise in the interim and that may relate to the reasonable need for treatment, care, aids or equipment;
4. The Defendant shall furnish Plaintiff with an Undertaking in terms of section 17(4)(a) of the Road Accident Fund Act in respect of the following:
 - 4.1 For the costs of the future accommodation of **THASELLO MAKAE** in a hospital or nursing home or treatment of or rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision which occurred on **03rd NOVEMBER 2009**, after such costs have been incurred and upon proof thereof;
 - 4.2 For establishing and administering the Trust referred to in paragraph 3 above, up to the maximum prescribed in terms of the Trust Property Control Act 57 of 1988;
5. The Defendant shall pay Plaintiff's taxed or agreed costs on the High Court scale as between party and party, for the 4th March and 5th April 2019 which costs shall include, but not be limited to:
 - 5.1 The costs of obtaining the all the reports, including addendum reports and joint minutes, if any, of experts

- 5.2 The reasonable taxable reservation and/or preparation fees, if any, of the experts referred to in paragraph 5.1 above;
- 5.3 The costs incurred in transporting Plaintiff to and from the above mentioned medico legal appointments;
- 5.4 The costs of making bundles for trial;
- 5.5 Costs of Counsel for the 4th March and 5TH FEBRUARY 2019
- 6 In the event that the amount in respect of costs is not agreed upon, then:
 - 6.2 The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record, and;
 - 6.3 The Plaintiff shall allow the Defendant 14 (Fourteen) court days to make payment of the taxed costs.
- 7. There is no contingency fee agreement applicable

BY THE COURT

REGISTRAR

For the Plaintiff: Adv L.T Leballo: 0795886629
For the Defendant: Adv T Malatje : 0828411304