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

APPEAL CASE NO: A102/2023

(1) REPORTABLE: ~~YES~~/NO

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

(3) REVISED.

DATE: 10 February 2025

SIGNATURE:

In the matter between:-

ADV S SAYED N.O.
(CURATRIX AD LITEM FOR FGW F[...])

APPELLANT

AND

ROAD ACCIDENT FUND

RESPONDENT

Coram: Neukircher, Millar et Kooverjie JJ

Heard on: 7 August 2024

Delivered: 11 February 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 11 February 2025.

ORDER

It is ordered: -

[1] The appeal is upheld.

[2] The order of the court *a quo*, prayer 3, is set aside and replaced with the following order:

“The defendant shall pay the plaintiff an amount of R1 million in respect of general damages”.

[3] The respondent is ordered to pay the costs of the appeal on Scale C.

JUDGMENT

KOOVERJIE J (NEUKIRCHER & MILLAR JJ CONCURRING)

THE APPEAL

[1] The appellant appeals the order of the court *a quo* in respect of general damages. The appellant’s main contention is that the award was unreasonable in light of the injuries sustained by the minor together with the consequential

sequelae. The appellant represents the minor child in her capacity as the duly appointed curator.

[2] The minor child, F[...] G[...] W[...] F[...] was 5 years and 10 months when he was injured in a tractor accident on 7 February 2017. He is currently 13 years old.

[3] The appellant pointed out that the court erred in the following respects, namely that:

[3.1] it failed to properly consider the findings of all the relevant experts, namely that the minor child's educational and future work ability would be compromised;

[3.2] it failed to adduce oral evidence of the experts to address any concerns pertaining to their findings;

[3.3] it failed to consider the minor's serious long-term mental and long-term behavioral disorder;

[3.4] it failed to consider the minor's injuries and circumstances against comparable sequelae where the courts have awarded general damages;

[3.5] it erred in merely noting that the minor suffered from a serious third degree burn on his back. Indisputably there is evidence of the mild brain injury with serious sequelae, neuropsychological difficulties, cognitive deficits and behavioral change. As a result, the minor's scholastic and overall functioning is continuously deteriorating and will worsen in the future.

THE COURT A QUO'S FINDINGS

[4] It is evident that the court *a quo* only considered the physical injuries sustained by the minor, namely the bruising on the face, deep abrasions on his back, the third degree burns and soft tissue right hip injuries.

[5] Particularly at paragraph [17] of its judgment the court *a quo*, concluded that the minor was not entitled to loss of earnings since he attended school and was progressing well. There was also no indication that he would undergo a major surgery in the future. The court also noted that there were no further follow-up consultations with the experts who had examined him. At paragraph [18] of the judgment the court concluded:

“In my view it will be premature to award damages in respect of loss of earnings since the minor is still making good progress at this stage and it is difficult to predict his future potential in earning a living.”

[6] As a result, the court consequently only awarded R350,000.00 in respect of general damages.

THE CURRENT CIRCUMSTANCES OF THE MINOR CHILD

[7] The court *a quo*'s judgment was delivered on 29 September 2022. At the time the court was placed in possession of various expert reports. The appellant's main contention is that the court *a quo* failed to have regard to the neuropsychological and behavioral difficulties of the minor.

[8] The minor was examined by the following medical experts, namely:

[8.1] Dr Moja, the Neurologist.

[8.2] Dr Smuts, an additional Neurologist.

[8.3] Ms Jonker, a Psychologist.

[8.4] Dr Naidoo; a Specialist.

[8.5] Dr Seabi, the Educational Psychologist.

[8.6] Dr Sissason, the Clinical Psychologist.

[8.7] Dr Pienaar, the Plastic and Reconstructive Surgeon.

[8.8] Dr Fredericks, the Disability and Impairment Assessor.

[8.9] the Occupational Therapist.

[8.10] the Industrial Psychologist.

[9] The experts commenced with the medical examinations that took place during 2020, which was at least 3 years after the accident. The appellant thereafter arranged for more recent follow-up consultations. The experts postulate the serious condition of the minor. All of the experts confirmed the minor's psychological and behavioral difficulties.

[10] Dr Pienaar, who examined the minor on 11 June 2020, noted that he has a WPI of 20% and qualifies on the Narrative Test for serious permanent disfigurement. He opined that the minor was entitled to general damages. Dr Pienaar further postulated that the accident left the minor with serious permanent scarring and disfigurement. This scarring seriously affects his appearance and dignity and causes severe social anxiety embarrassment and would affect his masculinity and his relationships with women in the future. The injuries have a negative

effect on his confidence and self-esteem and his quality of life. On this basis, Dr Pienaar completed the RAF form.

- [11] Dr Moja, in his initial examination, confirmed that the minor suffers from poor concentration and behavioral problems leading to post-traumatic psychological sequelae. He therefore deferred the minor to the clinical psychologist for a neuropsychological evaluation and an opinion on his cognitive function and behavior pre- and post-accident. In his later addendum, dated 12 December 2023, Dr Moja confirmed his previous findings.
- [12] Dr Smuts, also a neurologist, examined the minor on 15 June 2020. He opined that although the head injury sustained was mild in nature and seldom leads to long-term brain dysfunction, it is possible that the minor may have suffered a degree of anoxia or Attention Deficit and Hyperactivity Disorder (ADHD). Dr Smuts also noted that the minor's overall behavior is severely negative and then deferred the minor to a psychiatrist on the severity of the memory impairment.
- [13] The neuropsychologist, Dr Jonker, initially examined the minor on 17 June 2020 and thereafter on 31 March 2022. Dr Jonker, in her follow-up assessment, concluded that the minor child is more cognitively, psychologically and physically vulnerable five years after the accident. She opined there is a decline in the minor's cognitive, psychological and physical functioning which compromises his interpersonal functioning, quality of life and hampered his future scholastic functioning. His career choices and earning capacity would ultimately be effected.
- [14] Dr Jonker further confirmed that his psychological and behavioral difficulties would remain significant compromising factors and if they are not addressed his condition will worsen. His aggressive behavior, low frustration tolerance and trauma-related symptoms are expected to pose an additional challenge in respect of his future scholastic potential. His transition into adolescence and

adulthood would in all likelihood be more complicated if he does not receive treatment. She therefore suggested that he undergo psychotherapy and psychiatric treatment.

- [15] It was also postulated that the headaches he experiences once or twice a week would affect his attention and concentration abilities. She confirmed his attention difficulties and that he struggled to mentally shift from one task to another. This affected his processing abilities, verbal fluency and concept generation abilities.
- [16] Dr Seabi examined the minor in July 2020, and later filed an addendum report in June 2022 and thereafter conducted a psycho-educational legal assessment report in February 2024. At the time of the examination the minor was almost 13 years old. Dr Seabi concluded that the minor's cognitive, physical, behavioral, social, scholastic and emotional difficulties are linked to the injuries he sustained. His psychological and academic performance have been compromised. As he would progress through his education, he would struggle to cope with the complexity of the curriculum content and would lack the independence to study.
- [17] He further opined that it appears that his head and underlying brain may have experienced considerable forces of impact during the incident, which caused the cognitive and neuropsychological deficits. In his assessment, he found the minor to be easily distracted, inattentive, hyperactive and restless. Dr Seabi also opined that the minor developed an Attention Deficit and Hyperactivity Disorder (ADHD). He noted the persistent headaches and symptoms of a major depressive mood disorder as well as post-traumatic stress disorder and agreed that these psychological difficulties would most definitely affect his attention and concentration abilities.

- [18] Scholastically he postulated that his education progression would be negatively affected, particularly in his senior grades. He has difficulty in recalling information, including what he has learnt. Furthermore his difficulties are exacerbated by the Oppositional Defiant Disorder (ODD), which is disruptive behavioral disorder. This condition causes irritability, anger, vindictiveness and his argumentative nature.
- [19] Mr Sissison, the clinical psychologist assessed the minor in June 2020. He agreed that his psychological functioning has been compromised by the accident. He found the minor to be distracted and aggressive during the assessment. His conclusion is that the minor experiences psychological trauma and is at a greater risk of cognitive deficit. His developing brain would also be more vulnerable to neurological damage than that of an adult. He also confirmed that his struggle to articulate himself causes his destructiveness and irritable behavior. He would require attention from his caregivers and especially his scholastic learning in the future.
- [20] He confirmed the minor's symptoms, anxiety and PTSD. He is particularly anxious when travelling, he has flashbacks of the accident and this distresses him. He is also anxious when crossing the road as a pedestrian. He further opined that his residual headaches would be emotionally exhausting for him and impact negatively on his psychological adjustment and functioning.
- [21] In June 2020 Dr Fredericks, the educational psychologist, conducted a disability and impairment assessment. Dr Fredericks allocated 28% WPI rating in respect of the expert reports of Dr Jonker, Dr Moja and Dr Seabi. In respect of the permanent facial scar, he equated it to a 3% WPI rating and in respect of the permanent scars he equated to a 9% WPI rating. In total, the final combined WPI rating for all the impairments came to a WPI of 36%.

- [22] It is evident that the trial court failed to evaluate the minor's psychological, cognitive and emotional sequelae which had been identified by the experts. This is in my view material and requires interference with the award of the court *a quo*.
- [23] In having regard to comparable sequelae, our courts have awarded general damages in amounts much higher than that awarded by the trial court *in casu*. For instance, in *Penane*, a minor child sustained a brain injury with neuropsychological and neuropsychiatric disorders which had been permanent with the resultant educational and employment disability. The court awarded damages in the present-day value to be over R1 million (R450,000.00 at the time).¹
- [24] In this matter, the experts have confirmed that the minor's neuropsychological and behavioral deficits would affect his future scholastic capabilities, this deteriorating disorder together with extensive scarring which has a traumatic effect on him.
- [25] In my view, considering the totality of the injuries suffered by the minor child and their sequelae, an award of R1 million for general damages is appropriate. The costs will follow the result.
- [26] When the appeal was heard, the court raised various issues relating to the validity of the contingency fee agreement signed in favour of the appellant's attorney of record. The appeal was postponed to consider how these issues were to be ventilated.
- [27] It has since come to this court's attention that these issues were subsequently decided by another court and that the appellant's attorney has acquiesced to

¹ *Penane v RAF* (7702/06) [2007] ZAGPHC 397 (1 August 2007). See also *P obo P v Road Accident Fund* (46082/2018) [2022] ZAGPJHC 734, 23 September 2022.

the judgment of that court. Accordingly, the issues raised at the hearing of this appeal relating to the contingency fee agreement have been rendered moot.

[28] In the circumstances I propose the following order:

[28.1] The appeal is upheld.

[28.2] The order of the court *a quo*, prayer 3, is set aside and replaced with the following order:

“The defendant shall pay the plaintiff an amount of R1 million in respect of general damages”.

[28.3] The respondent is ordered to pay the costs of the appeal on Scale C.

**H KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I agree, and it is so ordered.

**B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I agree
**A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD ON:	7 AUGUST 2024
JUDGMENT DELIVERED ON:	11 FEBRUARY 2025
COUNSEL FOR THE APPELLANT:	ADV. J BAM
INSTRUCTED BY:	EHLERS ATTORNEYS
COUNSEL FOR THE RESPONDENT:	MS. E VAN ZYL
INSTRUCTED BY:	THE STATE ATTORNEY, PRETORIA