IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 1809/2022

In the matter between

C[…] D[…] K[…] obo C[…]-L[…] K[…] **PLAINTIFF**

and

THE ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

Date of hearing: 18 March 2025

Date of judgment: 27 March 2025

BHOOPCHAND AJ:

1. The Plaintiff is the biological mother of the eight-year-old minor. The minor was knocked down by a vehicle on 21 October 2020. The minor was 3 years and eleven months old when the accident occurred. The Defendant is the statutory body established under the Road Accident Fund Act, 56 of 1996 ('the RAF Act') to pay compensation for loss or damages wrongfully caused by driving motor vehicles.

2. The minor sustained a fracture line of the skull extending from the left occipital bone to the foramen magnum.[1] The minor did not lose consciousness at the scene of the accident. She was able to crawl out from under the van that knocked her but experienced headaches and vomiting soon after the accident. A radiological examination of her brain showed generalised swelling but no haemorrhage or fluid collections between the layers that cover the brain tissue. She suffered her first post-traumatic seizure two days later. The frequency of seizures increased and required increased medication for control.

3. The Plaintiff has claimed damages for past and future hospital and medical expenses. She claimed R4 884 280 for loss of earning capacity and R2 500 000 for general damages.

4. The minor was assessed by Dr A. J. Richardson ('Richardson'), a Neurologist, on 21 February 2022 and Dr V Radebe ('Radebe'), a Neurosurgeon on 26 June 2024. Richardson obtained the history that the minor was brought home conscious after the accident but complained of headaches and vomiting. The minor was admitted to Tygerberg Hospital. She spent five days in hospital. The minor was in a creche before the accident. She returned several months later. Richardson and Radebe relied upon the hospital assessment of the minor as having sustained a moderate traumatic brain injury. They agreed that the combination of post-traumatic epilepsy, ADHD, and post-traumatic headaches would negatively affect the minor's schooling and her vocational prospects.

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[1] The occipital bone is one of the posterior bones that make up the skull. The foramen magnum is a hole where the spinal cord enters the skull in its posterior aspect.

5. Richardson reviewed the hospital notes, which revealed that the minor suffered seizures daily, requiring admission initially to the Paarl Hospital and then back to Tygerberg Hospital. The seizures had increased to 3-4 per day and the postictal state to about twenty minutes. The minor became increasingly confused, with a personality change, regression in her speech and language, and became incontinent of urine. An MRI scan was performed on December 4, 2020, and the results were normal. An EEG was normal. Her initial medication for seizure control was weaned and stopped. She was commenced on dual anti-convulsive therapy in January 2021, as her seizures continued at a frequency of about 4-5 per day.

6. The minor began displaying signs of hyperactivity and inability to sustain attention in the aftermath of the accident. The minor remained on anti-epileptic medication. Richardson had initially assessed the minor as sustaining a mild closed-head injury with post-traumatic epilepsy. She did not expect any neurocognitive deficits from such an injury. She did qualify his finding by stating that long-term psychological sequelae are possible. Richardson expressed that the minor had reached maximum medical improvement.

7. The minor was formally diagnosed with ADHD in April 2023 and uses Ritalin twice daily.

8. The Neuropsychologists obtained a more florid history and their test results revealed extensive neuropsychological deficits. The Plaintiff-appointed Neuropsychologist noted that the minor suffered from post-traumatic epilepsy and ADHD. The minor exhibited fine and gross motor and visuomotor integration difficulties, which all suggested that the minor ex[experienced a more severe brain injury. The Minor obtained a global IQ score of 96, which the expert considered to be in the average range. Her verbal score was just below average at 87, but her performance score at 100 was average.

9. In the joint neuropsychology minute, the Neuropsychologists agreed that the minor suffered a ‘significant’ brain injury. They referred to the fracture of the occipital bone, which suggested a substantial impact on the head. They accepted the Neurophysicians' opinion that the minor had suffered a moderate traumatic brain

injury. They documented a wide range of neuropsychological symptoms relayed by the minor's mother. These complaints included attention, emotional, temper, memory, speech and language difficulties. The minor was hyperactive, exhibited disruptive behaviour, suffered nightmares and had frequent headaches. She had poor balance and was clumsy with her hands. The minor receives Epilim and Lamotrigine for the treatment of her epilepsy, Risperidone for her behavioural problems, and paracetamol for headaches. They agreed that the accident had and continues to have a significant negative impact on the minor's psychological well-being. Her interaction with her peers has been affected. They anticipate that the minor will become increasingly socially isolated, impacting on her social skills development. They speak of the complex interplay between neuropsychological and secondary psychological factors where cognitive impairments can mimic conditions such as ADHD. Emotional distress further exacerbates cognitive dysfunction.

10. The tests performed by the Neuropsychologists revealed extensive difficulties. Their results confirmed much of the neuropsychological symptoms reported by the mother. Their opinion is that a significant brain injury sustained at a young age typically results in a poorer outcome as the brain is developing and, therefore, susceptible to widespread neurological disruption that impacts ongoing cognitive, emotional, and academic development. They regard the deficits as being permanent and the prognosis for improvement of her psychological and psychiatric difficulties is poor.

11. The minor's speech assessment revealed marked cognitive and cognitive-communicative deficits, as well as communication impairments. The Speech therapist's report continues the theme of florid post-accident sequelae impacting the minor's speech modalities. The Therapist notes that her findings are consistent with the findings of the Plaintiff-appointed Neuropsychologist. She considered the speech impairments to be permanent.

12. The Defendant-appointed Educational Psychologist, Dr X S Fakude, who assessed the minor on 24 April 2024, found that the minor experienced difficulties in all areas of learning, including spelling and mathematical operations. She was functioning below the average range of intelligence. The expert expressed the opinion that it was probable that the minor's cognitive abilities and level of functioning

deteriorated. His assessment revealed cognitive deficits in attention, complex motor speed, verbal learning and executive functions. The Plaintiff-appointed Occupational Therapist confirmed the global deficits identified across the reports.

13. The experts obtained the history that the minor did not have any adverse cognitive deficits or suffered epilepsy before the accident. The mother had an uneventful pregnancy, and the minor attained her developmental milestones within expectations. She was at least of average intelligence. Her family's educational achievements suggested that the minor would have probably progressed through mainstream schooling and obtained a tertiary qualification. The Defendant's key experts, i.e., the Clinical Psychologist and the Educational Psychologist, assessed the minor at least two years after the assessments performed by the Plaintiff-appointed experts. Their assessment results and opinions confirm the severity of the post-accident neuropsychological deficits and, in some instances, their worsening with the elapse of time. On an overall conspectus, this matter underlines the principle in brain-related injuries that the initial injury may be mild, but the outcome or sequelae could be far more severe. It is impossible to address every deficit that the experts have identified, but it suffices to note that the Court has considered all the reports filed.

GENERAL DAMAGES

14. General damages are awarded for physical and psychological pain and suffering. There are usually two phases to injury assessment for general damages; the acute phase refers to the period from the time the injury is sustained to the time the injury stabilises or its sequelae disappear. The chronic phase refers to the ongoing symptoms and sequelae of the injuries, which may sometimes endure for the lifetime of the injured person. The assessment of general damages has introduced terms such as maximum medical improvement and percentage of whole-body impairment to determine whether general damages qualify for compensation. Serious injuries usually elicit the most physical pain and suffering and loss of life's amenities in the acute phase. The outcomes in the chronic or ongoing phase of injuries may be variable. A serious injury with a good outcome may result in minimal pain, suffering, and loss of

amenities, and the inverse may also apply. A mild injury may evolve into long-term difficulties as it progresses, as is the position *in casu*.

15. The Plaintiff submitted two cases for the Court to consider.

15.1. *Pietersen obo J St I v Road Accident Fund* [2011] ZAGPJHC 73; 2012 (6A4) QOD 88 (GSJ), involved a 4year and 7-month-old male who suffered a brain injury resulting in daily seizures and cognitive defects. The experts predicted that the minor would not complete mainstream schooling and would be vulnerable in the labour market. The minor also suffered degloving injuries to both feet, his buttocks, right shoulder, right forearm, right side of his face, scalp and occiput. He had severe disfiguring scars despite repeated skin graft procedures. The value of the Court's award in present-day terms is R1 532 000.

15.2. *Maribeng v Road Accident Fund*,2021 (8A4) QOD 39 (GNP), involved a 4-year-old male who suffered severe brain damage as well as facial lacerations and a right femur fracture. The brain injury resulted in serious cognitive and higher mental processing sequelae as well as emotional and behavioural problems. There was a 15% risk of developing epilepsy. The minor's education was affected. The history obtained from the mother included complaints of restlessness, headaches, hyperactivity, and memory problems. The value of the Court's award in present-day terms is R1 963 000.

16. The Defendant submitted ten cases for the Court to consider. Six were from the previous century, and three predated the case of *Marunga*, in which the modern tendency to award a higher quantum of damages was taken into account when awarding general damages.[2] That left just one case, which was incomparable as it involved a 36-year-old policeman who suffered a whiplash injury with no significant sequelae. Some legal practitioners need to reread the memorandum concerning the

[2] Road Accident Fund v Marunga 2003 (5) SA 164 (SCA)

selection of comparable cases that will assist the Court in determining a fair award for general damages. To its credit, the Defendant submitted that an award of R1.8 million would be reasonable in this case. The Plaintiff contended for an award of R2 million.

17. The younger the child, the longer they would have to suffer the long-term sequelae of brain injuries. This case does not clearly illustrate the distinction between acute and chronic sequelae as clearly as other cases do. There appears to be a relentless progression of the brain injury, commencing with protracted seizures and then cognitive and behavioural fallout that will impact the minor's scholastic and vocational pursuits. The Court is persuaded to award the amount contended for by the Plaintiff and does so without hesitation.

LOSS OF EARNINGS

18. The Industrial Psychologists predicted, based on their assessments and the opinions of the other experts instructed by both parties, that the minor would have progressed beyond grade 12 to either a diploma or degree qualification at the National Qualifications Framework level 7. She would have entered the job market in 2037 or 2038 and gradually advanced in her career towards a supervisory or specialised role, retiring at age 65. They suggested earnings in line with STATSSA's earning trajectories, as contained in Robert Koch's 2024 Quantum Yearbook. The figures cited are R300,000 to R421,000 to R535,000 per annum. They suggested that the income growth would have been gradual from age 22 and would have peaked between the ages of 45 and 53.

19. In the injured scenario, the Industrial Psychologists agree with the experts who suggest that the minor should be placed in a facility for learners with special educational needs. She will not be able to complete a grade 12 level of education and will, therefore, one day need to compete as an unskilled manual labourer. She would be vulnerable in the open labour market and will probably depend on accommodations and sympathetic employment opportunities. They disagree on the minor's potential injured earnings capacity. The Plaintiff-appointed Industrial Psychologist predicted a salary level in line with the lower quartile earnings of R27,600 per annum. The

Defendant-appointed Industrial Psychologist suggested an earnings potential with a median range for unskilled workers of R49,800 per annum between the ages of 40 and 45 years. Thereafter, inflationary increases would have applied.

20. The Court can take judicial notice that the current minimum wage amounts to R56 845.32 annually as of 1 March 2025 for a 38-hour work week. The injured earnings suggested by the plaintiff-appointed Industrial Psychologist are too pessimistic. The Court considers that once experts predict a residual earning capacity, as opposed to suggesting that an injured person is unemployable, it is then incumbent upon them to recommend reasonable earnings. The earnings suggested by the Defendant-appointed Industrial Psychologist, nevertheless, fall below the minimum wage. The Plaintiff-appointed Industrial Psychologist pitched the minor's earnings at the SASSA annual grant levels. There would be no incentive for a person to work if they can remain at home and collect the social security grant.

21. The Plaintiff provided an actuarial calculation dated 18 March 2025 at the Court's request. The table below reflects the capital value of the loss of earnings that the court will use in calculating the claim under this head of damages. The Court notes that the uninjured earnings are based upon the consensus between the two Industrial Psychologists. The calculation of the earnings suggested by the Plaintiff-appointed Industrial Psychologist yields R599 800. The Court has not considered this calculation. The contingency deduction that the Court shall apply to uninjured earnings is 22 percent in line with the recommendation in *Guedes*.[3] The Industrial Psychologists predicted that the minor would have commenced work at age 22 and retired at age 65 in the uninjured state. She would thus have worked for 43 years. The Plaintiff suggested that the Court apply a 25 percent deduction to uninjured earnings and a 40 percent deduction to injured earnings. The Defendant suggested a 30 percent contingency deduction for uninjured earnings and a 35 percent deduction for injured earnings. The injured career progression was customised to fit the circumstances of the minor. The Court has considered the basis for the respective submissions and considers a 30 percent deduction from injured earnings to be fair. The Industrial

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[3] *Road Accident Fund v Guedes* (611/04) [2006] ZASCA 19; 2006 (5) SA 583 (SCA) (20 March 2006) at para 9

Psychologists agreed on the career path for the injured state. There is no basis to apply a higher contingency deduction because the Court elected to use the higher earnings projection suggested by them.

	Uninjured earnings	Injured earnings	Loss of earnings
Future earning capacity	R 6 742 400	R898 900	R5 843 500
Contingency deduction	21.5 %	30%	
	R5 292 784	R629 230	**R4 663 554**

22. The Court accordingly awards the Plaintiff the sum of R4 663 554 for the minor's loss of earning capacity.

CONCLUSIONS

23. The Court was asked to adjudicate the claims for general damages and loss of earnings. The parties agreed to submit their expert reports, supported by affidavits, pursuant to Rule 38(2), and that the Court would consider the reports in place of their testimony. The Court directed the parties, pursuant to Rule 39(20), and they agreed to provide concise written and oral arguments on the remaining unresolved issues, stipulating that the matter would be determined based on the papers properly before it.

24. The Court awards R2 million in general damages and R4,663,554 for loss of earning capacity, totalling R6,663,554. The Court considers this award to be fair and equitable in the circumstances of this case. The Plaintiff sought her taxed or agreed costs as between party and party and Counsel's costs, as taxed ar agreed on scale B. The Defendant agreed that the costs order sought is appropriate. The following order is based on the draft submitted on behalf of the Plaintiff.

ORDER

1. The Defendant shall pay the Plaintiff's attorneys the sum of R6 663 554 (six million, six hundred and sixty-three thousand, five hundred and fifty-four rand) ('the capital') by electronic transfer to their trust account, the details whereof are set out hereunder,
2. Defendant shall provide an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 ('the undertaking'), to compensate the Plaintiff for 100% of the costs relating to the future accommodation of the minor, Cay -Leigh Koen, in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the minor, after the costs have been incurred and on proof thereof and arising from the collision which occurred on 21 October 2020,
3. Defendant shall pay Plaintiff's taxed or agreed costs as between party and party, including the costs of the postponement of the matter on 6 November 2024 and 20 February 2025,
4. Defendant shall pay the taxed or agreed costs of Counsel, including the costs of preparing heads of argument on scale B,
5. Defendant shall pay the capital within 180 days from the date of this order,
6. The defendant shall be liable for interest on the capital, which shall run from 14 days following the date of this order, and for any costs incurred in obtaining the capital,
7. The Defendant shall pay the taxed or agreed fees of the following expert witnesses and the costs attached to the procurement of medico-legal reports and other reports, joint minutes, as well as any other related costs, including x-rays, MRI scans, and CT scans provided that those reports have been served on the Defendant and filed in Court,
    - 7.1 Dr A J Richardson,
    - 7.2 Dr D Ogilvy,
    - 7.3 Ms L Crous,
    - 7.4 Ms R De Wit,
    - 7.5 Ms N Colley,
    - 7.6 Munro Forensic Actuaries

8. The defendant shall pay the taxed or agreed costs reflected in paragraphs 3, 4, and 7 of this order within 180 days following the date of taxation or, alternatively, the date the costs are agreed upon,
9. The Defendant shall be liable for interest in respect of the costs reflected in paragraphs 3,4 and 7 at the legal rate of interest, which will run from 14 days following the date of taxation or agreement of those costs,
10. The Plaintiff's attorneys' trust account details are as follows:

    Bank: FNB Business

    Account Holder: De Vries Shields Chiat Inc

    Branch: P[…]

    Account number: 6[…]

    Branch Code: 2[…]

Bhoopchand AJ

Acting Judge

High Court

Western Cape Division

Judgment was handed down and delivered to the parties by e-mail on 27 March 2025

Appellant's Counsel: E Benade

Instructed by: De Vries Shield Chiat

Respondent's Attorney: F S Goosen, State Attorney