

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

CASE NO: 96671/2015

16/7/2019

In the matter between:

DIMAKATSO V. NKUNA obo PTN N[....] Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

STRYDOM AJ

BACKGROUND:

1. The Plaintiffs claims on behalf of a male minor child who was involved in a motor vehicle collision on the 5th of June 2015. The minor at that stage was 12 years old and was in Grade 5. He is currently 16 year old.
2. The parties have previously settled merits, as well as general damages and have requested this Court to make a finding as to loss of earnings. Counsel for the parties submitted an averaged earnings as per the Plaintiffs actuarial calculations, which, they both agreed, represents the base pre-morbid, as well as post-morbid earnings. I have been requested to determine the contingency to be applied to these figures.

INJURIES AND SEQUALAE:

3. In general for the determination of contingencies one must look at matters on case by case basis.
4. The extent of the injuries sustained are largely common cause: The minor sustained a mild to moderate and/or severe head injury, with a secondary hypoxic brain injury due to uncontrolled epilepsy, that is a result of the trauma to the head. In addition thereto, the minor has suffered neurocognitive deficits as well as neurobehavioral problems.
5. He has been left emotionally vulnerable and is at risk of depression. These emotional difficulties will probably exacerbate his cognitive difficulties, impact his academic function, impact his motivation to secure employment and affect his overall occupation functioning (according to the clinical psychologist).
6. It is evident from the joint minute of the educational psychologists, that they agreed on neither the pre-morbid nor the post-morbid income potential of the minor child.
7. The Plaintiffs educational psychologist was of the view that the Plaintiff could have obtained a Grade 12, as well as a diploma on a part-time basis, whereas the Defendant's educational psychologist was of the view that he could have completed a certificate on a part-time basis.
8. Post-morbidly the Plaintiff's expert was of the view that he will fail Grade 12, whereas the Defendant's expert was of the view that, with help and if his epilepsy was controlled he would obtain a certificate.

ARGUMENT:

9. The counsel for the Plaintiff submitted that a 20% pre-morbid contingency deduction and a 40% post-morbid contingency deduction should be applied. The counsel for the Defendant on the other hand was of the view that 30% should be deduction in the pre-morbid scenario and 40% in the post-morbid scenario.

10. The Defendant supplied Heads of Argument and I am indebted to counsel for the Defendant in this regard. During argument, counsel for the Defendant cited the following factors which should serve increase the pre-morbid contingency deduction:

10.1 The minor had failed 2 grades prior to the accident and the likelihood of academic achievement, at the level as per the calculations, should be discounted against. In this regard the counsel for the Defendant conceded that where the parties had agreed to use the average of a certificate and a diploma earnings, this in itself is a type of "*contingency* ' and should therefore lower the contingency factor or at least be taken into account as a whole;

10.2 The Defendant's counsel further submitted that the socio economic circumstances of the minor should be taken into account and stated, that no one in the Plaintiff's family has achieved a diploma. Counsel for the Plaintiff however did indicate that the minor's sister completed a matric and is culinary student.

10.3 The argument based on socio economic circumstances of a particular child is one that must be considered with great circumspect and applied very cautiously. It is known that children tend to perform better than their parents and that, in specifically the South African context (with the amount of availability of educational resources becoming available to more and more children), the fact that parents could not complete school or could not study should not be countenanced against children *per se*. However, it is also a fact that finances do affect a person's ability to proceed, specifically, to tertiary studies. In this regard, it is noted that the educational psychologists agreed that, whichever tertiary study they propose the minor could have obtained, would have taken place over a period of time, with the minor studying part-time. The calculations presented do, in fact, take that into account already.

10.4 With regards to the pre-morbid contingency deduction, Defendant's counsel referred me to the offed quoted 0.5% per annum deduction

as proposed by Koch.

LEGAL FRAMEWORK:

11. I was also referred to various cases by the Defendant's Counsel, where contingencies had been applied which have been of assistance. In this regard I referred to the following cases:
 - 11.1 Titus v RAF 5 C&B E 7 - 9
 - 11.2 Benesse v RAF 2014 7A3 QOD
 - 11.3 Makapula v RAF 2011 684 QOD.
 - 11.4 Ian Christopher Hall v Road Accident Fund.¹
- 12 I have also noted that in the matter of **Ian Christopher Hall v Road Accident Fund** the Court was confronted with a situation where the Plaintiff following the accident was still employed, however, from a way of the various *sequelae* of his injuries and the effect on his income potential, it became apparent that the Plaintiff may or may not in fact lose his position. Should the Plaintiff have lost his position he would have remained unemployable.
- 13 The learned Judge expressed the following in paragraph 54: *"However, in my view, the Defendant's assumptions regarding the Plaintiff's future employability prospects were rather over optimistic in the circumstances of case... having regards to the accident scenario ... it appears most appropriate and fair that 50% be deducted from the future employment scenario..."*
- 14 In Southern Insurance Association Ltd v Bailey NO 1984(1) SA 98 AD at 113F- 114A the following is stated:
 - 14.1 *"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future without the benefit of crystal balls, soothsayers, augers or oracles.*

¹ Unreported case: case no 2008/11330 judgment delivered in the South Gauteng High Court, Johannesburg on the 28th of May 2013

All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of a loss

14.2 *It has open to it, two possible approaches.*

14.2.1 *One is for the Judge to make a round estimate on an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.*

14.2.2 *The other is to try and make an assessment, by way of mathematical calculations on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions and these may vary from the strongly probable to the speculative.*

14.2.3 *It is manifest that either approach involves guesswork to a greater or lesser extent. But the court cannot for this reason adopt a non-possumus attitude and make no award."*

15 In **RAF v Guedes** 2006(5) SCA 583 the court held:

"In essence the trial court exercises a discretion, and attempts to achieve the best estimate of a plaintiff's Joss: Southern Insurance Association v Bailey NO. It is trite that a person is entitled to be compensated to the extent that the person's patrimony has been diminished in consequence of another's negligence. Such damage include Joss of future earning capacity (see for example President Insurance Co Ltd v Mathews). The calculation of the quantum of a future amount, such as Joss of earning capacity, is not, as I have already indicated a matter of exact mathematical calculation. By its nature such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss which is often a very rough estimate (see for example Southern Insurance Association v Bailey NO). The court necessarily exercises a wide

discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial court has a wide discretion to award what it believes is just." (Court's emphasis)

16 The following is relevant with regards to the application of contingencies:

- 16.1 Matters which cannot otherwise be provided for or cannot be calculated exactly, but which may impact upon the damages claimed, are considered to be contingencies, and are usually provided for by deducting a stated percentage of the amount or specific claims.²
- 16.2. Contingencies include any possible relevant future event which might cause damage or a part thereof or which may otherwise influence the extent of the plaintiff's damage.³
- 16.3 In a wide sense contingencies are described as "the hazards that normally beset the lives and circumstances of ordinary people."⁴ Contingencies have also been described as "unforeseen circumstances of life".⁵
- 16.4 Contingencies are usually taken into account over a particular period of time, generally until the retirement age of the Plaintiff.⁶

17 Margo J in ***Goodwill v President Insurance Co Ltd*** 1978(1) SA 389 W at

² (De Jongh v Gunter 1975(4) SA 78 (W) 80F).

³ (Erdmann v SANTAM Insurance Co Ltd **1985 3 SA 402** (C) 404 -405; Burns v National Employers General Insurance Co Ltd **1988 3 SA 355** (C) 365) .

⁴ "(AA Mutual Insurance Association Ltd v Van Jaarsveld **1974 4 SA 729** (A); Van der Plaats v SA Mutual Fire & General Insurance Co Ltd **1980 3 SA 105** (A); Southern Insurance Association Ltd v Bailey **1984 1 SA 98** (A) 117).

⁵ (De Jongh v Gunther **1975 (4) SA 78 (W)** 80F).

⁶ (Goodal v President Insurance Co Ltd **1978 1 SA 389** (W) 393; Rij NO v Employers' Liability Assurance **1964 (4) SA 737** (W); Sigournay v Gillbanks **1960 2 SA 552** (A) 569; Smith v SA Eagle Insurance Co Ltd **1986 2 SA 314** (SE) 319) .

392H stated:

"In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art of science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office".

- 18 The advantage of applying actuarial calculations to assist in this task was emphasised in the leading case of Southern Insurance Association Ltd v Bailey **1984 1 SA 98** (A) 113H-114E , where the Court stated :

18.1 *"Any enquiry into damages for loss of earning capacity is of its nature speculative*

18.2 *All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award.*

18.3 *In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an 'informed guess' it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's 'gut feeling' (to use the words of appellant's counsel) as*

to what is fair and reasonable is nothing more than a blind guess."

18.4 But the Court emphasised that provision for contingencies falls squarely within the subjective discretion of the court as to what is reasonable and fair. This will depend upon the underlying assumptions made which are not the domain of the actuary.⁷

19 The learned author Koch has suggested the following well-followed approach: "what is described as a "sliding scale" is used, under which it is allocated a "1/2% for year to retirement age, i.e 25% for a child, 20% for a youth and 10% in middle age".

CONTINGENCIES TO BE APPLIED:

PRE-MORBID:

20 With regards to the minor *in casu* and his specific capabilities, I am of the view that, a 25% pre-morbid contingency deduction would cater for the risk that he might not have (even if the accident had not occurred) obtained the certificate/diploma level. This caters *inter alia* for the eventualities that his studies may have taken longer, financial restrictions or that he would have failed more grades, given the pre-existing learning disabilities.

POST-MORBID:

21 In the post-morbid scenario, it seems as if, the parties are *ad idem* that the minor has a 40% risk of not obtaining the earnings as per the post- morbid scenario (earnings on obtaining a certificate only).

22 Neither party presented a case, where calculations had been done on the basis that, the minor would not have obtained a certificate and merely have completed a matric. The educational psychologists, as stated *supra*,

⁷ (Shield Insurance Co Ltd v Hall **1976 4 SA 431(A)** 444; Pringle v Administrator, Tvl **1990 2 SA 379** (W) 397-398).

have varied conclusions as to the future (injured) potential of the minor; the Plaintiff's expert, in fact, concluded that he would not obtain a matric and the Defendant's expert is of the view that, with treatment and assistance, he might obtain a certificate.

23 It is accordingly evident that, the post-morbid scenario, as agreed by the parties, is an over estimation of what the minor might still achieve, similar to, as submitted by Defendant's counsel, the over estimation of his pre-morbid capacity.

24 The period for which the minor is to be compensated is a period of some odd 40 years. The impact of the "*once and for all rule*" in the South African law of damages, is that Courts should be mindful of the fact that the consequences of any order may be felt for many years to come.

25 I am aware that both parties have contended that a post-morbid contingency deduction of 40% should be applied. However, the deduction of contingencies falls within the discretion of the Court. From a reading of the common cause reports as well as the argument in Court, it would seem that whether or not the Plaintiff would in fact achieve the postulated post-morbid earnings, as per the actuarial calculation, remains in doubt. In this regard I share the sentiment expressed by the Court in the **Hall v RAF** matter *supra*; the experts are of the view that he may or may not achieve any form of qualification, all things considered.

26 In coming to this determination I am mindful of the fact that the Court has the future of a minor child proverbially in its hands.

27 I accordingly hold that a 50% post-morbid contingency deduction constitutes a fair and reasonable deduction in the present circumstances.

FINDING ON CONTINGENCIES:

28 In view of the aforementioned reasons I accordingly hold that 25% contingencies should be deducted from the pre-morbid earnings and 50% should be deducted from the post-morbid earnings.

29 The resultant calculation would therefore as follows:

- 29.2 Pre-morbid are R5 299 250.00 less 25% = R3 974 437.50;
29.3 Post-morbid are R1 986 626.00 less 50% = R993 313.00;
29.4 Total loss (R394 437.50 less R993 313.00): R2 981 124.00.

30 I consequently make the following order:

30.2 The Defendant shall pay the sum of R2 981 124.00 (Two Million Nine Hundred and Eighty One One Hundred and Twenty Four Rand Only) within 14 (fourteen) days of this order to the Plaintiffs attorneys, SB NGENTO ATI ORNEYS, in settlement of the Plaintiffs claim for LOSS OF EARNINGS, which amount shall be payable by direct transfer into the following trust account:

ACCOUNT HOLDER: SB NGENTO ATTORNEYS

NAME OF BANK: STANDARD BANK

ACCOUNT NO: [...]

BRANCH CODE: CARLTON CENTRE

30.3 The capital amount refers to in paragraph 1 *supra* will not bear interest unless the Defendant fails to effect payment thereof within 14 (fourteen) days, in which event the capital amount will bear interest at the rate of 10.25% per annum calculated from date of mora including the date of payment thereof.

30.4 The Defendant shall make payment of the Plaintiffs taxed or agreed party and party costs on the High Court which costs shall include the following:

- The fees of Counsel, including of the 7th May 2019;
- The reasonable taxable costs of all experts used in this matter.

30.5 The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-

- The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;

- The Plaintiff shall allow the Defendant 14 (fourteen) court days to make payment of the taxed costs from date of settlement or taxation thereof;
- Should payment not be effected timeously, Plaintiff will be entitled to recover interest at the rate of 10.25% on the taxed or agreed from date of allocation to date of final payment.

K STRYDOM (AJ)
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, GAUTENG
DIVISION, PRETORIA

Heard on: 2 July 2019

Judgment delivered: 16 July 2019

Appearances:

For the Plaintiff: Adv K Mhlanga

Instructed by: SB Ngento Attorneys Inc

For the Defendant: Adv K Phiri

Instructed by: Rambevha Morobane Attorneys