

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED

CASE NO: 50598/2016
22/5/2019

In the matter between:

ADV AJ DU TOIT obo S[....] N[....]

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KUBUSHI J

INTRODUCTION

[1] The plaintiff, Albertus Johannes Du Toit, an adult male advocate, acts herein in his representative capacity as the duly appointed *curator ad litem* to the claimant, S[....] N[....], a minor male born on 2 February 2007.

[2] The claimant, who was a pedestrian at the time, was seriously injured in a motor vehicle collision and the plaintiff is claiming compensation for damages for such injuries from the Road Accident Fund.

[3] The merits part of the claim was decided at 90% in favour of the plaintiff. What remains to be decided is *quantum*, that is, damages for: future medical and hospital related expenses, past medical and hospital expenses, general damages and future loss of earnings/earning capacity.

[4] The parties are to argue the matter on the basis of the joint minutes of the respective experts. The plaintiff, however, intends calling his industrial psychologist to give evidence in respect of loss of earnings.

[5] The joint minutes upon which argument will be based are those of the neurologists, educational psychologists, the industrial psychologists and the plaintiff's admitted actuarial report. The expert report of the plaintiff's orthopaedic surgeon, which is uncontested, also forms part of the record.

[6] The parties are agreed in respect of the past medical and hospital expenses in the amount of R312 583, 27 and the undertaking to be provided in respect of future medical and hospital expenses. It is only the general damages and damages for loss of earnings that will be argued. I deal hereunder with those damages in turn.

INJURIES

[7] The injuries sustained by the complainant are common cause. According to the report of the plaintiffs orthopaedic surgeon, the complainant suffered from polytrauma in that: he suffered a severe head injury; chest injury and the fracture of the tibia and fibular (these have healed and do not require further treatment). As a result of the injuries, the claimant lost various amenities of life (some have been regained) and he is disabled and functionally impaired by the head injury.

[8] As *per* the joint minutes of the neurologists the claimant suffered the following injuries: a severe closed head injury with permanent neurocognitive/linguistic compromise and personality change. As a result the injuries should be classified as serious with increased risk of epilepsy; main stream schooling will not be possible and the claimant is likely to arrive in adult life unemployable in the open labour market.

[9] The findings of the educational psychologists in their joint minute are that:

- 9.1 Post-accident the claimant is more suited for special schooling and will probably only progress, on a sympathetic level and appears to be incapable to pass on academic terms.
- 9.2 Pre-accident the claimant would have passed a grade 12 of education. According to the plaintiff's educational psychologist the highest level of education the claimant would have obtained is an NQF level 5 (certificate). Whilst the defendant's educational psychologist opined that it is possible that the claimant could have reached a NQF level 5 certificate but that it was not likely than the achievement of a Grade 12 as the highest level of education.

GENERAL DAMAGES

[10] The expert witnesses of both parties are agreed that the injuries sustained by the complainant are serious and warrant compensation for general damages.

[11] The submission by the plaintiffs counsel was that an amount of R2 000 000 was in the circumstances of this matter fair and reasonable as compensation for the plaintiff s general damages. The defendant's counsel on the other hand argued for an amount of R1 200 000 as sufficient compensation for general damages in this matter. The plaintiffs counsel ended conceding that an amount of between R1 000 000 and R1 200 000 would be adequate compensation in the circumstances.

[12] Both counsel referred me to a number of judgments with injuries almost similar to those of the plaintiff and where different amounts were awarded.

[13] The plaintiffs counsel referred me to the judgment in *Megalane NO v The Road Accident Fund*¹ wherein the court awarded general damages of R1 000 000, with a current value of R2 142 000, to an 11-year-old schoolboy at the time of the accident and 14 **years** old at the time of the trial. The boy had sustained a severe brain injury with diffuse and focal brain damage in the form of a subdural *haematoma* resulting in cognitive impairment characterised by poor verbal and visual memory; poor concentration and distractibility; impaired executive function

¹ 2006 (SA4) QOD 10 (W) Koch: 2019.

characterised by frontal lobe disinhibition causing inappropriate behaviour; speech difficulties characterised by dysarthria and word retrieval difficulties; bilateral hemiparesis with severe spasticity of all four limbs and left facial paralysis as well as *aphasia*. He was confined to a wheelchair with intelligence level that of a young child. Although limited, still has insight into his predicament. An above average scholar before the accident, who would probably have undergone tertiary education, was left with severe permanent physical and mental disabilities rendering him unemployable.

[14] The defendant's counsel referred me to the judgment in *Vakota v The Road Accident Fund*² wherein the claimant with scarring and other injuries was rendered unemployable and was awarded an amount of R600 000 which presently translate to R746 640. The other judgment was in *Mohale v The Road Accident Fund* wherein in 2014 the claimant had suffered swelling to the brain similar to that of the claimant *in casu* and was awarded R650 000 which translate to R774 970.

[15] As can be expected it is always not easy to find cases with injuries that are in all respect similar. As such, it is apparent from the judgments I was referred to that none is on all fours with the current matter. It is also apparent from the injuries in *Megalane* that the claimant in that case suffered injuries that are more severe than those suffered by the present claimant, this was conceded.

[16] As a result, my view is that, a fair and reasonable amount to compensate the plaintiff in the present circumstances is an award of R1 200 000.

LOSS OF EARNINGS/EARNING CAPACITY

[17] The parties argue this head of damages on a joint minute by the industrial psychologists and the actuarial report quantifying the joint minute, filed of record.

[18] The industrial psychologists are agreed that:

- 18.1 Post-accident, given the severe head injury, resulting in permanent neurocognitive deficits, including neuropsychological problems, the claimant will arrive in adult life unemployable in the open labour market. No residual earning capacity is foreseen.

² 2014 (3) QOO 1 Koch .

18.2 Pre-accident: there are two scenarios, firstly, assuming that Grade 12 (NQF4) would have been the highest level of education; and secondly, assuming that Grade 12 plus occupational related Certificate on NFQ5 level would have been obtained through in-house job training.

[19] The industrial psychologists are agreed on the job description and remuneration in both scenarios, they, however, disagree on the time frames for progression. The plaintiffs industrial psychologist allows for a longer time frame between job grading whilst the defendant's industrial psychologist allows for a shorter time frame.

[20] Obviously, the industrial psychologists do not agree regarding the probability of which scenario would be more probable. The plaintiffs industrial psychologist opines that probabilities are that the claimant would have progressed further than his parents because of the available opportunities at his disposal - his parent went to school and the claimant's own non-academic schooling record would have been to his advantage. To the contrary, the defendant's industrial psychologist opines that the claimant's parents and siblings are an indication that the claimant would not have progressed any further than his parents. It is on this point that argument between the parties rests.

[21] The actuarial calculations are based on the two scenarios as indicated by the joint minutes of the industrial psychologists. The parties did not argue the contingencies applied by the actuary to the scenarios. The arguments were, as already stated, on the time frames for progression between job grading. Based on the opinion of the plaintiffs industrial psychologist the plaintiffs counsel argued that scenario 2 which allowed for a longer time frame should not be discounted but be considered in the circumstances of the claimant as the most appropriate. Failing which, the average calculation of the two scenarios will, in the interest of justice, be appropriate. The defendant's counsel argued for the calculation in scenario 1 as most appropriate due to the short time frame opined for by its industrial psychologist.

[22] The defendant's industrial psychologist considered that the claimant would, after grade twelve, have obtained a tertiary qualification. The plaintiffs industrial psychologist on the other hand did not consider tertiary qualification but a situation where the complainant would have been employed after grade 12 by an employer who would have provided him with work skills.

[23] In scenario 2 the complainant would have entered employment as an unskilled worker and for the first fifteen years, with skills provided at work, would have taken efforts to improve his lot by on the job training.

[24] When it comes to the issue of which of the two scenarios is probable, it is my view that scenario 2 would be appropriate in the circumstances. Educational opportunities in this day and age are more available than they were at the time the claimant's parent went to school. Children are encouraged to educate themselves through media and other information. Bursaries and scholarship are more readily available to children who want to educate themselves than there were before. There appears to be no grounds why the claimant would not want to educate himself. In actual fact, that his parents are educated or not does not play such a pertinent role in determining whether the claimant would have progressed educationally or not.

[25] Even though scenario 2 would be appropriate in the circumstances of the matter before me, I, however, still have to take into account that considerations of this kind are speculative in nature. I would, thus, in the interest of justice award damages as proposed by the plaintiffs counsel, that is, the average calculation of the two scenarios. The just and appropriate amount for compensation should be R2 405 588.

[26] I am, therefore, satisfied that the plaintiff is entitled to the amount stated in scenario 2 of the actuarial calculations. But, on consideration that the calculations are broadly speculative, it is my view that the average amount between the two scenarios ought to be awarded to compensate the plaintiff for loss of earnings. The plaintiff is, thus, entitled to the following award in total:

General Damages

R1 200 000, 00

Past medical and hospital expenses	312 583, 27
Loss of earnings/earning capacity	2 <u>405 588. 00</u>
Total	3 918 171, 27

[27] A value of 10% of the total amount of R391 817, 10, should be deducted because liability was determined at 90% in favour of the plaintiff. The plaintiff is only entitled to 90% of the total amount of the award, which is R3 526 354, 17. In addition, and as offered, the defendant must furnish the plaintiff with a section 17 (4) certificate for all future medical and hospital related expenses.

[28] I make the following order:

1. The Draft Order marked 'xx' is made an order of court.

E.M. KUBUSHI
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for Plaintiff	: Adv. Anton Laubscher
Instructed by	: Andenorff Attorneys
Attorney for Defendant	: Adv. L. M. Maite
Instructed by	: Lekhu Pilson Attorneys

Date heard	: 02 May 2019
Date of judgment	: 22 May 2019

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

AT PRETORIA ON THURSDAY, 22 MAY 2019, IN COURT 6D.

BEFORE THE HONOURABLE JUSTICE KUBUSHI.

Case no: 50598/2016

In the matter between:

ADV ALBERTUS JOHANNES DU TOIT N.O.

obo S[....] N[....]

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

ORDER

HAVING PERUSED THE PAPERS, HEARD ORAL EVIDENCE AND HEARD ARGUMENT BY BOTH COUNSEL, IT IS ORDERED THAT, IN FULL AND FINAL SETTLEMENT OF THE PLAINTIFF'S CLAIM FOR DAMAGES ("THE PLAINTIFF"), IN RESPECT OF THE MERITS AND QUANTUM, AS SET DOWN FOR HEARING ON THURSDAY, 02 MAY 2019, THE FOLLOWING TERMS BE MADE AN ORDER OF COURT:

THE UNDERTAKING

1. The Defendant shall provide an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 ("the undertaking"), to compensate the Plaintiff / S N[....] for 90% (Ninety percent) of the costs relating to the future accommodation of the Plaintiff / S N[....] in a hospital

or nursing home or treatment of or rendering of a service or supplying of goods to the Plaintiff / S N[...] after the costs have been incurred and on proof thereof and arising from the collision which occurred on 11 October 2014.

THE MERITS

2. It is recorded that the merits were settled 90% (Ninety percent) in favour of the Plaintiff/ S N[...] on Tuesday 30 April 2019, and the Defendant is ordered to pay 90% (Ninety percent) of the Plaintiff / S N[...]’s proven claim.

PAST HOSPITAL AND MEDICAL EXPENSES BY STATE SERVICE PROVIDERS

3. It is recorded that the Plaintiff’s Past Medical and/or Hospital expenses have been settled in the amount of R281 324,94 (Two Hundred and Eighty One Thousand Three Hundred and Twenty Four Rand and Ninety Four Cents) after the application of the merits apportionment of 90/10% (Ninety percent) in favour of Plaintiff.
4. The Defendant indemnifies the Plaintiff and his representatives against any future claims by suppliers in respect hereof.

THE CAPITAL

5. The Defendant is ordered to pay to the Plaintiff the amount of R 5 526 354,17 (Three Million Five Hundred and Twenty Six Thousand Three Hundred and Fifty Four Rand 17/100 Only), ("the capital") by way of a lump sum payment on or before 30 August 2019, by way of electronic transfer to the trust account, details of which are set out hereunder ("the capital payment").
6. It is recorded that the Capital amount, as per paragraph 5 above. is made up as follows:
 - 6.1 Future Loss of Earnings: R 2 165 029-20 (Two Million One Hundred

and Sixty Five Thousand Twenty Nine Rand and Twenty Cents.

6.2 General Damages: R 1 080 000-00 (One Million and Eighty Thousand Rand)

COSTS

7. The Defendant shall pay the Plaintiff's taxed or agreed High Court Scale party and party costs, including for the sake of clarity, but not limited, to the costs of the Plaintiffs instructing attorneys, Adendorff Incorporated in Cape Town and the correspondent attorneys in Pretoria, Savage Jooste and Adams Inc, as well as the other costs set out hereunder.
8. The Plaintiff shall, in the event that the costs are not agreed, serve the Notice of Taxation on the Defendant or the Defendant's attorney of record.
9. The Plaintiff shall allow the Defendant 30 (thirty) calendar days to make payment of the taxed or agreed costs.

GENERAL COSTS

10. Any taxed or agreed costs incurred after the date of this order in obtaining payment of any of the amounts referred to herein.
11. The Defendant will not be liable for interest on the outstanding amount.

EXPERT WITNESSES

12. Regarding the expert witnesses listed hereinbelow ("the experts"), the taxed or agreed qualifying expenses , the reasonable attendance, travelling, waiting time and reservation fees of the experts listed herein below, if any, the reasonable costs attached to the procurement of the medico- legal and other reports , inclusive of those referred to, as well as joint expert minutes of the experts, including x-rays, MRI scans, Pathology reports, interpreter's services and addendum reports and all consultations with counsel, Plaintiff attorneys, as well as time spent travelling, subject to the discretion of the Taxing Master.
13. The experts are:
 - 13.1 Dr. JS Sager (Orthopaedic Surgeon);

- 13.2 Dr. J Slazus (Ophthalmologist);
- 13.3 Or. J Reid (Neurologist);
- 13.4 Dr. K Le Fevre (Psychiatrist);
- 13.5 Dr. D Ogilvy (Speech and Language Pathologist);
- 13.6 Ms R De Wit (Clinical- and Neurological Psychologist);
- 13.7 Ms Y Bekker (Educational Psychologist);
- 13.8 Ms M Bester (Occupational Therapist);
- 13.9 Ms E Aurret-Besselaar (Industrial Psychologist);
- 13.10 Messrs Munro Consulting (Actuaries).

TRAVELLING, ACCOMMODATION AND RELATED COSTS

- 14. The Defendant shall be liable to pay the reasonable costs of the Plaintiff's legal representatives, the travelling, waiting time, and accommodation and related costs incurred by Plaintiff's legal representatives and counsel in respect of settlement discussions with Defendant or Defendant's attorneys, and in respect of consultations with experts for trial preparation, costs for preparing for Pre-Trial Conference(s) and formulation of Pre-Trial Conference Minutes, Pre-Trial Agendas, Rule 37(4)&(6) Further Particulars, if any, Rule 35(9) & Rule 36(10) notices, Rule 38(2) affidavits, trial preparation, the preparation of 6 trial bundles as in terms of the Practice directives and the cost of this order, subject to the discretion of the Taxing Master.
- 15. The Defendant shall be liable to pay the reasonable travelling, waiting time, and accommodation and related costs incurred as follows; subject to the discretion of Taxing Master.
 - 15.1 In respect of the Plaintiff/ S N[...], and his family member accompanying him, to attend medico-legal examinations with expert witnesses in Cape Town and Gauteng respectively;
 - 15.2 In respect of consultations held on 25 April 2019, between Plaintiff, Adv AJ Du Toit (*Curator Ad litem*), Plaintiffs representatives, Adv A Laubscher, Dr. K Le Fevre (Psychiatrist), Dr. D Ogilvy (Speech and Language Pathologist), Ms R De Wit (Clinical and Neurological

Psychologist,) Ms M Bester (Occupational Therapist) and Ms E Auret-Besselaar (Industrial Psychologist;)

- 15.3 In respect of consultations held on 25 April 2019, between Plaintiff, Adv Du Toit, Plaintiff s representatives, Adv A Laubscher and Mr. PI Gxokhwe (eye witness);
- 15.4 In respect of S N[....]and his family member ("The Applicant"), travelling to attend consultations with Plaintiffs Representatives and the *Curator ad Litem* and/or *Curator Bonis* respectively;
- 15.5 In respect of Plaintiffs representatives attending the trial as set down for hearing on 02 May 2019;
- 15.6 In respect of Ms E Auret-Besselaar attending court for the trial as set down for hearing on 02 May 2019, at her respective hourly rate;
- 15.7 In respect of Adv AJ Du Toit (*Curator ad Litem*) attending court for the trial as set down for hearing on 02 May 2019 , at his respective hourly rate.

THE FEES OF COUNSEL

16. The fees of Plaintiffs senior junior counsel, which costs are inclusive of the day fee(s), perusing reports and documents in preparation for trial, consultations with expert-witnesses and drafting of submissions.

COSTS OF THE CURATOR AD LITEM

17. The Defendant shall pay the costs of the application to appoint the *Curator ad Litem* on the High Court scale, as between party and party, including the costs of the medical reports filed as part of the said application, as taxed or agreed, plus VAT.
18. The Defendant shall pay the costs of the *Curator ad Litem* on the High Court scale, as between party and party, as taxed or agreed, plus VAT.

COSTS OF CURATOR BONIS

19. In the event of the Western Cape High Court, or another competent Court having jurisdiction, appointing a *Curator Bonis* to S N[....], the Defendant

shall pay the costs of the *Curator Bonis*, as taxed or agreed. such costs including for the sake of clarity, but not limited to:

20. The costs of the application to the appoint the *Curator Bonis* on the High Court scale as between party and party, as taxed or agreed, plus VAT ("the application costs"):
 - 20.1 The costs, if any, incurred by the *Curator Bonis* in furnishing security to the Master;
 - 20.2 The fees and costs of the *Curator Bonis* in respect of administering the capital and the undertaking in terms of Section 17(4)(a).
 - 20.3 The fees of the *Curator Bonis* shall be paid from the Undertaking.

PAYMENT PROVISIONS

21. Payment of the capital amount as reflected above shall be effected on or before 30 August 2019 ("the capital due date") by way of electronic transfer into the Plaintiffs attorneys trust banking account, details of which are listed herein below.
22. Payment of the taxed or agreed costs reflected above shall be effected within 30 (thirty) calendar days of agreement or taxation ("the costs due date") and shall likewise be effected by way of electronic transfer into the Plaintiff's attorneys trust banking account. details of which are listed herein below.
23. Upon receipt of the capital amount in Plaintiff's attorneys trust banking account, same will be invested in an interest-bearing trust account pending the appointment of the *Curator Bonis*.

CONTINGENCY FEE AGREEMENT

24. It is recorded that the Plaintiff entered into a contingency fee agreement and that same complies with the Act.

TRUST BANKING DETAILS

25. The Plaintiff's attorneys' trust banking account details are as follows:

Bank : FIRST NATIONAL BANK

Account Name	:	ADENDORFF INC.
Branch Name	:	ADDERLEY STREET
Branch Code	:	201-409
Account number	:	[....]

BY ORDER OF THE COURT

COURT REGISTRAR

Box 71: Savage Jooste & Adams

Ref no: M Haasbroek / gk / MHA620 / GX02/0001

Plaintiffs counsel: Adv A Laubscher (082 658 4112)

Defendant's counsel: Adv L Maite (079 502 2951)