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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 216/2016

In the matter between:

BC VAN ROOYEN N.O. obo S H

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON: 19, 20 and 22 FEBRUARY 2019

JUDGMENT BY: JORDAAN, J

DELIVERED ON: 28 FEBRUARY 2019

- [1] The plaintiff, in his capacity as curator at item, claims damages on behalf of the patient, a minor girl, resulting from injuries she sustained in a motor vehicle accident when she was a pedestrian and hit by a motor vehicle. The incident occurred on 22nd of June 2011 when the patient when was six years of age.
- [2] The injuries sustained were recorded in the joint minutes of the occupational therapists and agreed to by the parties. They can be summarised as follows;
- compound fracture of the left tibia/fibula
 - fracture of the distal femur
 - degloving injury of the forehead with skull exposure
 - abrasion to the left medial ankle
 - laceration of the lip
 - laceration above the right elbow
- [3] As a result of the head injury she suffered a resultant concussive brain injury and post-traumatic loss of hearing. The fracture of the left femur healed with a slight varus deformity and the fracture of the tibia healed with a slight valgus deformity. She has a slight leg length discrepancy, has permanent visible scarring of the forehead and right arm and the brain injury resulted in her being cognitively and intellectually handicapped.

- [4] Liability was conceded on behalf of defendant. The only issues remaining concern the scope and amount of damages. The claim for past medical and hospital expenses was abandoned. In respect of future medical, hospital and related expenses, the defendant tendered an undertaking terms of section 17 (4) (a). The only remaining issues related to loss of income potential and general damages.

Loss of income potential.

- [5] At the time the accident occurred, the patient was in her third year at preschool. The next year she was enrolled at primary school in grade 1 but however had to repeat grade 1 in 2013. From 2014 she was placed in a remedial class. She was later transferred to a special school from 2018.
- [6] Various expert witnesses testified on behalf of plaintiff. The defendant chose not to tender any evidence except that of the occupational therapist contained in the joint minute.
- [7] It is not necessary to deal with each and every witness, especially due to the fact that no contradicting evidence has been tendered. The relevant evidence may be summarised as follows;
- psychometric tests done on the patient indicate that, pre-morbidly, she was intellectually regarded as falling into the upper limits of the below average class. The psychological experts

however conclude that she would have been able to obtain grade 12.

- As to her socio economic background, the evidence shows that the patient's mother fell pregnant when she was in grade seven where-after she left school. The father remains unknown and is suspected to have absconded. The patient's mother passed away when the patient was still very young. Her grandmother was also deceased so that she grew up in the home of her grandfather who also testified in this matter. The grandfather has three other children besides the patient's mother who passed away. According to the evidence of the grandfather, the two elder sons attained grade 10. The youngest one is still at school but attending school irregularly and shows to be unreliable and unruly. Neither the grandfather nor any other family members attained grade 12. The grandfather is uneducated.

[8] It is evident from the aforesaid that the postulation by the experts to the effect that the patient would have been able to attain grade 12, is somewhat favoring the patient.

[9] Part of her post-morbid problems at school were caused by the fact that she was rendered significantly deaf due to the laceration of both eardrums and damage to the inner ear in the accident. According to the Ear Nose and Throat specialist, her hearing can most probably be restored to normal by means of surgical intervention. The psychologists however opine that her loss of

hearing for several years during the most important development phase of her life led to her development falling behind to such an extent that the restoration of her hearing at this stage will not enable her to make up for the loss in her development. In any event, according to the experts, the patient's cognitive and intellectual abilities were permanently compromised by the brain injury to such an extent that she would not be able to be sufficiently educated and will remain unemployable in the open labour market.

- [10] Although the patient may benefit from vocational training in a special school, that may only enable her to be employed in a sympathetic and protected environment with a potential income amounting to no more than pocket money, which cannot be regarded as gainful employment.
- [11] Based on the postulation that the patient would have been able to attain grade 12, the industrial psychologist concluded that, premorbidly, she would have entered employment at that level and would have remained employed as such for the rest of her life, only receiving inflationary increases.
- [12] The actuary did his calculations based on the aforesaid scenario. Because of the conclusion that she has been rendered unemployable, he accepted that she will not earn any income post-morbidly. The actuary did two calculations, the first based on a

normal life expectancy and the second based on a life expectancy of 40 years. The second calculation is based on the evidence to the effect that the patient was, at a very young age already diagnosed as being HIV positive and most probably born as such.

According to the actuary, Mr Sauer, the life expectancy of 40 years is based on reliable research conducted and compiled by formidable experts in the field. I therefore have to accept that the calculation based on a life expectancy of 40 years is the most appropriate in the present circumstances.

[13] On this basis the actuary calculated the capitalized premorbid income potential of the patient to be R3 534 440.00. He then deducted a 20% contingency which he regards as the normal contingency. He however conceded that the patient's HIV status posed a high risk of her falling ill and become unemployable, at least intermittently. That would call for a higher contingency to be applied.

[14] I have already referred to the patient's socio-economic background, in view of which I found the postulation that she would have obtained grade 12 to be favoring her. In my view a contingency factor of 35% is more appropriate in the circumstances of this matter. In applying that, the patient's net capitalised loss of income potential amounts to R2 297 386.00.

General damages.

[15] I have been referred to various decisions and the awards made in those matters in respect of general damages. Of those that I have been referred to, I am of the opinion that *Mohale v RAF*, 2015 (7A4) QOD 15 (GNP) is the most comparable. In that matter the claimant was a 10 year old girl who suffered a brain injury as well as injuries to her neck and back, resulting in regular headaches, a slightly increased risk of developing epilepsy and neurocognitive changes leading to her being unemployable in the open labour market. The award of R650 000.00 amounts to a present value of approximately R820 000.00.

[16] From my own research, the matter of *GB v RAF* 2017 (7B4) QOD 31 (ECP) also shows significant similarities. The claimant suffered a degloving scalp injury with resultant scarring and fractures of both mandibles. She also suffered resultant brain damage described as follows;

“The reported symptoms are suggestive of more serious long-term sequelae of a mild traumatic brain injury. The significant post-morbid decline in the global intellectual performance of plaintiff supports suspicions of damage to the “frontal” brain structures causing a major neurocognitive disorder”

She was also regarded as unemployable. The award for general damages of R500 000.00 in 2017 equates to a present value of some R540 000.00.

[17] No comparable case is similar in all respects. In *GB v RAF* (supra) the plaintiff was much older than the present patient and suffered less orthopedic injuries. In the *Mohale v RAF* matter, the sequelae of the brain injury appear to be somewhat more serious than the present matter.

[18] Taking into account all relevant circumstances in this matter, I am of the view that an award for general damages in the amount of R750 000.00 is apposite.

[19] It appears to be common cause that any award made to the patient should be safeguarded and administered in a Trust for that purpose. Pending the establishment of such Trust, the award should be held in trust for the benefit of the patient by the plaintiff's attorneys. For that purpose, the plaintiff's attorneys submitted a draft order for which I am indebted. In some respects however, the draft order is unnecessarily detailed and inter-alia includes specific orders as to what costs are to be included, thereby usurping the duties of the taxing master.

[20] In the result I am of the view that the patient is entitled to be paid the following;

1. Loss of income: R2 297 386.00,
2. General damages: R750 000.00.

[21] In conclusion the following orders are granted:

1. The defendant is ordered to pay the plaintiff the amount of R3 047 386.00 (Three million, forty seven thousand, three hundred and eighty six rand).
2. The aforesaid capital amount and costs shall be payable into the trust account of VZLR Inc. attorneys, ABSA Business Bank, Hillcrest, branch code 632005, account number [...].
3. In default of payment within the respite afforded by the Road Accident Fund act, interest shall accrue at the mora rate as per the Prescribed Rate of Interest Act, 55 of 1975.
4. Defendant is ordered to furnish the trustee appointed in respect of S H an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56/1996 within 30 days from the date of this order, for the costs of future accommodation of the patient in a hospital or nursing home or the treatment of or rendering of a service or the supply of goods to the patient arising out of injuries sustained by her in a motor vehicle collision on 22 June 2011, in terms of which undertaking the defendant will be obliged to compensate the trustee in respect of the said costs after the costs have been incurred by either the patient or by the trustee or by any party on behalf of the patient and on proof thereof. The undertaking shall include the reasonable costs of the formation of an inter-vivos trust for the benefit of the patient and the costs of administration of the said trust by the trustee, including the costs attendant upon the provision of security by the trustee, provided

that such costs shall not exceed the costs which would otherwise be payable in law in respect of a curator bonis.

5. The defendant shall pay the plaintiff's party and party costs of suit, including the qualifying, reservation and attendance fees and expenses, where applicable, of the following experts:

- Ben Moodie
- Lida Moller
- Johan Sauer
- Anel Booyse of Rita van Biljon occupational therapists
- Rita du Plessis
- Dr. Danie Hoffman
- Dr. D.K.Mutyaba
- Dr. H.B. Enslin
- Dr. J.F. Ziervogel
- Dr. J.A. Smuts
- Dr. J.W. Callaghan
- Thea Pretorius

6. The award to the plaintiff shall be protected by means of it being entrusted to a trust to be formed for the benefit of the patient.

7. Until such time as the trustee still to be appointed and the trust to be erected is able to take control of the capital sum and to deal with same in terms of this order, the plaintiff's attorney of record:

7.1 shall be prohibited from dealing with the capital in any other manner unless specifically authorised thereto by the court, subject to the following sub paragraphs;

- 7.2 is authorised to invest the capital amount in an interest-bearing account with a registered banking institution, for the benefit of the patient and will only be allowed to pay such monies over to the trustees of the trust to be created in terms of this order once the Master of the High Court has issued the trustees with the necessary letters of authority.
- 7.3 plaintiff's attorneys are further authorised to pay the costs for the provision of security of the funds held in trust to the master by the trustees of the trust to be created, which costs in turn must be refunded by the defendant.
- 7.4 is authorised and ordered to make any reasonable payments to satisfy any of the patient's needs that may arise and that are required in order to satisfy any reasonable need for treatment, care, aid or equipment that may arise in the interim.
- 7.5 is authorized to make payment of the attorney and own client's costs, being fees, disbursements and interest on unpaid disbursements of the plaintiff's attorneys.
- 7.6 is authorised to make payment of such other amounts as may reasonably be indicated and/or required for the well-being of the patient and/or in her interest, which a diligent trustee would have paid had such trustee been appointed.
8. The plaintiff's attorney of record shall attend to the creation of an *inter vivos* trust in order to protect the awarded funds to the exclusive benefit of the patient.

9. The trust to be erected for the benefit of the patient shall include (but not be limited to) the powers as referred to in the trust deed attached hereto as annexure A and regarded as incorporated into this order, subject to the directives and requirements of the Master of the High Court.
10. The trustee is ordered to furnish security to the satisfaction of the Master of the High Court, if required.

A. F. JORDAAN, J

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