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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA LIMPOPO DIVISION, POLOKWANE

Case Number: 2313/2022

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

DATE

SIGNATURE

In the matter between:

ADV LESIBA DONOVAN TJALE N.O.

On behalf of: N[...] N[...] B[...]

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MARAIS C AJ:

INTRODUCTION:

[1] On 06 March 2010, a minor child, who was twenty-three months old at the time, was hit by a white Chevrolet Spark vehicle with registration number: F[...] (the “accident”), whilst the minor was standing inside a residential yard situated at Stand 6[...], C Section Nwamitwa Village in the Mopani District.

[2] The Defendant is the Road Accident Fund (“RAF”), which is a statutory body duly incorporated in terms of section 3 of the Road Accident Fund Act 56 of 1996 (as amended) (“RAF Act”) whose object is “...*the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles*”.

[3] The minor child, being the Plaintiff herein, is represented by his duly appointed curator *ad litem*, advocate Lesiba Donovan Tjale, who was so appointed by virtue of an application for his appointment, granted by this Court on 16 March 2023, under case number: 12986/2022. I will elaborate more on this appointment later in my judgment.

[4] Before me is an application for default judgment against the Defendant, only in respect of future loss of earnings. General damages and medical expenses were to be postponed *sine die*, as the Plaintiff intended to refer the issue of general damages to the Health Professions Council of South Africa.

[5] Plaintiff, in his particulars of claim dated 04 March 2022, pleaded that as a result of the accident, Plaintiff sustained a head and a leg injury, causing impairment and movement problems, intellectual disability and mental fatigue and that the impairment and disabilities are permanent and irreversible. The Plaintiff claims R500 000 with respect to future loss of earnings.

[6] On 28 August 2023, Plaintiff filed a notice in terms of rule 28(1) of the rules of this Court, whereby he gave the intention to amend his particulars of claim. In terms of this notice, Plaintiff intended to increase his loss for future loss of income to R6'000 000. The ten-day period to file an objection against the intention expired on 06 September 2023. No objection was filed. The further ten-day period to file the amended particulars of claim pages, as provided for in rule 28(5), as read with rule 28(7) of the rules of this Court, was 20 September 2023. The Plaintiff, however, only served his 'amended pages' on 26 September 2023 and filed it with the registrar on 04 October 2023.

[7] When the matter was argued before me, counsel for the Plaintiff did not bring the rule 28 notice to amend the particulars of claim under my attention. It was only when I started to write this judgment that I became aware that there might be a problem with the *dies* and filing of the amended pages. I then gave a directive to the Plaintiff's attorneys to provide me with supplementary heads of argument, wherein they only address the issue of the *dies* to file their amended particulars of claim, as I wanted to allow them to fully address me on this issue.

[8] On 22 February 2024, I received the supplementary heads of argument. I am satisfied that the Plaintiff made a proper case and that their amended particulars of claim are properly before this Court. Thus, the claim before me for loss of future income is the amount of R6'000 000.

EVIDENCE:

[9] In the Plaintiff's application for default judgment, he prayed that the Court use its discretion in terms of rule 38 of the rules of this Court to accept the evidence of the experts referred to in the expert reports and their respective confirmatory affidavits. In terms of rule 38(2), I accepted the evidence by the experts as contained in their respective reports and confirmatory affidavits.

[10] Ms Anna Mabina, an educational psychologist, consulted with the minor and his biological mother, on 19 August 2023, which is more than 13 years after the accident occurred. At the time of the consultation, the minor was 15 years and 4 months old and in grade 9. The minor's mother reported to the expert that her pregnancy with the minor was normal. She breastfed the minor until the age of two and that the minor's infant development was normal. The minor sat, crawled, stood and walked at age-appropriate periods. The minor is one of seven children and the sixth-born child in his family. He has one younger brother. Of the five elder siblings, only one sibling is reported to have completed grade 12 and is self-employed.

[11] It was further reported that the minor's mother did not complete grade 12 and was at the time, a taxi driver. Further, that on the day of the accident, the minor was with his brother – who was not named, and on the way to creche when the minor got hit by a car that was driven by a teacher from a neighbouring school, who was dropping a child at creche. The teacher allegedly reversed and knocked the minor down and the car went over the minor's leg. The teacher then transported the minor to the Letaba Hospital for medical assistance.

[12] The minor repeated grade 2. The expert only had school reports of grades 7 and 8. According to the minor's mother, the minor has poor concentration and attention span and only forgets his house chores but always remembers his schoolwork. The minor is reported to be well disciplined and participates in school competitions, but as of late, has become short-tempered and easily irritable. He is reported to have developed anger and is aggressive towards other children. The minor reported that he enjoys mathematics. The minor's current complaints are that he sleeps a lot, has pain when running, and often has nose bleeds.

[13] Following the Senior South African Individual Scale-Revised assessment, the minor tested significantly below average in the verbal, non-verbal, and full IQ scales. The minor also tested significantly below average in the attention and memory tests, concentration and mental tracking tests, and perceptual reasoning and reasoning tests.

[14] However, the minor tested within the high average range of the Bender Gestalt II tests for visual-motor integration functioning and his recall ability to encode, store and retrieve information from memory. The minor struggled to read with poor word recognition. The expert opined that the minor would benefit from intense reading to help him improve his vocabulary and familiarise himself with unfamiliar words. The minor could perform basic mathematics but struggled with more complex sums.

[15] The educational psychologist concludes that if not for the accident, there would have been a high possibility of the minor completing grade 12 with an endorsement of a diploma or bachelor pass, however, whereas the expert had no early childhood development reports it is difficult for the expert to make a confident postulation. She further postulated that the minor presents with emotional distress, and that the challenges that the minor displayed regarding reading and spelling, were not that significant.

[16] The minor consulted with an occupational therapist on 18 September 2023, which was more than thirteen years after the accident. The minor's mother reported to the occupational therapist that the minor was the third-born child in the family of four children – which is contrary to what was stated by the educational therapist. Further, that the minor left the accident scene by way of ambulance, contrary to the other expert report that the minor was taken to hospital by the teacher who knocked him over with a car.

[17] The Occupational Performance Components/Psychopathological Problems report confirmed that the minor presented with pain-free neck, back and upper limb movements. The minor presented pain in his right ankle joint. He has oedema on the fracture site and on his left ankle, with no visible scars. The minor had good sitting endurance but struggled to stand or walk for longer periods. The minor's senses,

posture and balance were normal. His muscle strength in the left ankle and foot tested good in strength with pain. He walked with an abnormal gait, and it was noted that he had a malunited left tibia fracture. The expert postulates that the minor will benefit from occupational therapy to assist with his cognitive and physical challenges.

[18] The minor and his mother consulted an orthopaedic surgeon, Dr L Nevondo on 07 April 2022, which was just over twelve years after the accident. The minor's mother reported to the orthopaedic surgeon that the minor was "*a pedestrian who got hit by a car which revering as he was playing with his friends*" (sic). This is contrary to the other versions given to other experts.

[19] The orthopaedic surgeon noted no deformities, scars, mild tenderness on the left leg, and normal range of motion in the ankle and knee. An x-ray to the left leg confirmed that the minor had a malunited fracture of the left tibia and fibula, distal 1/3 and medial angulated at 5 degrees. The minor's whole-person impairment was 5%. The expert opined that the concerns raised by the minor may be managed with physiotherapy and pain medication, and that further operative procedures are not warranted. In his view, the minor's injuries were not likely to influence the minor's life expectancy.

[20] On 29 September 2023 the minor consulted a neurosurgeon, Dr Thobejane. It was reported to Dr Thobejane that the minor resided with his mother and two siblings, which is contrary to other reports. All tests done by the neurosurgeon proved that the minor was healthy. More specifically, his neurological examination proved to be GCS15/15. The expert concluded that the minor sustained a mild head injury and suffers from mild post traumatic amnesia which affects some of his daily activities and that there were no focal neurological deficits.

[21] Lungile Langa, the industrial psychologist, met with the minor and his mother on 07 April 2022, which was just over twelve years after the accident. The minor and his mother reported to the industrial psychologist that the minor only failed grade 3,

contrary to what was reported to both the educational psychologist and occupational therapist.

[22] It is reported to the industrial psychologist that eight family members live in their four-bedroom house and have an inside tap. The educational psychologist and occupational therapist reported that they did not have a tap and had to walk to another yard to get water.

[23] The industrial psychologist states *“[f]rom a pessimistic point of view, one would have concluded that (the minor)’s educational attainments would therefore have been in line with his socio-economic background and family history, thus his parents educational background. But reality is the trend now lately is that children often achieve more than their parents academically and vocationally. This is due to the educational policies that encourage learner support and has seen most learners completing high school education resulting to the majority of them achieving more than their parents academically and vocationally.”*

[24] The expert opines that the most probable scenario is that the minor could have enrolled for a post-matric certificate, and, if it transpired that the minor was more technically inclined, he could have completed his N-studies at a technical college and applied for apprenticeship positions. If the minor opted for an apprenticeship, he would have earned on par with Paterson B1-B3 – 4 years. After this period, he could have written a trade test and could have qualified as an artisan in which case he would have earned on the lower quartile of a Paterson level B5, progressing to the lower of level C2, reaching his occupational ceiling at the age of 45 to 50 years.

[25] Tshebo Actuaries took the industrial psychologist report into consideration and concluded that, if it is assumed that the minor will complete grade 12 and obtain a post-matric certificate injured, and enrolled for an apprenticeship in January 2029,

earning in line with Paterson B1-B3 level, he could earn an average of R235 000 per annum. If the minor secures permanent employment in January 2033, he could earn Paterson B5 level with an average income of R364 000 per annum. With an increase linearly to Paterson C2 level, the minor could earn R473 000 per annum, by age 47.5 and thereafter to increase with inflation until retirement at the age of 65.

[26] Uninjured, the actuary opines that the minor would have completed grade 12 with a degree in December 2025 and June 2030 respectively. If the minor then secured permanent employment in July 2030, he could have earned in line with Paterson B4/B5/C1 level with an average of R425 333 per annum. The increase is assumed to have increased linearly to Paterson D1 level of an average of R1 082 000 per annum by age 42.5. Thereafter, the income is assumed to increase with inflation until retirement at age 65. In conclusion, the actuary calculated the loss in difference in future income to be R5 338 230.

CURATOR AD LITEM

[27] When the matter came before me on 09 October 2023, the curator *ad litem*, was not present, nor was his curator's report filed. The application for the appointment of a curator *ad litem* and possible curator *bonis* or creation of a special trust, was also not before me. This application was launched under a separate case, case number: 12986/2022.

[28] I postponed the matter to 12 October 2023 and ordered that the curator *ad litem* appear before me, that his curator's report be duly filed and that a copy of the application for the appointment of a curator also be filed under the current case number.

[29] There is a tendency amongst legal practitioners to launch applications for the appointment of a curator under a different, new case. This practice must be

discouraged because there is no logical explanation for this. Not only does the new case file cause unnecessary administration and filing challenges to the Court, but it also creates a situation wherein the judge who presides over the trial does not have a full and detailed explanation as to why there was a need to appoint a curator in the first instance, and what the curator's rights and responsibilities were. The trial judge must satisfy himself/herself that the appointed curator duly complied with the order granted.

[30] On 12 October 2023, the attorney on behalf of the Plaintiff and the curator *ad litem*, Adv Lesiba Donovan Tjale, appeared. A copy of the application for the appointment of curator as well as the curator *ad litem*'s report were filed.

[31] It is trite that an application for the appointment of a curator *ad litem*, is sought in terms of rule 57. Rule 57(5), as read with rule 57(13), provides that upon the appointment of the curator *ad litem*, who shall if practicable, be an advocate or, failing such, an attorney, shall without delay interview the patient (in this instance, the minor and his legal guardian(s)) and shall also inform the latter (or his legal guardian) of the purpose and nature of the application for appointment of a curator, unless the curator *ad litem* consulted with a medical practitioner who supported the application for the appointment of a curator, and the curator *ad litem* is satisfied that it would be detrimental to consult with the patient (or his legal guardian). The curator *ad litem* must make such inquiries as the case appears to require and thereafter prepare and file with the registrar his report on the matter to the Court and, at the same time, furnish the applicant (for the appointment of a curator) with a copy of his curator's report. In the curator *ad litem*'s report, he must set forth such further facts that he ascertained in regard to the patient's mental condition, means and circumstances, and he must draw the Court's attention to any consideration which, in his view, might influence the Court in regard to the terms of any order sought.

[32] In **Ex Parte Phillipson and Wells NO 1954 (1) SA 245 (E)** at 246, the Court held: "...it is a little difficult to state the limits of the authority of the Court to appoint a

curator ad litem or a curator bonis. But appointments have been made to avoid injustice...The principle underlying these cases would appear to be that the Court has power to appoint, and will appoint, a curator ad litem to assist persons to vindicate rights where there is no other suitable means in the ordinary way and will do so by appointing a curator ad litem either to the property plaintiff or to the defendant, for where there is a claim of right there should be a means of vindicating it."

[33] In **Abroms v Minister of Railways and Harbours 1917 WLD 51**, it was held that a curator *ad litem* will be appointed, *inter alia*, to litigate and vindicate the rights of those who cannot do so because of absence and impossibility of communication. Although this case was based upon a war situation, it applies to matters where children are involved. Section 10 of the Children's Act 38 of 2005 makes it mandatory that every child, that is of the age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child, must be given due consideration. An appropriate way is through the assistance of a curator *ad litem*.

[34] In terms of section 34 of the Constitution, 1996, each person has the right to access the courts. Access to courts is essential to achieving social justice. In **Rein v Fleischer NO 1984 4 SA 863 (A)** at 874C, Hoexter JA referred to the appointment of a curator *ad litem* as "*that vigilant protection of the rights of minors which our system of law seeks to promote.*"

[35] Since the enactment of our 1996 Constitution, we have become a society that is more vigilant about protecting children's rights. Section 28(1)(h) of the Constitution gives every child the right to have a legal practitioner assigned to such child by the state, at the state's expense, in civil proceedings affecting the child, where substantial injustice would otherwise result. In **Du Toit v Minister of Welfare and Population Development 2003 2 SA 198 (CC)** at 201G par 3, the Court referred to its constitutional obligation to appoint a curator *ad litem* for children where there is a

risk of substantial injustice. It stated that in matters where children's interests are at stake, those interests must be 'fully aired' before the Court to avoid substantial injustice to those children.¹

[36] In the present matter, although the mother of the minor was in a position to speak on behalf of the minor, she was not in a position to speak in his name. In **Christian Education South Africa v Minister of Education 2000 4 SA 757 (CC)** at para 53, the Court emphasised the importance of the appointment of a curator and that a curator (on behalf of a minor child) should make sensitive enquiries to enable the child's voice and that voice to be heard.

[37] Highly acclaimed Professor Trynie Boezaart² summarised the duties of a curator *ad litem*, *inter alia*, that the curator must interview the child without delay and make further enquiries as the curator deems necessary. The curator's report should bring facts or circumstances pertinent to the Court's attention. The curator *ad litem* must represent the child's best interest and do so by advancing all arguments that can reasonably be put forward on the child's behalf.

[38] In **Ex Parte Glendale Sugar Millers (Pty) Ltd 1973 (2) SA 653 (N)** the Court stated "*..the duties of a curator ad litem are clearly not to be confined to, or delayed until, an appearance in Court; the curator must investigate the relevant facts and circumstances and apply his judgment extra forensically in deciding what attitude he should adopt and the precise contents of his report to the Court*", and further that "*curators must make such investigations and judgments in regard to the appointment of curator bonis...*".

[39] International law, our Constitution, and the Children's Act have all played their part in protecting children's rights and broadening the vital role of a curator *ad litem* on behalf of a minor child. But the positive strives can only be improved if officers of

¹ See: T Boezaart 'The role of a curator ad litem and children's access to the courts' 2013 *De Jure*.

² Ibid.

the Court, such as an advocate appointed as curator *ad litem* over a minor child, fulfil their duty towards the courts. Failure to provide the Court with a proper curator's report on time could cause injustice to the child, and that would constitute an infringement of the child's constitutional rights.

[40] I deem it necessary to highlight the importance of a curator *ad litem* in children's matters, as in the matter before me, the curator *ad litem*'s report did not do justice to the minor and did not express the voice of the child.

[41] The application for the appointment of a curator *ad litem* was granted as early as 23 March 2023. However, the court order was only served upon the curator *ad litem* on 09 October 2023, when the matter was initially enrolled for default judgment. There was no explanation for why the attorney on record took more than six months to serve the application and court order upon the appointed curator. Had they done so, the curator would have had sufficient time to comply with his duties and report to this Court well in advance.

[42] The curator *ad litem*, in his report, confirmed that upon receipt of the court order, he made contact with the minor's mother and arranged to meet her at their homestead on 10 October 2023.

[43] The curator *ad litem*'s report states that the minor, his mother, and his siblings stay in a three-bedroom home, contrary to the experts who stated they reside in a four-bedroom home. I am inclined to accept this version of the curator *ad litem*, as he attended the minor's home, whereas the reports by the experts are based upon information they received from the minor and his mother.

[44] The curator *ad litem* further states that when he met with the minor “[t]he minor looked fine when I consulted with him except that he looks a bit worried.” The

greater part of the curator *ad litem*'s report, was a 'copy and paste' summary of what the experts had opined in their expert reports.

[45] The curator *ad litem* recommends that a curator *bonis* be appointed to assist the minor in managing his affairs for two reasons. First, the appointment of the curator *bonis* would be based on the fact that the injured is still a minor and, therefore, incapacitated to manage his own affairs and interests. Second, the medical findings by the experts indicate that the minor is *compos mentis*, though he has some cognitive and emotional impairments that affect and will continue to affect his vocational and scholastic capabilities and will so impact his occupational prospects and ability to secure employment in the future.

[46] The curator *ad litem* concluded to recommend that a certain Advocate Mkgopo be appointed as a curator *bonis* over the minor child and that he should provide security to the satisfaction of the Master of the High Court; that the curator *bonis* should be afforded the powers and obligations as set out in an annexure attached to his curator *ad litem* report, subject to the approval of the Master of the High Court, or should the Court not be inclined to appoint a curator *bonis*, that in the alternative a protection trust be created in favour of the minor, with Absa Bank as the trustee to such trust.

[47] The curator *ad litem* only briefly met the minor and his family once, and he confirmed that he never confirmed or had proper insight into the minor's academic achievements or his school reports. The curator *ad litem* further confirmed that he never met or consulted with the proposed curator *bonis*. Unfortunately, the curator *ad litem*'s report was of no help to this Court, which is quite understandable, given that the curator *ad litem* only received the court order whereby he was appointed, a day before meeting the minor and his family.

[48] In the case of **Modiba**³ the Court held: *"The appointment of a curator to a patient represents a very serious invasion of the Patient's liberty, dignity and control of his destiny. It is therefore essential that the conditions set out in sub-rules (1), (2) and (3) of the Rule are met before a curator may be appointed: see Ex parte Futter, supra. As Galgut J said in Ex parte Klopper: In re Klopper 1961 (3) SA 803 (T) at 805E to H: ". . . a Court will not appoint a curator bonis until it is absolutely satisfied that the patient has to be protected against loss which would be caused because the patient is unable to manage his affairs..."*

[49] The South African Law Commission Report of December 2015, Project 122, arose from concern over how South African law addresses the needs of people with diminished capacity to make informed decisions and exercise their legal capacity. It noted that: *"Making decisions is an important part of human life. By exercising choice through our decisions in matters relating to our personal welfare and financial affairs, we express our individuality and exert control over our own lives. Impaired decision-making ability can be the result of mental illness, intellectual disability, brain injury, stroke, dementia, a specific disease, or impairment related to ageing in general. A legitimate expectation for the law is that it should establish a structure within which autonomy and self-determination are recognised and protected, while also protecting persons with decision-making impairment from abuse, neglect and exploitation....."*⁴

I share these sentiments.

³ Modiba obo Ruca; In Re: Ruca v Road Accident Fund (12610/2013; 73012/13) [2014] ZAGPPHC 1071 (27 January 2014) at para 1 thereof.

⁴ As cited in *Scott and Others v Scott and Another* (2020) ZAKZDHC 37 at para 1.

[50] As stated earlier, the curator *ad litem*'s report should assist the Court in making decisions in the best interest of children. To achieve this, the curator *ad litem* could consider the following factors (which list is not exhaustive),:

- (a) The minor's scholastic achievements, past and current school reports, his highest level of education and the highest possible level of education that he could achieve, injured;
- (b) Having regard to the child's age, whether the child has been exposed to any form of work experiences or similar exposure;
- (c) Whether the child has any talents such as musical, art, sports and the like, which he could continue doing after school as a source of income.
- (d) Having regard to the child's family dynamics, whether the child will have any family member or another trustworthy person who will be able to assist the child in making financial decisions once the child reaches the age of majority.
- (e) The child's current health.
- (f) Whether the child is exposed to alcohol, cigarettes or other intoxicated substances, which could cause health problems to the child or financial exploitation upon the child, should an award be made to such child;
- (g) Whether the child has ever been in conflict with the law which could have an adverse effect on such child, especially upon reaching the age of majority when such child may manage his own affairs;
- (h) The nature of the child's injuries;
- (i) The child's family or his next of kin who resides with him, their highest level of education or current employment status;

- (j) The support system that the child has, especially should an award be made to the child;
- (k) The voice of the child, taking due consideration of the age, level of maturity and stage of development into consideration and what the child's ability would be, should he reach the age of majority;
- (l) Whether the attorneys on record for the minor Plaintiff, has taken all reasonable steps in favour of the minor Plaintiff, which the curator *ad litem* should ratify, inclusive of whether any contingency fee agreement complies with the Contingency Fees Act 66 of 1997, as it will have a financial impact on the minor Plaintiff;
- (m) And, the fourteen factors – where applicable, which are in the child's best interest, as provided for in section 7 of the Children's Act, 38 of 2005.

[51] I have considered the expert reports, the minor's academic achievements, and his family dynamics. The minor is healthy, and I have no reason to believe that he will be totally incapable of managing his own affairs upon reaching the age of majority. Considering his youthfulness and maturity, as well as the fact that he has no family member or friend that could assist him in making sound financial decisions upon reaching the age of majority, there is a greater need to protect any award to be made to this minor Plaintiff.

[52] It cannot be in dispute that the minor suffered an injury as a result of the accident that took place on 6 March 2010 when the minor was almost two years old.

Whereas the minor suffered an injury due to a motor vehicle which knocked over the minor, the minor is entitled to receive compensation from the Defendant.

[53] On 31 May 2023, Kganyago J ordered that the Defendant be held liable for 100% of the merits.

[54] I am of the view that the Plaintiff's health concerns, such as constant headaches, nose bleeds, and often sleeping, are all treatable through appropriate therapy and medication, as opined by various experts. It is not life-threatening and the minor's life expectancy was not affected as a result of the accident.

[55] It is trite that the percentage of the contingency deduction depends upon many factors and ranges between 5% and 50%, depending on the facts of the case.⁵

[56] I am bound to make an award on the pleadings that are before me. In the particulars of claim, Plaintiff claimed R6'000 000 for future loss of earnings. I have further considered the actuary report and the Plaintiff's heads of argument regarding this claim. The actuary recommended that with regards to future loss of income, a deduction of 20%, uninjured and 35%, injured be applied.

⁵ See AA Mutual Association Ltd v Maqula 1978(1) SA 805 (A) 812

[57] Whereas this Court was not provided with complete scholastic reports of the minor, nor could the experts opine thereon as they, too, did not have such reports, and also taking into consideration that the minor was only twenty-three months old at the time of the accident, his family dynamics and current health status, a high contingency must be applied if I accept the figures stated in the actuary report.

[58] In the result, I have applied a 50% contingency deduction to the pre-morbid earnings and a 50% contingency for post-morbid. I am satisfied that the contingency deduction concerning both pre-morbid and post-morbid income would be just and fair, considering all the evidence presented to me.

[59] The calculations are as follows:

Income if the accident did not occur:

Past	-	R0
Future	-	<u>R12 452 346</u>
		R12 452 346
Less 50%		<u>R6 226 173</u>
Amount:		R6 226 173

Income post-accident:

Past	-	R0
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Future	-	<u>R7 113 303</u>
		R7 113 303
Less 50%		<u>R3 556 651.50</u>
Amount:		R3 556 651.50

[60] The nett loss of earnings is $R6\,226\,173 - R3\,556\,651.50 = R2\,669\,521.50$. Given all the facts presented, the balance of probabilities favours awarding compensation to the Plaintiff for loss of income in the amount of R2 669 521.50, which is fair compensation.

[61] The only remaining question is whether the funds should be protected by way of the appointment of a curator *bonis*, or the creation of a special (protection) trust. I am guided by the principles laid down in the case of **Master of the High Court v The Pretoria Society of Advocates**.⁶

[62] In my view, appointing a curator *bonis* would be too costly and limit the minor's right to make his own decisions upon reaching the age of majority.

[63] A special trust, created solely for the benefit of the minor Plaintiff, would be better suited for him, to allow him to attain legal capacity upon reaching the age of

⁶ Master of the High Court v The Pretoria Society of Advocates and Others; Van Rooyen N.O. obo Ntsoke v Road Accident Fund; Raphulu v Road Accident Fund; Raubenheimer obo Brian v Road Accident Fund; Segoba obo Sekwne v Road Accident Fund; Wentzel v Road Accident Fund (35182/2016;28304/2014;44200/2018;17258/2015;40258/2021;35182/2016) [2022] ZAGPPHC 396; 2022 (6) SA 446 (GP) (20 May 2022)

majority and to enter into contracts freely. Upon reaching the age of majority, the trustee would also be able to guide the minor to make sound financial decisions. Should the trustees believe that the minor Plaintiff (upon reaching the age of majority) can make his own sound financial decisions, then upon an application to the High Court, this special trust may be terminated.

[64] The curator *ad litem*, made recommendations in his report should a special trust be registered. In this regard, ABSA Bank has consented to accept the nomination as a trustee, and a copy of the draft trust deed and acceptance as trustee was attached to the curator *ad litem*'s report as annexures "B11" and "B12" respectively.

Accordingly, I make the following order:

ORDER:

[65] The Defendant shall pay to the Plaintiff the total capital amount of R2'669 521.50 (two million, six hundred and sixty-nine thousand, five hundred and twenty one rand and fifty cents) for loss of future loss of earnings, together with interest at 9% per annum from 11 March 2022, being the date of service of the summons.

[66] The amount of R2'669 521.50 (two million, six hundred and sixty-nine thousand, five hundred and twenty one rand and fifty cents) plus interest at

9% per annum, from 11 March 2022 until date of full payment (the “*compensation amount*”), shall be paid by way of electronic transfer into the trust bank account of the attorneys of record on behalf of the Plaintiff, being NKP Manamela Attorneys, of Moshiya’A Mphora House, 55B Jorissen Street, Moregloed, Polokwane, 0699.

[67] The compensation amount payment shall be made into the Attorney of record’s trust account, which trust account shall be one envisaged in terms of section 86(4) of the Legal Practice Act, 28 of 2014, pending the establishment of the Trust to be created and the issuing of the letters of authority (“*the Trust*”);

[68] The attorneys of record in the action are ordered to establish a Trust for the benefit of N[...] N[...] B[...], identity number: 0[...], and the nett proceeds of the action on his behalf, after the deduction of the taxed party and party scale costs are to be deposited to the credit of such Trust.

[69] The terms of the trust are to include:

- a. The proposed trustee is ABSA Trust, represented by Leane Edwards (of Block A, ABSA Bank Pretoria Campus, 337 Petroleum Street, Waltloo, Pretoria, 0184) whose written consent to act as trustee is annexed hereto marked “A”
- b. If Leane Edwards on behalf of ABSA Trust is unable or unwilling to accept appointment or for any reason becomes unable to continue to act once

having been appointed, then the Master of the High Court will in his or her sole discretion be entitled to appoint another trustee.

- c. c. The trustee is required to furnish security for the administration of the trust's assets. The trustee's fees for the administration of the trust are to be calculated at the rate of 1% per annum of the trust assets under administration.
- d. The trustee shall administer the trust subject to the powers and terms, which follow.
 - i. The trustee must in writing accept her/their appointment as such and the benefits and duties conveyed by the trust deed, and acknowledge receipt of the donation in terms of which the trust will be established.
 - ii. The trustee may at any time in writing appoint additional trustees, or one or more trustees to succeed any or all of them, or one or more agents with powers of substitution and delegation, to perform any acts on their behalf. If ever there is no trustee, the person who keeps the books of the trust or any beneficiary may call a meeting of the beneficiaries, assisted by their guardians if applicable, which meeting shall appoint a trustee or trustees, failing which the Master will appoint a trustee.

- iii. A trustee shall cease to act as such if he/she resigns, or becomes mentally disturbed or ill, or alcoholic, or incompetent or unable to act as trustee, or being a corporate body, it is liquidated. If any trustee ceases to act, the remaining trustee/s shall continue to act and shall have full powers in terms hereof.
- iv. In administering the trust, the trustee shall follow such procedure as they deem fit. Proper books of account shall be kept. The trustee may appoint an auditor for the trust, but are not obliged to do so. Leane Edwards on behalf of ABSA Trust shall have the sole signing powers on all banking accounts and shall have the power to veto any decision. Nevertheless, she shall consult with the other trustees, if any, as to any distributions.
- v. Any trustee or trustee's agent who is a professional person will be entitled to perform professional work for the trust and to charge reasonable professional fees for such services over and above the fees allowable to the Trustee as set out herein. The Master of the High Court is entitled to call for taxation of any fees so charged.
- vi. The trustee has the power to perform in the name of the trust or in their own name on behalf of the trust, any acts and enter into any contracts and undertake any obligations, whether commercial or otherwise, which may be done by a natural person of full legal capacity, which powers include but are not limited to the following:

1. To purchase or acquire in any shares, unit trusts, debentures, stocks, negotiable instruments, mortgage bonds, notarial bonds, securities, certificates, and any moveable or immovable property or any incorporeal rights and to invest in such assets and to lend funds to any party or make a deposit or investment with any institution, such as investments to be of such nature and on such terms and conditions as the trustee may deem fit;
2. Exchange, replace, re-invest, sell, let, insure, manage, modify, develop, improve, convert to cash or deal in any other manner with any asset which from time to time form part of the trust funds;
3. Pledge any trust assets to encumber such assets with mortgage bonds or notarial bonds to utilise same as security in any manner whatsoever;
4. Institute or defend any legal proceedings or otherwise to take any other steps in a court of law or other tribunal and to subject controversies and disagreements to arbitration;
5. To call up and or collect any amounts that may from time to time become due to the trust funds;
6. Settle or waive any claim in favour of the trust;

7. Exercise any option and to accept and exercise any rights;
8. Exercise any rights or to incur any obligation in connection with any shares, stocks, debentures, mortgage bonds or other securitys or investments held by the trust;
9. Open accounts at any bank or other financial institution and to manage such accounts and if necessary to overdraw such accounts;
10. Take advise from any attorney or advocate or any other expert for the account of the relevant trust account;
11. Lodge and proof claims against companies in liquidation or under judicial management and against insolvent or deceased estates;
12. Appoint professional or other person on a temporary or permanent basis to conduct the whole or any portion of the business of the trust under supervision of the trustee or manage the investment opart or the entirety of the funds of the trust and remunerate such persons for their services out of the funds of the trust;p

13. Form any company and to hold any interest in any company and to form any other trust to hold an interest in any other trust or partnership or undertaking for the purposes of this trust or in the interest of Ngobeni Nyiko Bornwise;
 14. Amalgamate with any other trust with the same or similar aims in this trust;
 15. Commence any business or continue such business or to acquire an interest therein and for such purpose to acquire assets or to incur expenses and to partake in the management, supervision and control of any business and to conclude any partnership or joint venture;
 16. Accept any disposal in favour of this trust and to comply with any conditions regarding such disposal;
 17. In general, do all things and to sign all documents required to give effect to the aims of this trust.
- e. The trustee has an absolute and unlimited discretion, in all matters relating to the trust but they may not act contrary to this order and the trust deed to be drafted in accordance herewith.

- f. The trustee and his/or her successor or successors shall be required to provide security for the due administration of the trust.
- g. The trustee shall not be personally liable to the beneficiaries for any trust losses, except caused by gross negligence or deliberate wrong.
- h. The trustee shall under no circumstances be personally liable to creditors of the trust.
- i. The beneficiary, who for income and capital, is N[...] N[...] B[...] and any of his biological or legally adopted child/ren for whom he would be responsible for in law to maintain and support.
- j. No asset, capital or income of the trust will vest in any beneficiary until such is actually paid over, handed over or delivered by the trustee to the beneficiary. No capital or income benefit to which any beneficiary is or may become entitled by virtue of this trust deed shall, prior to actual payment or transfer thereof by the trustees to the beneficiary, be capable of being ceded, assigned or pledged, or transferred in any way, or be capable of attachment by any creditor or trustee of a beneficiary upon insolvency, unless the trustees consent thereto in writing.
- k. The trustee may in his/her absolute discretion, at any time prior to termination of the trust, transfer or pay any part of the trust fund to the beneficiary, as the free and absolute property of such beneficiary.

l. Any asset or money which the beneficiary receives pursuant to this trust deed shall not form part of any joint estate, and shall not be subject to any marital power.

m. The trust deed can only be amended in writing with the consent of the Master of the High Court and, failing such consent, with the leave of this Court provided however that no amendment which is in conflict with the provisions of the Court Order may be effected without the prior leave of the Court having been granted thereto.

[70] The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale, which shall include the reasonable costs incurred by and on behalf of the Plaintiff, as well as the costs consequent to attending the medico-legal examinations.

C MARAIS
ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 16h00 on _____ 2024.

DATE OF HEARING: 12 October 2023.

DATE JUDGMENT DELIVERED: _____ 2024.

APPEARANCES:

Counsel for the Plaintiff:
Attorney for the Plaintiff:
Email Address:

NKP Manamela Attorneys
info@nkpattorneys.co.za

Counsel for the Defendant:

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