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: **804/2019**

In the matter between:

ADVOCATE NGAKA DAVID KHOKHO N.O.
(curator *ad litem* to M M) Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT BY: **S.G.MEINTJES, AJ**

DELIVERED ON: **12 SEPTEMBER 2019**

---

[1] This is an action for damages arising out of a collision involving a motor vehicle with registration letters and numbers […] FS which

occurred on 18 July 2013 along George Lubbe Street, Bloemfontein. At the time of the collision, the said motor vehicle was being driven by one Tiisetso Samuel Lusie and M M (M) was a pedestrian.
In consequence of the collision M, who was 6 years of age at the time, sustained certain severe bodily injuries.

M's grandmother, Ms.L M, initially instituted the action in her capacity as grandmother and guardian of M against the Road Accident Fund.

However in due course, Adv.Khokho was on 6 June 2019 appointed as curator ad litem to M, by the High Court, Free State Division, Bloemfontein. He is therefore suing in his representative capacity as curator to M, as Plaintiff.

[2] No oral evidence was led in this case. The parties to this action presented a Stated Case.
The issues of liability and future medical expenses have been settled between the parties. They have agreed that it may be ordered, by consent, that the Defendant is liable for 100% of the Plaintiff's agreed or proven damages, in his representative capacity, suffered by M as a result of the collision. They have also agreed that the Defendant shall furnish the Plaintiff, in his representative capacity, with an Undertaking in terms of section 17(4)(a) of the Road Accident Fund Act,56 of 1996.

The issues in dispute and to be decided on, are the determination of the quantum of the Plaintiff's claim in his representative capacity, in relation to M's future loss of earnings and general damages.

[3] The parties agreed, based on medico-legal reports of a number of experts as submitted, (the Expert Notices)that:

3.1 as a result of the collision, M suffered a very severe brain injury, consisting of: a diffuse cerebral oedema; a (R) temporal subdural haematoma; a subarachnoid haemorrhage and an occipital skull fracture. This resulted in, amongst other conditions, in spasticity; multiple convulsions and an increased risk of seizures;

3.2 he was after the collision admitted to the Pelonomi Hospital in Bloemfontein, where he was detained for 3 months, during which he was admitted to the intensive care unit of the hospital immediately after the collision. There in hospital, he was sedated; splints were applied due to the spasticity as a result of the brain injury; he was intubated and ventilated; he underwent the insertion of an external CSF drain and he received blood transfusions on no less than 3 occasions;

3.3 he was discharged from the intensive care unit on 23 July 2013;

3.4 he was readmitted to the intensive care unit on 25 July 2013 due to respiratory distress as he developed septic complications of the respiratory system and streptococcus viridians infection in the blood;

3.5 he received Epanutin to prevent seizures and Epilim to prevent fits;

3.6 he received naso-gastric feeds;

3.7 he developed a urethral stricture and subsequent circumcision to relieve urinary symptoms experienced;

3.8 he was discharged from the intensive care unit again on 31 July 2013;

3.9 he underwent a CT scan, occupational therapy, speech therapy and physiotherapy;

3.10 he was finally discharged and carried out of hospital due to spasticity on 13 October 2013;

3.11 he presents with significant organic brain damage to his young and immature brain, and it being anticipated that, besides causing brain tissue and functional tissue damage, there will be impaired development of his brain, with either retardation of function or absence of outcome functions, that he will have some permanent and irreversible damage, the effect of which coupled with the effect on brain function development will be more significant as he grows older and is faced with more complex interactions and tasks to do, with problems academically, socially and as regards eventually martially and occupationally, the so-called "sleeper effect". He also presents severe neurocognitive deficits in several areas as found. He presents a major personality change after the collision, and he has impaired insight and reasoning ability. He presents major physical, cognitive, emotional and behavioural losses, including amongst others, chronic fatigue, daytime somnolence, weakness of the (L) arm and (L) leg, abnormal speech profile and severe dyslexia.

These deficits to be considered as permanent and irreversible;

3.12 M will in future require ongoing long-term psychiatric treatment, use medication and undergo psychotherapy. It was also agreed that the prognosis for good improvement is poor as a result of the permancy of organicity.

[4] **LOSS OF EARNING CAPACITY:**

Apart from the above, the parties relied on this aspect of the case on a Joint Minute, compiled by their respective industrial psychologists, i.e, Mr. B. Mendelowitz and Mrs. M. Kheswa.

It seemed that M before the accident, resided with his grandmother, mother and half-brother in Bloemfontein. He was in good health, not suffering from any physical, neuropsychological, psychological and psychiatric issues and attending a mainstream school, considered to have had intellectual potential in the average range.

The industrial psychologists in their Joint Minute, agreed that M "had the potential, had the accident not occurred, to obtain and qualify for a Higher Diploma at a university of technology…It is more than likely that he would have had financial assistance like a bursary or some other similar source to fund his studies. It is reasonable to expect that he would have so qualified by age of 25 and after job seeking for about 2 years, he would have found suitable employment in the corporate sector at about age 27,by virtue of his tertiary qualification. He would have started earning in the corporate sector at a LOWER QUARTILE B4 LEVEL, total packages, progressing continuously in the formal sector to an UPPER QUARTILE C4 LEVEL, by age 48, remaining at this plateau level, with annual inflationary increases until his normal retirement age of 65".They also agreed that M would have been continuously employed to age 65.

It seemed that after the accident, M is still residing with his grandmother and half-brother at the same address. His mother has passed away. His father being unknown to him and his grandmother. He never returned to a mainstream school, but in fact commenced schooling in 2015 at a special school and will remain in special education until such time as he is old enough to terminate his education, i.e. until he is 15 years old, whereupon he will exit the education system with severe deficiencies. He is in fact regarded as a severe handicapped person. The industrial psychologists agreed "that he will not cope in the workplace and will never be able to participate in the open labour market. This renders him unable to earn any income, post morbidly".

They agreed "that it is highly probable that his post- accident potential has been seriously and permanently affected and decreased to naught by this accident and its sequelae. He is…not suited to any work in the open or sheltered labour market". They agreed that due to his injuries, M will never be employed in the open labour market and should be afforded the opportunity to receive expert recommended treatments.

The Plaintiff obtained an actuarial report from Koch Consulting Actuaries, which report is based upon the agreed facts. The actuarial calculations reflecting M's future loss as R5 891 844.00, with no deduction for general contingencies. That was left to the parties to negotiate, or for the Court to decide.

The Defendant also obtained an actuarial calculation, prepared by Rosewood Technologies (Pty) Ltd, based upon the Joint Minutes by the industrial psychologists. They calculated M's future loss as R6 182 521.00.General contingency deductions also still to be taken into account.

Counsel for Plaintiff argued that a contingency deduction of 25% in respect of M's uninjured earnings should be applied to his loss of income (R5 891 844.00).Counsel for Defendant argued that a contingency deduction of 35% be applied. Also based on a future income of R5 891 844.00 as calculated by Plaintiff's Actuary.

It is clear, *in casu*, that the Court is approached by the parties, to make an assessment of M's future loss on the basis of actuarial calculations of the income he would have made but for the accident (R5 89 1844.00) and from which figure a contingency deduction still has to be made.

It ought to be borne in mind that reports by experts like industrial psychologists and actuaries, although based on expertise and being of huge benefit to a Court, are only a guide and ought to be evaluated as part of the totality before the Court.

In *Road Accident Fund v Guedes 2006(5) SA583 (SCA) at p586 para[8]* it was said: "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 a another's negligence. Such damages include loss of future earning capacity…The calculation of the quantum of a future amount, such as loss 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 that is often a very rough estimate…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…".

The contingency factors to be applied in any given case are to be considered on the facts of that case.(See Corbett: The Quantum of Damages in Bodily and Fatal Injury cases vol 1 (General Principles) at 51-52).The usual considerations include the possibility of errors in the estimation of the injured party's life expectancy, the likelihood of illness and unemployment which would have occurred in any event or which may in fact occur, inflation or deflation of the value of money, tax, alterations in the costs of living allowances and accidents or other contingencies which would have affected the relevant party's own capacity in any event. In Southern Insurance Association Limited v Bailey NO1984 (1) SA 98 it was stated as follows at 116 G-117 A: "Where the method of actuarial computation is adopted, it does not mean that the trial Judge is" tied down by inexorable actuarial calculations" He has "a large discretion to award what he considers right" (per HOLMES JA in *Legal Assurance Co v Botes 1963 (1) SA 608 (A) at 614 F)*. One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd 1980 (3) SA 105 at 114-5*. The rate of the discount cannot of course be assessed on any logical basis; the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case"

The actuarial calculations of Koch upon which both parties relied on, are based upon an allowance having been for M to be continuously employed until normal retirement age of 65.He has been assumed to have average mortality expectations.

Having regard to all the facts and circumstances of this case, including M's tender age at the time of the accident and actually very grim and restrictive expectations of life, I am of the view that a contingency factor of 25% should be applied. In the circumstances M is therefore entitled to be awarded in the sum of R4 418 883.00 in respect of future loss of earnings. Calculated as follows: Future income: R5 891 844.00-R1 472 961.00(Contingency deduction of 25%)=R4 418 883.00.

[5] **GENERAL DAMAGES:**

Counsel for_the Plaintiff submitted, with_reference to relevant case law, that the sum of R2 200 000.00 should be awarded in respect in respect of Plaintiff's claim for general damages.

Counsel for the Defendant also cited various decisions and contended that the sum of R1 500 000.00 should be awarded as such.

In *Bonesse v Road Accident Fund 2014 JDR 0303 (ECP) p28 – p29* it was stated as follows: "The principles relevant to the assessment of general damages are well-known and appear from cases such as Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194;Protea v Lamb 1971 (1) SA 530 (A); *AA Onderlinge Assuransie Assosiasie Bpk v Sodoms 1980 (3) SA 134 (A) and Southern Insurance Association v Bailey N.O. 1984(1) SA 98 (AD) at 119 G-H.*

In summary, in determining what would constitute fair compensation in a particular matter the court has regard, inter alia, to the circumstances of the case, amounts previously awarded in broadly comparable cases and the decrease in the value of money since those previous cases were decided. The court must bear in mind, however, that awards made in previous cases can only afford broad and general guidelines in view of the differences that inevitably arise in each case".

It appeared from the agreed facts that M has suffered a severe head injury, accompanied by brain damage. The brain damage severe and irreversible. The sequelae of his injury to be devastating on his life as a whole. The effects of his injury and condition will become worse in future as he grows older. He will not cope in the workplace one day. He will never be able to participate in the open labour market. In fact, he is unable to earn any income and will need life-long support.

Prior to the accident he was only 6 years old. Being a normal and healthy boy without any restrictions. His whole life with all its promise laying ahead. He attended a mainstream school with the intellectual potential in the average range as most of us and had the potential to obtain a Higher Diploma at a university of technology, had it not been for the accident .But now, since then, he seems uneducable in a special school and does not make any progress. His mortality expectancy to be assumed as average.

He will therefor endure his dismal future until he is 65 as estimated. He has suffered a severe loss and should be compensated well.

Having regard to all the circumstances of this case, the comparable cases as cited by counsel and the decrease in the value of money since those cases were decided, I am of the opinion that a fair amount would be one of R2 200 000.00.R1 500 000.00 as contended by counsel for Defendant as an appropriate award, just too low.

[6] **ORDER:**

6.1 Defendant is liable for 100% of the Plaintiff's agreed or proven damages, in his representative capacity, suffered by M as a result of the collision which forms the subject matter of this Stated Case;

6.2 Defendant shall pay to the Plaintiff, in his representative capacity as duly appointed curator ad litem to M M (M), a minor male, born on the 6th day of December 2006 the sum of:

6.2.1 R4 418 883.00 in respect of M's future loss of income and;

6.2.2 R2 200 000.00 in respect of M's general damages, together with interest thereon at the rate of 10.25% per annum, calculated from the day following the lapse of a period of 14 days from the date of the grant of this order to date of final payment;

6.3 The payment referred to in paragraph 6.2,supra,and the costs referred to in paragraph 6.5, infra, shall be made into the trust account of the Plaintiff's attorneys, being S.S.H. Mehlomakulu & Company Trust Account, (First National Bank Account Number: […]) pending the establishment of the trust contemplated in paragraph 6.6 ,infra;

6.4 Defendant shall furnish the Plaintiff, in his representative capacity, with an undertaking, as contemplated in section17(4)(a) of the Road Accident Fund Act, 58 of 1996, to compensate M for the cost of his future accommodation in a hospital or a nursing home, or for the treatment of, or rendering of a service or supply of goods to him, arising from injuries sustained by M in a motor vehicle collision which occurred on the 18th day of July 2013, after such costs have been incurred and on proof thereof, which undertaking shall include an undertaking to pay the reasonable costs to be incurred for purposes of:-

6.4.1 The establishment of a trust and the appointment of a trustee;

6.4.2 The fees of the trustee in administering the aforesaid nett capital amount and the costs of administering the aforesaid undertaking as determined by the Administration of Estates Act, 66 of 1965;

6.4.3 The furnishing of security by the trustee and obtaining of annual security bond to meet the requirements of the Master of the High Court in terms of Section 77 of the Administration of Estates Act.66 of 1965.

Subject thereto that the costs referred to in 6.4.1, 6.4.2 and 6.4.3 above are limited to the prescribed tariff applicable to a *curator bonis*;

6.5 The Defendant shall pay the Plaintiff's costs of suit as taxed or agreed, on a scale as between party and party, together with interest thereon calculated at the rate of 10.25% per annum, calculated from the day following the lapse of a period of 14 days from the date of the allocator to date of payment, such costs to include the costs occasioned by the:-

6.5.1 Appointment of the curator ad litem in this matter;

6.5.2 Employment of the following expert witnesses, including their reservation and qualifying fees, fees for attending Court, if any, and the costs of such expert witnesses attendant upon the consultations between such expert witnesses and the Plaintiff's legal representatives to attend such consultations:-

6.5.2.1 Dr Wilkenson (neurosurgeon);

6.5.2.2 Dr Fine (psychiatrist);

6.5.2.3 Mr Mashaba (occupational therapist);

6.5.2.4 Mrs Gibson (neuro-psychologist);

6.5.2.5 Mr Mendelowitz (industrial psychologist);

6.5.2.6 Mrs F van Vuuren (educational psychologist);

6.5.2.7 Dr R.J.Koch (actuary);

6.5.2.8 Dr Guy (speech and language therapist).

("The Expert Witnesses")

6.6 The Plaintiff's attorneys are hereby directed to:-

6.6.1 Cause a trust to be established in accordance with the Trust Property Control Act,57 of 1988;

6.6.2 Pay such amount as may be due to M to the trust for the benefit of M;

[7] The trust instrument contemplated in paragraph 6.6 *supra*, shall provide that:-

7.1 M will be the sole beneficiary of the trust;

7.2 The first trustee(s) shall be Mahalia Molefe as nominee for and on behalf of ABSA Trust Limited;

7.3 The trustee(s) shall provide security to the satisfaction of the Master of the High Court of South Africa;

7.4 The ownership of the Trust Property shall vest in the trustee(s) of the trust, in his/her/their capacity as trustees;

7.5 Procedures to resolve a potential dispute, shall be subject to the review of the above Honourable Court;

7.6 The trustee(s) shall be authorized to recover the remuneration of as well as the costs incurred by the trustee(s) in administrating the Undertaking as envisaged in paragraph 6.4,supra;

7.7 There shall be an exclusion of any community of property in the event of the marriage of M;

7.8 The amendment of the trust instrument shall be subject to the leave of the Honourable Court;

7.9 The trust shall terminate upon the death of M in which event the trust assets shall pass to the estate of M;

7.10 The trust property and the administration thereof shall be subject to an annual audit;

7.11 The trustee(s) shall maintain M as may be reasonably required from time to time.

[8] The attorneys shall be entitled to make payment of and or recover all disbursements incurred by them in the action, including, but not limited to, accounts rendered by:-

8.1 The expert witnesses;

8.2 Counsel employed in behalf of M;

8.3 The curator ad litem;

from the aforesaid funds received by them in trust for and on behalf of M.

[9] The attorneys shall be entitled to payment, from the aforesaid funds received by them in the trust and on behalf of M, of their fees.

____

S.G.MEINTJES,AJ

On behalf of the plaintiff: Adv. S.STRYDOM
Instructed by:
S.S.H.Mehlomakulu &CO
Attorneys
BLOEMFONTEIN

On behalf of the defendant: Adv. M.SHATA
Instructed by:
Maduba Attorneys
BLOEMFONTEIN