

REPORTABLE



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

CASE NO: 77426/2009

DATE: 18/03/2013

In the matter between:

RADEBE, JULIA obo TD

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KUBUSHI, J

[1] This is a personal injury claim of a minor child (T) against the Road Accident Fund. At the time of the accident T was thirteen years old.

He is now seventeen years old.

[2] T was injured in a motor vehicle accident which occurred on 7 February 2009 in Qwaqwa.

At the time of the accident he was a passenger in the insured motor vehicle.

[3] At the hearing of the case I was informed that the merits of the case have been resolved between the parties. The defendant has conceded 100% of the liability for the damages sustained by T and agreed to pay the proven or agreed quantum. The defendant has also undertaken to provide the plaintiff with a certificate in terms of section 17 (4) (a) of the Road Accident Fund Act, No. 56 of 1996, as amended, in respect of future medical costs for T.

[4] What this court must now determine is the quantum. The outstanding damages which require quantification are in respect of general damages and prospective loss of income/ loss of earning capacity. The parties agreed that no evidence would be led in respect of these claims and that the evidence and opinions contained in the bundle of the experts' reports be placed on record as evidence. The agreed bundles of documents were handed in and admitted into the record as exhibit "A", "B" and "C" respectively. Exhibit "A" is the Index to Plaintiff's Expert Bundle; Exhibit "B" is the Index to Defendant's Expert Bundle; and Exhibit "C" consisted of the experts' joint minute bundle of:

- a. Minute between Ms Mattheus and Ms van der Ryst
- b. Minute between Ms Du Toit and Mr Wessels

The parties were agreed that the contents of exhibit "C" will be used for the purpose of arguing quantum. The actuarial report, which was based on exhibit "C", was also handed in and admitted into the record as exhibit "D".

GENERAL DAMAGES

[5] The plaintiff's counsel contends that T suffered severe brain damage which resulted in neurological injuries and should as such be awarded general damages in the amount of R1

000 000. She referred me in this respect to the unreported judgment of Masipa J in WEBB v RAF 2007 103/13786, wherein a claim was for a minor child with severe brain injury.

According to her, as per the report of Dr Edeling, the neurosurgeon who examined T, T continues to suffer recurrent headaches and since the accident he exhibits mood swings and aggressive behaviour.

[6] The defendant's counsel conceded in argument that it is clear T sustained head injuries. He however, contended that T had previous learning difficulties and that his history showed that he failed and repeated grade 1. He argued that from the report of Dr Edeling it is clear that the injury to the head was not serious as he recovered fully two days after the accident. He referred me to the report of Dr Brink, the neuro-psychologist, whose formulation was that the adverse effects of the brain injury were mild to moderate. In this regard he referred me to the judgment in COMBRINK v RAF 2001 (5) C & B B4/81 (W) wherein a girl aged fourteen years sustained head injuries and was awarded an amount of R180 000 which translates in 2013 to R365 000. He also referred me to the judgment in ROAD ACCIDENT FUND v MARUNGA 2003 (5) SA 164 (SCA) in respect of the proper process of determining general damages in present times. He submitted that an amount of R400 000 will suffice in the circumstances of this case.

[7] The parties' counsel are in agreement about the injuries sustained by the claimant. They differ as to the sequelae of the injuries and about the amount of quantum. The plaintiffs counsel is praying for an amount of R1 000 000 whilst the defendant's counsel says an award of R400 000 will be appropriate.

[8] The opinions of the various experts who examined T show that he sustained severe brain

injury with the following sequelae:

- a. the narrative test done by the psychiatrist, Dr Shovel, show that T is as a result of the accident suffering from an Organic Brain Syndrome which is permanent and irreversible. This Organic brain Syndrome is assessed as constituting serious long term mental disorder as well as serious long term behavioural disturbances;
- b. the prognosis of Dr Edeling, the neurosurgeon, is that the neurological sequelae of his brain injury have stabilised and become permanent and has resulted in an increased risk of late post-traumatic epilepsy;
- c. Mr Stipinouich, a speech - language therapist, is of the opinion that T's cognitive-communicative difficulties have consequences which are serious with regard to enjoyment of life.

This evidence is undisputed as the defendant did not tender evidence to the contrary and I am thus inclined to accept it for purposes of quantifying the damages.

[9] A claim for general damages comprise of pain and suffering, disfigurement, permanent disability and loss of amenities of life. See *PROTEA INSURANCE COMPANY v LAMB* 1971 (1) SA 530 (A) at 534H and *ROAD ACCIDENT FUND v MARUNGA* above at para [23],

[10] It is evident from the reports of the experts that T has suffered and will continue to suffer loss of amenities of life. The sequelae of T's injuries are considered by the Educational Psychologists, in their joint minute to have resulted in significant degrees of permanent educational and employment disability as well as loss of amenities, independence and enjoyment of life. He is also at risk of developing a variety of underlying organically based psychiatric conditions because of the diagnosed organic brain syndrome. According to the psychiatrist there has been devastating loss of amenities and T's general enjoyment of life

has very markedly diminished. According to the neurologist's opinion it is expected that the neurological sequelae of his brain injury will result in more significant losses of general amenities and enjoyment of life in adulthood. It is unlikely that he will develop the mental capacity for fully independent living or for fully independent management of his personal-, financial- or legal affairs.

[11] It is also undisputed that T suffered pain at the time of the accident. He is still in pain and shall continue to suffer pain even in the future. It is undisputed that he continues to suffer recurrent headaches. The neurosurgeon's opinion, which I accept, is that the organic neurological sequelae of T's brain injury have stabilised and become permanent. His post-traumatic headaches have become chronic, and are expected to persist in variable degrees in the long term. The brain injury has also resulted in increased risk of late post-traumatic epilepsy.

[12] On the issue of the awarding of quantum, a court has a wide discretion to award what it considers to be fair and adequate compensation to the injured party. It has been said that there is no hard and fast rule of general application requiring a court to consider past awards. It is generally accepted that it would be difficult to find a case on all fours with the one being heard and that awards in decided cases should be considered only as a guide of how other courts arrived at an award. See *PROTEA INSURANCE COMPANY v LAMB* above at 535H and *ROAD ACCIDENT FUND v MARUNGA* above at para [24].

[13] Having considered the various judgments I was referred to by counsel and other comparable awards from previous decisions, which I considered only as a guide,, my view is that a fair and just amount in the circumstances of this case would be R800 000.

PROSPECTIVE LOSS OF INCOME

[14] The parties are agreed that T is entitled to be awarded damages for future loss of income. What is in dispute is the contingency percentage applicable.

[15] The plaintiff's counsel is of the view that the percentage applicable should be 10% or at most 15% and not higher. She argued that T had no pre-existing learning difficulties before the accident. He had a stable upbringing and the experts are agreed that he would have completed matric and entered the job market. According to her, if the 10% is applied to the amount of the total of the gross future loss of R2 520 127 as actuarially determined in exhibit "D", T will be entitled to an amount of R2 268 114.

[16] The defendant's counsel on the other hand, contends that T had previous difficulties with his school work and doubts that he would have completed grade 12. He submitted that his family is not employed and not educated and as such nothing would have motivated him to complete grade 12. He prayed that the court must deviate and use a higher percentage. He submitted that an appropriate percentage should be 45%. He further submitted that when a contingency of 45% is applied to the total of the gross future loss of R2 520 127 T must be awarded an amount of R1 000 850-80 as damages for prospective loss of income. He referred me to the judgments in GOODALL v PRESIDENT INSURANCE CO 1978 (1) SA 389 (W) and SOUTHERN INSURANCE ASSOCIATION LTD v BAILEY NO 1984 (1) SA 98 (A).

[17] It is trite that contingency deductions are within the discretion of the court and depends upon the judge's impression of the case. Contingencies are normally calculated at 5% for past loss and 15% for future loss. See SOUTHERN INSURANCE ASSOCIATION V BAILEY NO

above at 113 (G) and Robert Kock: IHE QUANTUM YEARBOOK 2011 at p104.

[18] No contingency deductions have been made in this instance. The actuary, rightly so, did not make any contingency deductions in the calculation with a view that the deductions fall within the purview of the court. Factors which the court must take into consideration, when determining contingencies, are: the possibility that the plaintiff may eventually have less than a normal expectation of life; and that he or she 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 the discount may therefore vary, depending upon the circumstances of each case. See SOUTHERN INSURANCE ASSOCIATION v BAILEY NO above at 116G -H.

[19] In this instance, as per the joint minute of the Educational Psychologists, the opinion of the expert, which opinion I am inclined to accept, is that T presented with pre-existing learning difficulties, which would have impacted on his performance throughout high school as he was probably of below average intellectual abilities. However, the experts are agreed that he would most probably have been able to complete grade 12 (without university exemption). He would have probably attempted to enter into the open labour market, and would not have progressed to tertiary training.

[20] It is common cause that, due to the accident, T's chances of employment have been destroyed. He will never be able to earn an income.

Dr Edeling's opinion is that he will never work. The opinion of the industrial psychologists in their joint minute is that should T obtain some form of employment it would be of a highly

intermittent nature reaching a stage where extended unemployment would become a reality. These circumstances, in my view, should serve to tremendously lower the contingency deductions in favour of T.

[21] Under these circumstances my view is that a fair, just and reasonable contingency of 15% should be deducted from the plaintiff's earnings post morbid. The calculations are therefore as follows:

Value of income uninjured	R 2 520 127-00
Value of income injured	R_____ -
Gross future loss	R 2 520 127-00
Less: 15% deduction	378 019-05
Total gross loss.	R 2 142 107-95

The plaintiff is therefore entitled to R2 142 108-00 in respect of her claim for damages for future loss of earnings of T.

[22] In the premises I make the following order:

a. The draft order as amended marked with an "X" and initialled by me is made an order of this court.

EM KUBUSHI

JUDGE OF THE HIGH COURT

HEARD ON THE : 05 FEBRUARY 2013

DATE OF JUDGMENT : 18 MARCH 2013

PLAINTIFF'S COUNSEL : ADV N. ENGELBRECHT

PLAINTIFF'S ATTORNEY : MOKODUO INCORPORATED

C/O VAN STADE VAN DER ENDE

DEFENDANT'S COUNSEL : ADV J. SCHERMAN

DEFENDANT'S ATTORNEY: FOURIE FISMER INC

“X”

IN THE NORTH GAUTENG HIGH COURT. PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 2009/77426

PRETORIA_5_FEBRUARY2013

BEFORE THE HONOURABLE KUBUSHI J.

In the matter between;-

RAPEBE. JULIA obo TD

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

DRAFT ORDER

Having heard counsel / By agreement between the parties, the following order is made:-

1. The Defendant is ordered to pay the sum of R 1 3 to the Plaintiff in full and final settlement of the Plaintiffs claim. Payment shall be made into the trust account of the Plaintiffs attorneys, details as follows:

Mokoduo Incorporated Trust Account First National Bank, Rosebank Branch Account Number:
.....8290 Branch Code: ..3305

2. The Defendant is ordered to furnish the Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 Of 1996, for the costs of the future accommodation of TDR (hereinafter referred to as “the minor”) in a hospital or nursing home

or treatment of or rendering of a service or supplying of goods to the minor arising out of the injuries sustained by him in the motor vehicle collision of 7 February 2009, after such costs have been incurred and upon proof thereof.

2.1 In terms of the statutory undertaking referred to in paragraph 2 above, the Defendant shall pay:-

2.1.1 the reasonable costs of the creation of the Trust referred to in paragraph 4 below and the appointment of the Trustee;

2.1.2 the reasonable costs of the furnishing of security by the Trustee;

2.1.3 the costs of the Trustee in administering the minor's estate, as determined by Section 84(1)(b) of the Administration of Estates Act 66 of 1965, as amended, according to the prescribed tariff applicable to curators.

3. The Defendant will pay the agreed or taxed party and party High Court costs of the action to E) February 2013, such costs to include:

3.1 the costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 1 above;

3.2 the preparation and reservation costs of the Plaintiffs experts Dr. D. A. Shevel, Dr. H. J. Edeling, M. Gibson, A. Stipinovich, A. Mattheus, A. Greeff, C. Du Toit and G. Whittaker, if any and as agreed or allowed by the Taxing Master;

3.3 the costs of counsel; and I

3.4 the Plaintiff's attorneys shall serve the notice of taxation on the Defendant's attorneys and shall allow the Defendant 7 (seven) court days within which to make payment of such costs.

4. The requisite steps shall be taken by the Plaintiff with a view to forming a trust to, inter alia, administer and/or manage the financial affairs of the minor and that such trust shall be formed within 3 (three) months of the date of this order.

4.1 The Trustee shall be required to furnish security to the satisfaction of the Master in terms

of Section 6(2)(a) of the Trust Property Control Act 57 of 1988, as amended.

5. The trust instrument shall provide for the following:-

5.1 The separation of the property of the trustee/s from the trust property;

5.2 Ownership of the trust property vests in the trustee/s in their capacity as trustee/s;

5.3 The trustee/s shall provide security to the satisfaction of The Master in terms of Section 6(2)(a) of the Trust Property Control Act, 57 of 1988;

5.4 Procedures to resolve any disputes shall be subject to the review of any decision made in accordance therewith by the above Honourable Court;

5.5 Amendment of the trust instrument shall be subject to the leave of the above Honourable Court;

5.6 The trustee/s is authorised to recover the remuneration of and cost incurred by the trustee/s in administering the undertaking in accordance with the undertaking;

5.7 The minor shall be the sole income and capital beneficiary;

5.8 The trust property is excluded from any community of property in the event of the marriage of the minor;

5.9 The trust shall terminate on the death of the minor whereafter the trust assets shall devolve on his estate;

5.10 The trust property and administration thereof is subject to annual reporting by an accountant;

6. The capital amount referred to in paragraph 1 above, shall be paid by the Defendant directly into the trust account of the Plaintiffs Attorneys of record, Mokoduo Incorporated, for the benefit of the minor.

7. The statutory undertaking referred to in paragraph 2 above shall be delivered by the Defendant to the aforesaid Mokoduo Incorporated within 14 (fourteen) days of the date of this Order.

8. Mokoduo Incorporated will invest the capital amount less attorney and client fees and disbursements in terms of Section 78(2)(A) of the Attorneys Act, 53 of 1979, with First National Bank, Rosebank, for the benefit of the minor, the interest thereon, likewise accruing for the benefit of the minor which investment shall be utilized as may be directed by the Trustee of the Trust, when created.
9. Mokoduo Incorporated shall render an attorney and client statement of account to the Trustee, of the trust to be formed, in terms of the fees contract entered into between the Plaintiff and Mokoduo Incorporated.
10. The party and party costs referred to in paragraph 3 above, as taxed or agreed, shall be paid by the Defendant directly into the trust account of Mokoduo Incorporated for the benefit of the minor. After deduction of the legal costs consultant's fee for drawing the bill and attending to its settlement or taxation, the balance shall be paid into the trust unless same has not yet been created, in which event, such balance shall be invested in terms of Section 78(2)(A) of the Attorneys Act, 53 of 1979, with First National Bank, Rosebank, for the benefit of the minor, the interest thereon, likewise accruing for the benefit of the minor and shall be utilized as may be directed by the Trustee of the Trust, when created.

BY THE REGISTRAR