

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

DELETE WHICHEVER IS NOT APPLICABLE:

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

19 April 2024 _____

DATE: SIGNATURE:

CASE NR: 80725/2018

In the matter between:

ADV CLAIRE CAWOOD N.O

obo A-L P

APPLICANT

and

ROAD ACCIDENT FUND

RESPONDENT

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 19 April 2024

JUDGMENT

MARUMOAGAE AJ

- [1] The plaintiff, Advocate Claire Cawood, instituted action proceedings in her representative capacity on behalf of A-LP against the defendant for the injuries sustained by A-LP as a passenger in a motor vehicle accident that occurred on 17 December 2016. A-LP is a minor.
- [2] The defendant conceded the merits in writing and admitted 100% liability for the harm suffered by A-LP because of the accident. The details of this accident will be narrated below. The court is called upon to determine the amounts of damages that the defendant should be ordered to pay relating to loss of earnings (including earning capacity) and general damages.
- [3] It was contended on behalf of the plaintiff that at the time of the accident, A-LP was fourteen months old. Further, she was taken to Swellendam Hospital where she was stabilized. She was further transferred to Red Cross Hospital where it was established that she sustained a traumatic brain injury with extensive degloving scalp injury with underlying comminuted fractures.
- [4] The plaintiff submitted evidence from various expert witnesses: an Industrial Psychologist, an Occupational Psychologist; an Educational Psychologist; a Clinical Psychologist; a Speech Therapist; an Ophthalmologist; a Neurologist; and a Neurosurgeon. The evidence contained in the reports of these expert witnesses' highlights how the accident impacted A-LP's life.

- [4.1] A-LP sustained a serious traumatic brain injury with extensive skull fractures and a degloving scalp injury and has residual cognitive and behavioural problems that are in keeping with the severity of the brain injury she sustained. She suffered moderately severe head trauma and bilateral occipital contusions.
- [4.2] A-LP remains at risk of developing late post-traumatic epilepsy and the accident negatively impacted her performance at school and future employability. A-LP will not be able to progress at a mainstream school. She would probably increasingly fall behind her peers in all areas of development. Had the accident not taken place, A-LP would have been able to complete her grade 12.
- [4.3] A-LP's probability of securing gainful employment in the future seems exceptionally small and almost non-existent. Her future occupational functioning and subsequent career prospects have been obliterated by the *sequelae* of the injuries sustained in the accident.
- [4.4] Due to these injuries, A-LP experiences some cognitive-linguistic, communicative, and cognitive difficulties which are attributable to the traumatic brain injury she sustained. She needs specialised education because she will experience severe difficulties in mainstream primary school education. She is also at a high risk of experiencing severe difficulties in the acquisition of literacy.
- [4.5] A-LP is vulnerable to being exploited and she will need supervision and guidance for the rest of her life. Her mental processing speed is generally slow, including her capacity to reason and respond.
- [4.6] The appointment of a *curator ad litem* and *curator bonis* is necessary.
- [5] According to the plaintiff, A-LP is currently performing poorly at school because of cognitive problems. It was further submitted that this poor performance will likely continue which will have a bearing on her future

employability. Further, while she would have been able to work had she not been involved in the accident, following the accident she will be unable to work and sustain herself financially. She will remain dependent on the guidance and supervision of others.

[6] It was contended that A-LP was probably going to obtain grade 12 had it not been for the accident, with a possibility of attaining some form of tertiary qualification. It was submitted further that the accident has drastically and irrevocably changed the trajectory of A-LP's life and the gap between her, and her peers will continue to widen exponentially. It was also submitted that she has significant scarring on the left side of her scalp of which she is severely self-conscious.

[7] Concerning the future loss of earnings, A-LP would probably have commenced earning an income associated with the National Minimum Wage and have reached the upper quartile for semi-skilled workers. I agree with the plaintiff that it would be fair and reasonable to apply contingencies of 25% to future uninjured income. I had regard to the Actuarial Report prepared by Munro Consulting where they calculated the total loss of earnings, after applying contingencies of 25%, to be R 2 202 375.00. This amount appears to be an adequate amount under the circumstances.

[8] The plaintiff also claimed general damages in this matter. General damages are within the discretion of the court. Each case must be determined on its own merits having regard to its own unique facts. The defendant accepted that the injuries that A-LP sustained are serious and made an offer to compensate her with general damages. The amount of compensation suggested by the defendant has been rejected by the plaintiff.

[9] In a reported decision of *Megalane v Road Accident Fund*,¹ an eleven-year-old boy who was a passenger in a motor vehicle accident sustained a severe head injury, including left intradural hematoma and a diffuse axonal injury. The injuries sustained in the accident resulted in poor verbal and visual

¹ [2007] 3 All SA 531 (W)

memory, poor concentration, and speech difficulties. It was found that had it not been for the accident, the boy would have been able to obtain grade 12 and possibly tertiary education. The court awarded general damages of R 1 000 000.00, with the current value of R 2 584 000.00.² It appears to me that a similar approach must be adopted in this case. I agree with the plaintiff that the adequate amount of general damages would be an amount of R 2 750 000.00

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

1. The Defendant is ordered to pay to the Plaintiff the amount of R 4 952 375.00 [Four million nine hundred fifty-two thousand three hundred seventy-five rand only] (“the capital”), by way of a lump sum payment within 180 (one hundred and eighty) calendar days of service of the order, by way of electronic transfer to the trust account, details of which are set out hereunder (“the capital payment”) which is calculated as follows:

1.1 Future Loss of Earnings: R 2 202 375.00.

1.2 General Damages: R 2 750 000.00

1.3 Total: R 4 952 375.00

2. Payment of the aforesaid sum must be made directly to the Plaintiff’s Attorneys of Record, ADENDORFF INC by direct transfer into their trust account with the following details:

ACCOUNT HOLDER: ADENDORFF INC

BANK: FIRST NATIONAL BANK

BRANCH CODE: 201 409

ACCOUNT NUMBER: 621 131 979 76

REFERENCE NUMBER: JOS12/0001

3. The Defendant is ordered to furnish the Plaintiff with an undertaking

² Koch R *The quantum yearbook* (2023) 21.

within 30 days from the date hereof, free from caveats and qualifications, in terms of section 17(4)(a) of the Road Accident Fund Act, for 100% (one hundred percent) of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service to the Plaintiff or supplying of goods to the Plaintiff arising out of the Plaintiff's injuries sustained in the motor vehicle collision which gave rise to the action, after such costs have been incurred and upon proof thereof.

4 The Defendant shall pay the reasonable costs of the Trustee appointed in terms of paragraph 7 hereof, in respect of establishing a Trust and any other reasonable costs that the Trustee may incur in the administration thereof including her fees in this regard, which shall be recoverable in terms of the Section 17(4)(a) Undertaking, and which may also include and be subject to the following:

4.1 The fees and administration costs shall be determined in accordance with the Trust Property Control Act, 57 of 1988 (the Trust Act), as amended from time to time, and shall include but not be limited to disbursements incurred.

4.2 The costs associated with the yearly audit of the Trust by a chartered accountant.

4.3 The reasonable costs of the furnishing of security in obtaining an annual bond, if required by the Master of the High Court.

4.4 The costs incurred in administering the Undertaking in terms of Section 17(4)(a).

5 That the net proceeds of the amount referred to in paragraph 1 above, after the deduction of Plaintiff's attorney's attorney and client costs ("the capital amount"), shall be payable to a Trust in respect of the A[...] - L[...] P[...] TRUST, to be established within 6 months from date of receipt of the "capital amount".

6 Upon the establishment of the Trust referred to in paragraph 5 above and opening of a bank account of the Trust, the Plaintiff's attorneys shall pay the capital amount as referred to in paragraph 6 above, including the accrued interest, into the Trust's said bank account.

7 The Terms of the Trust are as follows:

7.1 The proposed Trustee is Shalene Schreuder (ID Number: [...]), whose written consent to act as Trustee in the Trust is loaded on case lines.

7.2 If Shalene Schreuder (ID Number: [...]), failing which, a nominee of Shalene Schreuder Attorneys is unable or unwilling to accept the 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/her sole discretion be entitled to appoint and/or nominate another trustee.

7.3 The trustee is required to furnish security for the administration of the assets of the trust.

7.4 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.

7.5 The trustee shall administer the trust subject to the powers and terms, which follow as from paragraph (7.6) to (7.23) herein below.

7.6 The trustee must in writing accept her 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.

7.7 The trustee may at any time in writing appoint additional trustees limited to one additional trustee.

- 7.8 A trustee shall cease to act as such if he/she resigns, becomes mentally disturbed or ill, or alcoholic, or incompetent or unable to act as the 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.
- 7.9 In administering the trust, the trustee shall follow such procedure as they deem fit.
- 7.10 Proper books of account shall be kept.
- 7.11 The trustee may appoint an auditor for the trust but is not obliged to do so. Shalene Schreuder (ID Number: [...]), 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.
- 7.12 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:
- 7.12.1 To purchase necessary movable and immovable property for the beneficiary once she requires same.
 - 7.12.2 To insure, build on, and improve all or any part of its property and assets, if so required.
 - 7.12.3 To borrow money, only for the necessary living expenses of the beneficiary, only until such time as the Road Accident Fund claim is finalised, 100% (one hundred percent) of the remainder of the claim.
 - 7.12.4 To invest money in any financial institution accredited by the South African Reserve Bank, in an investment, or

investments that is risk averse, such as a money market account.

- 7.12.5 To open and operate a banking account.
- 7.12.6 To make donations to the beneficiary.
- 7.13 The assets of the trust must be held in the name of the trust.
- 7.14 The trustee has an absolute and unlimited discretion, in all matters relating to the trust but may not act contrary to this order and the trust deed to be drafted in accordance herewith.
- 7.15 The trustee and/or her successor or successors shall be required to provide security for the due administration of the trust.
- 7.16 The trustee shall not be personally liable to the beneficiaries for any trust losses, except caused by gross negligence or deliberate wrong.
- 7.17 The trustee shall under no circumstances be personally liable to creditors of the trust.
- 7.18 The beneficiary for income and capital is A[...] L[...] P[...].
- 7.19 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.
- 7.20 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.
- 7.21 Any asset or money that 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.

7.22 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.

7.23 The Master of the Western Cape High Court, is directed to register the Trust.

8 The Defendant shall pay the Plaintiff's taxed or agreed High Court Scale party and party costs, subject to the discretion of the Taxing Master, inclusive of the costs related to any motions and applications and including for the sake of clarity, but not limited, to the costs of the Plaintiff's instructing attorneys, Adendorff Incorporated in Cape Town and the correspondent attorneys in Pretoria, SA[...]ge Jooste and Adams Inc, as well as the other costs set out hereunder;

8.1 The costs of the experts employed as per case lines, inclusive of reports, consultations and confirmatory affidavits, being:

8.1.1 Dr Zayne Domingo (Neurosurgeon);

8.1.2 Dr Johan Reid (Neurologist);

8.1.3 Dr Johann Slazus (Eye Specialist);

8.1.4 Dr Keith Cronwright (Plastic and Reconstructive Surgeon);

8.1.5 Dr Dale Ogilvy (Speech and Language Therapist);

8.1.6 Ms Renee De Wit (Clinical Psychologist);

8.1.7 Ms Yolande Bekker (Educational Psychologist);

8.1.8 Ms Michelle Bester (Occupational Therapist);

8.1.9 Ms Karen Jerling-Kotze (Industrial Psychologist);

8.1.10 Munro Consulting (Actuary).

8.2 The costs of Plaintiff's counsel, inclusive of preparation, day fees and Heads of Argument.

8.3 The costs of the *Curatrix ad Litem*, inclusive of day fees.

8.4 The application costs of appointing the *Curatrix ad Litem*.

9 The capital is to be paid within 180 days of service of this order, but interest shall accrue at the prescribed interest rate, from the 15th day of service of this order.

10 Costs are to be paid within 14 days of settlement or taxation, failing which interest shall accrue at the prescribed interest rate.

11 The above costs shall be paid into the Applicant attorney's trust account as mentioned in paragraph 2 above.

12. It is recorded that the Plaintiff entered into a contingency fee agreement and that same complies with the Act.

C MARUMOAGAE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

Counsel for the plaintiff: Adv Frans Ras SC

Instructed by: Adendorff Attorneys

Counsel for the defendant: Ms Boitumelo Kgoebane

Instructed by: State Attorney

Date of the hearing: 07 November 2023

Date of judgment: 19 April 2024