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FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

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

Case No. : 1189/2014

In the matter between:-

ANDRE BERRY N.O
o.b.o S P

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: DAFFUE, J

HEARD: 8 MAY 2018

JUDGMENT BY J P DAFFUE

DELIVERED: 5 JULY 2018

I INTRODUCTION

- [1] A claim was instituted by a mother on behalf of her minor son as long ago as 2014. She was run over by a motor vehicle whilst eight months pregnant. She was found to have suffered from an abruptio placenta and an emergency Caesarian section was done. The foetus suffered from fetal distress and the child was later diagnosed with cerebral hypoxia and epilepsy.
- [2] The claim was defended, but as will be indicated, all disputes, save one, have been settled. The only live dispute is the percentage of contingencies to be applied to the claim for loss of income.

II THE PARTIES

- [3] Adv A Berry is the plaintiff in his representative capacity as *curator ad litem* for the minor child, S P (“the child”). Mr B L Kretzmann is the *curator bonis*.
- [4] The Road Accident Fund (“RAF”) is the defendant.

III HISTORY OF LITIGATION

- [6] On 7 March 2017 defendant accepted liability in full for plaintiff’s proven damages. In terms of the order of court granted by

agreement, defendant also furnished the applicable undertaking in accordance with s 17(4) of the Road Accident Fund Act, 56 of 1996.

- [7] The matter was postponed to 16, 17 and 19 May 2017 for the *quantum* trial. On 16 May 2017 defendant was ordered by agreement to pay R1 500.000.00 to plaintiff in respect of general damages. Further orders were granted, *inter alia* to assist with finalisation of the remainder of the claim.
- [8] The matter was eventually set down for 8 and 9 May 2018 for adjudication of the remainder of the claim, to wit the loss of income.

IV THE OUTSTANDING DISPUTE

- [9] The parties agreed eventually that the actuarial report of Mr Rosslee of Argen Actuarial Solutions in respect of the loss of income before the application of contingencies should be accepted as correct. The amount agreed upon is R1 045 676.00.
- [10] The only dispute is the percentage of contingencies, if any, to be applied. Plaintiff submitted that 10%, alternatively 15% contingencies should be applied to the pre-morbid income calculated by the actuary to be R1 386 223.00. A 100% contingency percentage should be applied to the post-morbid income according to plaintiff's counsel, which the actuary calculated at R340 547.00 Defendant's counsel submitted that

the percentages should be 25% in respect of pre-morbid income and 35% in respect of post-morbid income.

- [11] The parties agreed to lead no evidence and that the court may adjudicate the matter on receipt of their written heads of argument.

V EVALUATION

- [12] Several expert reports were placed before the court and reliance was particularly placed on the joint minutes of the industrial psychologists, Mrs S J van Jaarsveld and Ms M Kheswa. Plaintiff also referred to a belated report obtained from an educational psychologist, Ms N P Ntuli. As mentioned, the report of the actuary was accepted by both parties as correct.

- [13] Due to the limited scope of the dispute, I do not intend to deal with any of the reports or the submissions in the heads of argument, save in the limited manner *infra*, but reiterate that cognisance has been taken thereof.

- [14] I accept that the child's career opportunities have been narrowed down significantly, but I cannot agree with Mrs Van Jaarsveld's submission that the child should be compensated for the total loss of his pre-morbid income.

- [15] No doubt, the determination of contingencies is a process of subjective impression or estimation rather than an objective calculation. The application of contingencies is largely

arbitrary and depends on the trial judge's impression of the case. The future is uncertain and it is difficult to judge how a person's career prospects may change over a considerable period of time and/or what other factors may influence the career, either positively or negatively. The facts and all relevant circumstances must be considered as best as possible in order to adjudicate the matter. See: *Ndokeni v RAF* 2014 (7A4) QOD 9 (ECP) at A4-11 and *Bonesse v RAF* 2014 (7A4) QOD 1 (ECP) at A3-17 where Pickering J relied on the well-known *Bailey* judgment.

[16] In my view, and notwithstanding the experts' and in particular Mrs Van Jaarsveld's views, there is no clarity that the child would have passed grade 12 pre-morbid, or at best, that he would have done so at the age of 18. I refer to the history of his siblings. His sister, that excelled the best, finished school at the age of 20 only. The Supreme Court of Appeal mentioned in *Glenn Marc Bee v RAF* (093/2017) [2018] ZASCA 52 (29 March 2018) para [30] that a court is entitled to test the reliability of the joint opinion of experts. Such agreed opinion may be rejected if it is based on incorrect facts. I have no issue with the joint minutes of the industrial psychologists in this regard, but the principle remains.

[17] I mentioned the fact that the child's one sister passed grade 12 at the age of 20. His mother is a hawker that passed grade 7 and his father, also a hawker, passed grade 11. His brother and half-brother passed grade 11 and both are unemployed.

One must be realistic and experts in particular should be warned not to be subjective and try to be too generous when reporting on the pre-morbid career prospects of plaintiffs. Our country is in a financial crisis and our employment rate is in excess of 25%; even higher under the youth. Many people with grade 12 certificates, even university degrees, are unemployed. The future is bleak for the majority of our young people.

[18] The “sliding scale” principle relating to contingency calculations in terms whereof a 1/2% is allocated for each year till retirement was mentioned and explained in *RAF v Guedes* 2006 (5) SA 583 (A) 588B – C, but although it may be accepted as a guide, it can never be the alpha and omega. The same court approached the matter totally different as is apparent from paragraphs [16] – [19].

[19] Bearing in mind the “sliding scale” principle a 25% contingency deduction for a child is not unusual. In matters as *in casu*, as was the case in *RAF v Guedes* 2006 (5) SA 583 (SCA), different contingency percentages may be applied to pre-morbid and post-morbid income.

[20] I am satisfied that a 25% contingency deduction in respect of both pre-morbid and post-morbid income would be just and fair. The effect hereof is that plaintiff is entitled to payment in the amount of R784 257.00, which is calculated as follows. The pre-morbid income is R1 386 223.00. If R346 557.00 (25%

contingencies) are deducted, the pre-morbid income after contingencies is R1 039 667.00. The post-morbid income amounts to R340 547.00. Once contingencies in the amount of R85 137.00 (25%) are deducted, the total post-morbid income is R255 410.00. The amount to be awarded is therefore R1 039 667.00 less R255 410.00 which is R784 257.00.

VI CONCLUSION

[21] The plaintiff is successful and entitled to party and party costs. Costs orders have been made by agreement against the RAF on 7 March 2017 and 16 May 2017 respectively. The costs order to be made shall take those orders into consideration.

VII ORDERS

[22] The following orders are issued:

- 1) Defendant is ordered to pay to plaintiff the amount of R784 257.00 (Seven hundred and eighty four thousand two hundred and fifty seven Rand) together with interest at the prevailing rate from a date 14 (fourteen) days after judgment to date of final payment.
- 2) Defendant shall pay plaintiff's costs of the action, including the qualifying and reservation fees and expenses of all further necessary expert witnesses for whose fees and expenses provision was not made in the orders of 7 March 2017 and 16 May 2017.

J. P. DAFFUE, J

On behalf of applicants: Adv D.R Thompson
Instructed by:
B L Kretzmann INC
c/o Claude Reid
BLOEMFONTEIN

On behalf of respondents: Adv I Sander
Instructed by:
Maduba Attorneys
BLOEMFONTEIN