IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable/Not reportable

Case number: 277/2021

In the matter between

Z[...] R[…] S[…] obo L[…] T[…] S[…] **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

Coram: Loubser J
Heard: 13 August 2024
Delivered: 15 November 2024

Summary: Young child aged 8 years injured in accident – child functioned below average with cognitive difficulties before accident – contingencies

ORDER

1. The draft order is made and order of court.

JUDGMENT

LOUBSER J

[1] On 16 July 2019 a young boy by the name of L[…] T[…] S[…] was hit by a car when he was walking to school in the morning. The accident happened along the Tebang-Main Road in the area of Makwane in the Free State Province. At the time, L[…] was 8 years old and in Grade 2. He suffered serious injuries in the accident in the form of a concussive brain injury and an occipital haematoma.

[2] As a consequence, summons was issued against the Defendant for the payment of damages in the total amount of R11 031 418.00. The proceedings came before this Court. L[…] is now 13 years old and he is represented in the proceedings by his mother and natural guardian, Z[…] R[…] S[…], who is suing in her personal as well as in her representative capacity.

[3] At the commencement of the proceedings counsel appearing for the Plaintiff informed the Court that the issues of the Defendant’s liability, the general damages to be paid by the Defendant and the payment of future medical treatment by the Defendant have all been settled by the parties. It was agreed that the Defendant would be 100% liable for the Plaintiff’s proven or agreed damages, that the Defendant would pay an amount of R600 000.00 for general damages, and that the Defendant would provide an undertaking in terms of Section 17(4)(*a*) of the Road Accident Fund Act[1] for the future medical treatment of L[...].

[4] The Court was further informed that it only had determine the loss of earnings suffered by L[...]. It soon transpired that in respect of this item, only the contingencies to be applied remained an issue between the parties. An application was made by counsel for the Plaintiff for the expert evidence of the Plaintiff and of the Plaintiff herself to be presented by way of affidavit in terms of Uniform Court Rule 38(2), to which application the Defendant had no objection. Ms. Bornman, representing the Defendant, informed that there would be no need to cross-examine the expert witness, since only the contingencies remained in dispute.

[5] The expert evidence of the Plaintiff comprised of the evidence of a general practitioner, a neurologist, a clinical Psychologist, an educational psychologist, an occupational therapist, an industrial psychologist and an actuary. The actuary made his calculations on the basis of the opinions expressed in the evidence of the experts mentioned. In view thereof that there were no objection to the handing in of the affidavits and expert reports, the Court then granted the application in terms of Rule 38(2).

[6] In the evidence, the experts dealt with the situation of the minor pre-accident as

[1] Act 56 of 1996

well as post-accident. It appears that he was in Grade 2 when the accident happened. Before the accident, he had to repeat Grade 1, while he also had to repeat Grade 2 after the accident. After the accident, he suffered from recurrent headaches, poor memory and concentration, nose bleeds, behavioral changes and seizures. It is indicated that he needs placement in a special school catering for the needs of children with cognitive impairments. The industrial psychologist is of the opinion that L[...] has been rendered exceptionally vulnerable by the accident and the related sequelae. His eligibility for sheltered employment means that he would be precluded from gainful employment. He will probably remain largely unemployed because of the mild traumatic brain injury he suffered in the accident.

[7] It is further indicated that L[...]'s mother completed Grade 11 and his father Grade 10. Before the accident, he was likely functioning at a below to average level of intellect. He showed pre-existing cognitive difficulties during the period before the accident. Even disregarding the accident, he may have experienced periods of unemployment during his career. It is suggested by the industrial psychologist that an appropriate pre-morbid contingency be applied to cater for the aforementioned factors.

[8] The actuary based his calculations on the reports of the experts referred to above, and on instructions by the attorneys representing the minor child. As for the post-accident loss of earnings, the actuary assumed that the child would be unemployable in the future with nil earnings. Post-accident contingencies were therefore not applicable. The pre-accident earnings, in other words the present value of earnings had the accident not occurred, were calculated by applying a 20% contingency deduction. So calculated, the loss of earnings amounted to the sum of R2 369 399.00, the actuary found.

[9] In making final submissions to the Court, counsel for the Plaintiff contended that the contingency deduction of 20% was the appropriate percentage in the circumstances. However, it was submitted on behalf of the Defendant that a 55% deduction should have been applied due to the below average performance of the minor before the accident.

[10] The Court was referred to the recent judgment of Bhoopchand, AJ in the matter

of *Advocate A.J. du Toit and the Road Accident Fund*.[2] The facts of the matter are very similar to the facts of the present matter. The injured minor in that case was almost 9 years old when the accident happened, and he also sustained a mild traumatic brain injury which caused a loss in concentration and poor attention which affected his learning. It also appeared that he was a vulnerable learner before the accident, just as the minor child in the present case. In the case referred to, the Court found that a contingency deduction beyond 22% was not justified in determining the patient's loss of earnings in the injured state.

[11] In the present case the child functioned below average with cognitive difficulties before the accident. That does not mean, however, that he could be regarded as someone without any prospects of progressing in a special school to a level where he would be able to find some form of employment, even if such employment is periodic in nature. In the circumstances, I am of the view that a contingency deduction of 25% should be applied in determining the child's loss of earnings in the injured state.

[12] The Plaintiff has been substantially successful, and there is no reason why he should not be awarded his costs. The following orders are premised upon a draft order presented by counsel appearing for the plaintiff.

1. The issue of liability is settled for 100%.

2. The Defendant shall pay to the Plaintiff a capital amount of R2 821 312.00 being:

2.1 R2 221 312.00 for loss of earnings;

2.2 R600 000.00 for general damages.

3. Payment will be made directly to the trust account of the Plaintiff's attorneys of record, details as follows:

Holder:	Mokoduo Erasmus Davidson Attorneys Trust Account
Bank and Branch:	First National Bank (FNB), Rosebank
Account number:	6[…]
Code:	253305

[2] Unreported judgment in the Western Cape High Court under case no 22528/2018 delivered on 1 August 2024

Ref: S244

4. Payment of the capital amount referred to in paragraph 2 above shall be made on or before 180 (one hundred and eighty days) days from the date of this court order.

5. Interest *a tempore-morae* shall be calculated in accordance with the Prescribed Rate of interest Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund Act 56 of 1996, fourteen (14) days.

6. The Defendant is ordered to furnish the Plaintiff with the **100%** Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for the costs of the future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the L[...] T[...] S[...] arising out of the injuries sustained by the Plaintiff in the motor vehicle collision which occurred on the 16 July 2019 after such costs have been incurred and upon proof thereof.

7. The statutory undertaking referred to in paragraph 6 above shall be delivered by the Defendant to the aforesaid Mokoduo Erasmus Davidson Attorneys on or before thirty (30) days from the date of this court order.

8. From the mentioned amount in paragraph 2, **R100 000.00** (*One Hundred Thousand Rand)* shall be paid to the Plaintiff and will not be subject to the discretion of the Trust.

9. In terms of the statutory undertaking referred to in paragraph 6 above, the Defendant shall pay:-

9.1 the reasonable costs of the creation of the Trust referred to in paragraph 8 above and the appointment of the Trustee;

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

9.3 the costs of the Trustee in administering the L[...] T[...] S[...]'s estate shall be entitled to recover its full fees of office in accordance with its tariff in force from time to time during the subsistence of the trust fund as follows:

9.3.1 1.00% acceptance fee is charged on the value of the assets placed under the management of Mwanga Fiduciary Services subject to a minimum fee of R15 000.00 once off.

9.3.2 1.2% management fee per annum subject to a minimum fee of R500 per month charged monthly in arrears.

9.3.3 Where the clients are non-resident, a 0.1% premium will be charged.

9.3.4 2.28% distribution fee is payable on the capital value of assets released from the administration of Mwanga Fiduciary Services. The distribution fee is payable in recognition of the time and costs related to the releases of capital. It is payable irrespective of the reason for the release of assets or capital.

9.3.5 Costs relating to fixed property, shares and to any other assets requiring specific address will be treated as an expense and charged separately if applicable.

10. The Defendant will pay the agreed or taxed party and party High Court costs of the action up to and including the date on which this draft is made an order of the above Honourable Court, such costs to include inter alia:-

10.1 the costs of Counsel (scale B);

10.2 the costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 2 above;

10.3 the trial costs up to and including the date of judgment;

10.4 the costs of the Plaintiff's expert reports. Such experts to include, but not limited to:

10.4.1 Dr Makua (General Practitioner);

10.4.2 Dr Scher (Orthopaedic Surgeon);

10.4.3 Dr Taniel Townsend (Neurologist);

10.4.4 Talita da Costa (Clinical Psychologist);

10.4.5 Alet Mattheus (Educational Psychologist);

10.4.6 Sharilee Fletcher (Occupational Therapist);

10.4.7 Lee Leibowitz (Industrial Psychologist) and

10.4.8

Wim Loots (Actuary), if any, as may be agreed or allowed by the Taxing Master;

10.5 the Plaintiff's attorneys shall serve the notice of taxation on the Defendant's attorneys and shall allow the Defendant 180 (one hundred) days within which to make payment of such costs.

11. The requisite steps shall be taken by the Plaintiff's Attorneys with a view to forming a trust to, *inter alia*, administer and/or manage the financial affairs of L[...] T[...] S[...] and that such trust shall be formed within a reasonable period from the date of this order.

12. The trust instrument shall provide for the following as a minimum:-

12.1 there shall be a minimum of two trustees and a maximum of three, of which at least one shall be a qualified professional person; to the extent possible and practical.

12.2 if the number of trustees drops below the prescribed minimum the remaining trustees are prohibited from acting other than to appoint a replacement trustee;

12.3 the composition of the board of trustees and the voting rights shall be such that any single trustee cannot be outvoted in relation to management of trust assets by any other trustee who has a personal interest in the manner in which the trust is managed;

12.4 the powers and authority of the trustees shall not exceed those usually granted to trustees of special trusts;

12.5 procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Honourable Court;

12.6 the trust should be stated to have the purpose of administering the funds in a manner which best takes account of the interests of the Minor;

12.7 the separation of the property of the trustee/s from the trust property;

12.8 ownership of the trust property vests in the trustee/s in their capacity as trustee/s;

12.9 the independent 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;

12.10 amendment of the trust instrument shall be subject to the leave of the above Honourable Court;

12.11 the trustee/s is authorised to recover the remuneration of and cost incurred by the trustee/s in administering the Section 17(4)(a) RAF undertaking in accordance with the undertaking;

12.12 L[...] T[...] S[...] shall be the sole income and capital beneficiary;

12.13 the trust property is excluded from any community of property in the event of the marriage of L[...] T[...] S[...];

12.14 the trust shall terminate upon the beneficiary's attaining the age of twenty-one (21) whereafter the trust assets shall be paid to the beneficiary.

12.15 the trust property and administration thereof is subject to annual reporting by an accountant;

13. The capital amount referred to in paragraph 2 above, shall be paid by

the Defendant directly into the trust account of the Plaintiff's Attorneys of record, Mokoduo, Erasmus, Davidson Attorneys, for the benefit of the Minor.

14. Mokoduo, Erasmus, Davidson Attorneys will invest the capital amount less the reasonable attorney and client fees and disbursements in terms of Section 86(4) of the Legal Practice Act 28 of 2014, 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;

15. The party and party costs referred to in paragraph 8 above, as taxed or agreed, shall be paid by the Defendant directly into the trust account of Mokoduo, Erasmus, Davidson Attorneys.

P.J. LOUBSER, J

Appearances

For the Plaintiff:	Adv. C. Hendriks
Instructed by:	MED Attorneys, Bloemfontein
For the Defendant:	Adv. C. Bornman
Instructed by:	The State Attorneys, Bloemfontein