

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

**DATE: 25/5/2019
CASE NO: 51938/2015**

In the matter between:

NTULI HILDA FUGLE obo S[....]

PLAINTIFF

And

ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT

MAKHOBHA, AJ

- [1] The plaintiff is Ms H.F Ntuli she instituted a claim against the defendant in her representative capacity of her minor son. The claim is for damages suffered as a result of injuries her son sustained in a motor vehicle collision which occurred on the 6th April 2014. The minor child was born on the 11th January 2009. At the time of the accident he was five (5) years old.
- [2] Liability has been settled in terms of which the defendant is liable to compensate the minor child 100% of the proven or agreed damages

suffered by the minor child. The quantum of the plaintiffs claim is in dispute. The parties agreed to postpone general damages sine-die. Thus therefore the only issue before court is loss of earnings.

[3] The parties agreed not to lead any oral evidence but admitted all the medico legal reports and addressed the court. Both counsels submitted their heads of argument.

[4] The joint minutes of the following experts were handed in by agreement.

- 4.1. Educational psychologists - Mr W.M Kumalo and Alet Mathews
- 4.2. Clinical psychologist - Dr M 1V1 Katjene and Ms G Bokaba
- 4.3. Industrial psychologist-K Pulles and A Lamprecht
- 4.4. Actuarial report

[5] According to the neurosurgeons the minor child sustained a mild traumatic brain injury and experienced post-concussion symptoms including headaches. The neuro cognitive deficits have a negative functioning.

[6] Counsel for the plaintiff submitted in his heads of argument that the injuries had an impact on his future academic career as well as employment whereas for the defendant counsel submitted that the minor child school performance is the same as his parents and siblings and not necessarily as a result of the accident.

[7] **In Van Rij, NO v Employers' Liability Assurance Corporation Ltd, 1964 (4) SA 737 (W)** the plaintiff was a minor who had not yet embarked on a firm career the court allowed 20% for contingencies, see also **De Jong v Gunther and Another 1975 (4) SA 78 (W) at page 80**. In **Prinsloo v Road Accident Fund 2009 (5) SA 406 (SE)** the court was called upon to adjudicate plaintiff's claim for loss of earning capacity the court held that in assessing expert evidence, the court had to be satisfied that the experts opinion had a foundation in logical reasoning.

[8] **In Road Accident Fund v Kerridge 2019 (2) SA 233 (SCA) paragraph 25** the court said "Indeed, a physical disability which impacts on the

capacity to an income does not on its own, reduce the patrimony of an injured person. There must be proof that the reduction in the income earning capacity will result in actual loss of income".

- [9] On paragraph 40 to 42 of the same decision the SCA articulate what is loss of future earnings and the application of the contingency deductions. In paragraph 40-42 the court said:

"E [40] Any claim for future loss of earning capacity requires a comparison of what a claimant would have earned had the accident not occurred, with what a claimant is likely to earn thereafter. The loss is the difference between the monetary value of the earning capacity immediately prior to the injury and immediately thereafter. This can never be a matter of exact mathematical calculation and is, of its nature, a highly speculative inquiry. All the court can do is make an estimate which is often a very rough estimate, of the present value of the loss.

[41] Courts have used actuarial calculations in an attempt to estimate the monetary value of the loss. These calculations are obviously dependent on the accuracy of the factual information provided by the various witnesses. In order to address life's unknown future hazard, an actuary will usually suggest that a court should determine the appropriate contingency deduction. Often a claimant, as a result of the injury, has to engage in less lucrative employment. The nature of the risks associated with the two career paths may differ widely. It is therefore appropriate to make different contingency deductions in respect of the pre-morbid and post-morbid scenarios. The future loss will therefore be the shortfall between the two, once the appropriate contingencies have been applied.

[42] Contingencies are arbitrary and also highly subjective. It can be described no better than the oft-quoted passage in *Goodall v President Insurance* where the court said: ' In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of fortelling the future, so

confidently practiced by ancient prophets and soothsayers, and by authors of a certain type of almanack, is not numbered among the qualifications for judicial office'

[10] The court further reiterated the general rules in regard to contingency deductions as follows in paragraph 44:

[44] Some general rules have been established in regard to contingency deductions, one being the age of the claimant. The younger a claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings they include, inter alia, a downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill health, death and the myriad of events that may occur in one's everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in a pre-morbid scenario, generally awarded higher contingencies, the younger the age of the claimant. The court, in *Guedes*, relying on Koch's *Quantum* Yearbook 2004, found the appropriate pre-morbid contingency for a young man of 26 years was 20% which would decrease on a sliding scale as the claimant got older. This, of course, depends on the specific circumstances of each case but is a convenient starting point"

[11] It is clear from the above referred case law that it is trite that the application of contingencies is a discretionary power exercised by the court seized with the matter. The contingency to be applied in each case is to be considered on the facts of that particular case. The usual considerations include inter alia the possibility of errors in the estimation of the plaintiff's life expectancy, the likelihood of illness and unemployment which would have occurred. The court must also take into account inflation or deflation in the value of money, tax, alterations in the cost of living allowances.

[12] In the quantum year book 2009, at page 100, Koch states as follows:

"It has also become customary for the court to apply the so-called sliding scale to contingencies which entails that half a percent for every year to retirement age i.e 25% for a child, 20% for a youth and 10% in middle age **(See Goodall v President Insurance Limited 1978 (1) SA 389 (W))"**

- [13] The clinical psychologists in their findings agree with the joint report of the neurosurgeons. On paragraph 3.2.2.2 of their report they say the following "We agree that Ntando experiences concussion headaches and physical pains that have an adverse effect on his emotional, psychological, behavioural and academic functioning" However it ; should not be overlooked as well what the educational psychologist{said on page 2 paragraph 12 they say the following "It is noted that his siblings present with academic difficulties and have repeated some grades, given the information made available. A M opines that he would probably have been able to complete grade 12 with an endorsement to continue with a Higher certificate. However given his family background, it appears that he would probably not have been able to cope with the demand of tertiary training and would probably have been a more suitable candidate for vocational training" This indeed indicates that there is some uncertainty regarding the minor child's post-morbid level of functioning"
- [14] In my view although there is an element of the min child's family struggling in school grades, it cannot be refuted that the accident did have an impact on his future learning capabilities. I am therefore satisfied that an application of a higher than normal contingency is w ted in respect of the child's post morbid prospective income.
- [15] Having regard to all the relevant factors an application of a 35% contingency to uninjured earning and 50% injured earnings is deemed to be appropriate.
- [16] The minor child will accordingly be entitled to the sum of:

Uninjured earnings of R5567300 - 35%

= R3618745

Injured earnings of R3922 200.00- 50%

= R1961100

Total loss of earnings = R165 7645.00

[17] I make the following order:

17.1. **The defendant shall pay the sum of R1657645.00 (One million six hundred and fifty seven. six hundred and forty five rands only)** in settlement of the Plaintiff' s claim to the Plaintiff's attorneys, Mphela & Associates, payable by direct transfer into their trust account with the following details:

ACCOUNT HOLDER : MPHELA & ASSOCIATES

BANK : STANDARD BANK

BRANCH CODE : 05-26-27

ACCOUNT NUMBER : [...]

REFERENCE NUMBER : MMM/GI187/ps

17.2. The aforementioned total amount of **R R1657645.00 {One million six hundred and fifty seven, six hundred and forty five rands only}** referred to above will not bear interest unless the Defendant fails to effect payment thereof within 14 (FOURTEEN) calendar days of the date of this Order, in which event the capital amount will bear interest at the prescribed rate of 10% per annum calculated from and including the ·15th (FIFTEENTH) calendar day after the date of this Order and including the date of payment thereof.

17.3. The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs on a High Court Scale,

17.4. The reasonable taxable costs of the experts mentioned herein below including, but not limited to, travelling, travelling time, preparation for trial, qualifying and reservation fees (if any and upon proof thereof) as well as the costs of the RAF 4 serious injury assessment reports, medico-legal reports, addendum reports, actuarial/revised actuarial calculations, court attendance and joint minutes of all of the Plaintiff's experts, which include, but will not be limited to, the following experts:

17.4.1 Prof Lekgwara (Neurosurgeon);

17.4.2 Dr CJ B Smit (ENT)

17.4.3 Dr M Katjene (Clinical Psychologist);

17.4.4 Mr M W Kumalo (Educational Psychologist);

17.4.5 Thandi Motsepe (Occupational Therapist);

17.4.6 Andre Lamprecht (Industrial Psychologist)

17.4.7 Munro Forensic Actuaries (Actuary);

17.4.8 All other experts' reports served on the Defendant;

17.5. All the fees of the Plaintiff's Counsel on a High Court Scale, inclusive of the drafting of the Heads of Argument and Advice on Evidence, where applicable, and Plaintiff's Counsel's day fee, for the reservation for trial, preparation for trial, consultation with client, attorney and experts;

17.6. The reasonable costs for Plaintiffs attorneys, correspondent attorneys which includes pre-trial preparation, traveling, traveling time and attendance of the respective pre-trial conferences, court attendances and trial preparation;

17.7. The reasonable costs in respect of the preparation, drafting and copying of all the bundles of documents, including trial bundles and bundles for the experts, containing expert reports, pleadings and

notices, and all other documents and all indexes thereto, the traveling time, traveling costs and time spent traveling to deliver the bundles;

- 17.8. The reasonable costs for the preparation, attending, traveling expenses and time spent for conducting an inspection in loco, inclusive of work site visits;
 - 17.9 The costs attendant upon the obtaining of payment of the amounts referred to in this Order, including the costs to obtain an administer the Undertaking in terms of Section 17(4) (a);
 - 17.10. The reasonable traveling costs (inclusive of toll gate and e-toll charges), traveling time, subsistence, accommodation and transportation costs, if any and upon proof thereof, incurred by the Plaintiff in attending medico-legal examination(s) with the parties' experts and in attending Court on the day(s) of trial;
 - 17.11. The costs of a consultation between the Plaintiff and his/her attorney to discuss the settlement offer received from the Defendant and the terms of this Order;
 - 17.12. The above costs will be paid into the aforementioned attorneys trust account.
18. Payment of the above costs by the Defendant is subject to the following conditions:
- 18.1 The Plaintiff is ordered to serve the Notice of Taxation of the Plaintiffs party and party bill of costs on the Defendant's attorneys of record;
 - 18.2 The Defendant is order to pay the Plaintiffs' taxed and/or agreed party and party costs within 14 (fourteen) days from the date upon which the accounts are taxed by the Taxing Master and/or agreed between the parties;
 - 18.3. Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the prescribed rate of 10% on the

taxed or agreed costs from the date of the allocator to date of final payment.

19. The capital must be protected by way of a trust. To this end, the Defendant is ordered to pay:
 - 19.1 The reasonable costs of the creation of a trust for the benefit of the minor as principal beneficiary, in accordance with the Trust Deed attached hereto marked as Annexure "A";
 - 19.2 The costs of the first trustee to be appointed as well as reasonable costs of Trustees to be appointed in administering the capital amount referred to in paragraph 2 hereof as determined by the Administration of Estate Act 66 of 1965, as amended, and which is usually the reasonable costs in the administration of an estate, according to the prescribed tariff applicable to *curators* as provided for in the Government Gazette R 1602 of 1 July 1999 and subsequent amendments thereof and more specifically paragraphs 3(a) and 3(b) of the Schedule thereto, alternatively as prescribed by Section 22 of the Trust Property Control Act 57 of 1988, as amended and;
 - 19.3 The reasonable costs of the furnishing of security of the obtaining of an annual bond, if required by the Master of the High Court, or to meet the requirements of the Master of the High Court.
20. The Defendant shall pay the capital into the trust account of Mphela & Associates; and
21. Mphela & Associates shall be entitled to make payment of the expenses incurred and accounts rendered by experts and Counsel employed on behalf of the minor from the said sum and/or costs upon taxation or agreement;
22. Mphela & Associates shall pay the capital of the said amount and taxed or agreed costs directly into the trust account of the Trustee of the Trust to be created and administered by Standard Trust Limited;

23. The party and party costs referred to, as agreed or taxed, shall be paid by the Defendant directly into the trust account of Mphela & Associates, for the benefit of the minor;
24. Mphela & Associates shall be entitled to deduct the fee of the legal costs consultant for the drafting of the party and party Bill of Costs and for the attendance pertaining to settlement;
25. Standard Trust Limited is ordered to furnish security to the satisfaction of the Master;
26. Until such time that the trustees are able to take control of the capital sum and to deal with same in terms of the Trust Deed, Mphela & Associates are:
 - 26.1 authorized to invest the capital in an interest-bearing account in terms of Section 78(2A) of the Attorneys Act to the benefit of the minor, with a registered banking institution, pending finalization of the directives in paragraph 7 above;
 - 26.2 are authorized and ordered to make any reasonable payments to satisfy the needs of the minor that may arise and that is required to satisfy any reasonable need for treatment, medical intervention, care, schooling, equipment and any other reasonable ordinary needs that may arise from time to time, pending the finalization of the directives referred to in paragraph 7 above.
27. The issue of general damages is postponed *sine die*.

BY ORDER OF COURT

Counsel for Plaintiff: Adv P.M. Leopeng 012 3344102/ 083 665 1466

Counsel for Defendant: Adv P. Nonyana 012 303 7812/ 073 233 318

D. MAKHOB

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

ATTORNEY FOR PLAINTIFF

: MPHELA & ASSOCIATES

COUNSEL FOR PLAINTIFF

: ADV P.M LEOPENG

ATTORNEY FOR DEFENDANT

: LEKBU PILSON ATTORNEYS

COUNSELFORDEFENDANT

: ADV P. NONYANA