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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)**

CASE NO:9805/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED

Signature:

Date: **23 OCTOBER 2024**

In the matter between:

M[...] L[...] N[...]

obo M[...] S[...] S[...]

PLAINTIFF

And

ROAD ACCIDENT FUND.

DEFENDANT

JUDGMENT

MONENE AJ

[1] On 1 November 2021 S[...] S[...] M[...], a minor child of the plaintiff was a passenger in a motor vehicle, to wit a bakkie, which, when it hit a pothole and or a speedbump while travelling at a very high speed, caused the minor child to fall off the motor vehicle and sustain injuries.

[2] As a result of this incident the minor child sustained injuries recorded as severe head injury and various bodily soft tissue injuries.

[3] The plaintiff, biological mother to the minor child, instituted action proceedings, on behalf of her minor child, against the defendant for damages arising from that accident.

[4] The defendant did not defend this action leading to the plaintiff approaching this court on default and seeking to be heard per cover of affidavit in terms of uniform rule 38(2). The plea to proceed in terms of uniform rule 38(2) was positively responded to by the court.

[5] It being so that the jurisdiction of this court is unfortunately as per precedence hampered by the defendant's failure to make an election on the seriousness of the injuries in *casu*, what stands to be determined before this court is the liability and the plaintiff's loss of earnings with general damages having to be postponed *sine die*.

LIABILITY

[6] Section 17(1) of the Road Accident Fund Act 56 of 1996 provides that the defendant should compensate any person for loss or damage arising from injuries sustained because of the negligence of a driver of a motor vehicle on the road.

[7] In the unreported matter of ***Mukansi v Road Accident Fund (Case Number 22/2013) out of this division delivered on 3 September 2024 at paragraph 8*** this court, dealing with passenger claims, made the following remarks which deserve, in my view, emphasis in *casu*:

"I struggle to fathom why negligence on the part of an insured driver is, in passenger claims, sometimes treated as some brainteaser because, save for where the passenger somehow took over or hijacked or interfered with the act of a driver by perhaps contesting over control of the steering wheel of a motor vehicle or the acceleration, clutching or braking system or perhaps frustrating

the driving function in any manner, there is simply no way a passenger can be liable for a motor vehicle accident.”

[8] Under cover of affidavit the plaintiff adduced the following uncontested evidence in the form of section 19(f) affidavit as well as a default judgment damages affidavit where she recorded that it was the negligence of the bakkie motor vehicle who caused the injuries sustained by the minor child in that he drove at an excessive speed and failed to keep a proper lookout.

[9] There was no evidence led by anyone to gainsay this version at all and accordingly I do not have to struggle to find that the proverbial one percent negligence on the part of the bakkie driver has been proven, clearing the way for the defendant to be found liable for 100 percent of the plaintiff's proven damages.

[10] Accordingly I must find that the defendant is 100 percent liable for the plaintiff's proven damages.

QUANTUM (LOSS OF EARNINGS)

[11] In pith and in substance the evidence led by the plaintiff under cover of affidavit in terms of Uniform rule 38(2) was the following:

11.1 Dr D Bounge-Poati, the neurosurgeon testified, in the main that, arising from the injuries sustained in the accident the minor child suffered a mild traumatic brain injury and is post the accident evincing features of attention deficit hyperactivity disorder.

11.2 The educational psychologist, M Lautenbach, opined that the minor child is post- morbid forgetful and generally lacks concentration. It was further observed by this expert that the child probably needs to be diverted from normal schooling to a special needs school. However, it was still likely that this minor child may reach grade 12, opined this expert.

11.3 Dr R S Leshilo, a psychiatrist found the minor child to be incapable of playing with other children because he was now moody, aggressive and generally disruptive in all social contexts. This expert determined the minor child to be uncooperative with teachers and to be seeing schoolwork as unnecessarily burdensome, it was further determined by this witness that going forward the minor child will need continuous conduct disorder or psychiatric intervention. His cognitive challenges resulting from the sequelae of the accident, it was opined further by this witness, may worsen as the minor child grows into an adult. Currently, the cognitive incapacities arising from the accident make the child unable to manage his academic and personal affairs.

11.4 The occupational therapist, S Doorasamy, stated that even with long-term intervention to ameliorate the minor child's cognitive deficits, the child will at the terminal end of his school years need vocational skills training which may assist him in the future regarded sheltered or sympathetic employment that. That sheltered employment could only now, post-morbid be in sedentary and light to medium works only

11.5 M N Del Valle, the plaintiff's industrial psychologist made a postulation that the minor child's pre-morbid occupational prospects would have taken him post matric from unskilled work to semi-skilled employment and then with upskilling to the upper quartile of semi-skilled. He would have, it was opined further, worked until retirement at age 65 years with uninjured contingencies of employment opportunities, improvement in education levels, job performance and possible retrenchments and early death not being disregarded. Post-morbid the minor child was now less likely to complete NQF Level 1 as his academics may worsen because of the already stated possible further decline in cognitive abilities. The industrial psychologist further opined that because of the cognitive, emotional and psychosocial deficits suffered by the minor child, he was going to be a vulnerable member of the labour market in an unstable job-shedding environment.

11.6 Mr Sauer, an Actuarial scientist, informed in the main by the industrial psychologist's report, which itself summarised all other expert reports

preceding it, postulated a net future loss of earnings at R2 325 813.00 having factored contingencies at a 20 percent to 40 percent spread.

[12] The approach in computation of loss of earnings was stated in ***Southern Insurance Association v Bailie v NO 1984(1) SA 98(A) at 112E-114F***(“*Bailie*”) where the following was stated:

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augururs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment by way of mathematical calculations on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.”

[13] In ***Prince v Road Accident Fund(ca143/2017) [2018] ZAECHC 20(20 March 2018)*** the full court cautioned courts never to ignore loss of earnings computations so long as those computations are having an evidential basis. I thus, in general, have no appetite to deviate from actuarial computations in this matter seeing that they are premised on the uncontroverted evidence of preceding experts such as the educational psychologist, the psychiatrist, the neurosurgeon, the occupational therapist, the industrial psychologist.

[14] Furthermore, having regard to the facts and expert opinions already referred to above, particularly the minor child’s relatively young age of 11 years at the moment and consequent expected long life expectancy against the backdrop of a very high unemployment rate in this country and the forever present reality of possible early death, I am persuaded that the contingency percentages loss of earnings factored in by the actuarial scientist as already alluded to above are fair and

reasonable. Indeed, I find those contingencies to accord with ***Van der Plaats v Southern African Mutual Fire and General Insurance Co 1980(3) SA 105(A) 114-115*** which a long time ago spelt out that contingency deductions must allow for the possibility that the plaintiff may have less than normal expectations of life and may experience periods of unemployment flowing from accident sequelae and is seen within the prism of prevailing economic conditions.

[15] I am furthermore counseled on contingencies by ***Dlamini v Road Accident Fund (59188/13) [2015] ZAGPPHC 646(3 September 2015)*** where, inter alia, it was stated that:

“Both favorable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should, in exercising its discretion, lean in favour of the plaintiff as he would not have been placed in the position where his income would have to be the subject of speculation if the accident had not occurred.”

[16] I am accordingly inclined to award loss of earnings as computed by the expert actuarial scientist.

UNDERTAKING IN TERMS OF SECTION 17(4)(a) OF ACT 56 OF 1996

[17] According to the the plaintiff's minor child will in the next three years need neurosurgical intervention to deal with the trauma flowing from the accident.

[18] According to the psychiatrist the child will need outpatient psychotherapy for a period of a year and there is, furthermore, there is a likelihood that he may need in-hospital psychiatric treatment in future.

[19] The occupational therapist opined that to address cognitive deficiencies, emotional difficulties and delays in academic skills development, the minor child will need weekly occupational therapy sessions.

[20] The plaintiff has thus, in my view, successfully mounted a case for an undertaking in terms of section 17(4)(a) of the Act. Whether it is competent of this court to expressly order an “undertaking” is a question I will not answer today as precedence in this RAF matters has seen such an order made.

[21] In the result, I make the following order:

[21.1] The defendant is 100 percent liable for damages suffered by the minor child of the plaintiff arising from the motor vehicle accident of 1 November 2021.

[21.2] The defendant shall pay an amount R2 325 813.00 (**TWO MILLION THREE HUNDRED AND TWENTY-FIVE THOUSAND EIGHT HUNDRED AND THIRTEEN RANDS ONLY**) in respect of loss of earnings.

[21.3] The said amount shall be paid into the trust account nominated by the plaintiff’s attorneys of record within 14 days of this court order by direct transfer within 180 days of this court order being delivered:

[21.4] The defendant shall pay the plaintiff’s taxed or agreed to party and party costs on a high court scale which costs shall include the costs attendant to obtaining expert reports and the costs of counsel on scale B:

[21.5] Should the defendant fail to pay the amount in 21.2 above within the 180 days and/or the agreed to or taxed costs within 30 days of taxation or agreement; the plaintiff shall be entitled to recover interest thereon on the prescribed rate of interest from the due date to date of final payment:

[21.6] The defendant shall furnish the plaintiff with an undertaking in terms of the provisions of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 within 60 days of this order being granted:

[21.7] The issue of general damages is postponed sine die.

MALOSE S MONENE
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on : 26 June 2024

Judgment delivered on : 23 October 2024

For the Plaintiff : Adv. J Bam
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For the Defendant : No appearance