

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

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 7955/2019

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

DATE

SIGNATURE

In the matter between:

B[...], D[...] obo B[...], N[...]

Plaintiff

and

**ROAD ACCIDENT FUND
(Link No.: 4536852)**

Defendant

JUDGMENT

KOM AJ:

Introduction

[1] Ms D[...] B[...] (B[...]) instituted action against the Road Accident Fund (the Fund) on 6 March 2019. The action was instituted by B[...] in her representative

capacity as the mother of her minor child, N[...] B[...], for the injuries that the minor child sustained during a motor vehicle accident.

- [2] On 11 October 2022, the interlocutory court ordered that the Fund's defence is struck out and further that the plaintiff's trial should proceed by way of default. At the commencement of the trial, B[...] made an application in terms of rule 38(2) of the Uniform Rules of Court for the admission of evidence on affidavit. Prior to the hearing, the parties settled the issue of merits, with the Fund accepting 100% of the liability of B[...]’s claim on behalf of the minor child.
- [3] An undertaking, in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 (the Act) was furnished by the Fund to reimburse B[...] for her claim of future medical, hospital and related expenses for the minor child. The Fund also agreed to pay B[...] the sum of R500 000.00 as an interim payment and this sum was not allocated to any specific head of damage.

Evidence

- [4] In 2016, shortly prior to the accident involving the minor child, the minor child's father was killed in a motor vehicle accident. It was reported by B[...] that the father was a carpenter. B[...] holds a senior certificate and a diploma in graphic design. The formal qualifications of the father were unknown to B[...] and could not be established during investigation. Three minor children were born of the relationship between B[...] and the deceased father. The minor child being the middle child of the 3, with an elder sister and younger brother.
- [5] B[...] confirms in her affidavit that she was not at the scene of the accident and that the bulk of the information about the scene was relayed to her by the minor child's elder sister, who was accompanying the minor child when the accident occurred.
- [6] In 2016, the minor child was 4 years old when she was struck by a motor vehicle while she was walking across a public road in Troyeville. It was reported to B[...] that, as the vehicle passed the minor child, the side mirror of the vehicle struck the minor child on her forehead. It was further reported that the minor child immediately loss consciousness and the minor child was then

rushed to the Charlotte Maxeke Hospital. On arriving at the hospital, the hospital records reflect that the minor child was conscious at the scene of the collision and that her Glasgow Coma Scale score (“GCS”) was 15/15. Further medical investigations by the hospital including a CT brain scan, yielded normal results.

[7] Observable was a 5cm facial laceration on the left side of the minor child's forehead which was sutured in casualty. The laceration was described as having been deep enough to reach the minor child's skull. The minor child was not admitted to hospital and was discharged on the same day; however, she was subsequently reviewed multiple times according to the hospital's outpatient clinic's notes. The hospital's records as well as the hospital' outpatient clinic notes are filed of record and were made available to the appointed medico-legal experts.

[8] The medico-legal experts that were appointed by B[...] are as follows —

- a. Dr A Kelly, neurosurgeon;
- b. Dr L Berkowitz, plastic and reconstructive surgeon;
- c. Dr M Voster, forensic psychiatrist;
- d. Ms M Gibson, educational and neuropsychologist;
- e. Ms A Clayton, educational psychologist;
- f. Dr D Stoler, ophthalmic surgeon;
- g. Ms R Burger, industrial psychologist;
- h. Ms N du Plessis, educational psychologist;
- i. Ms L Kruger, occupational therapist;
- j. Ms M Georgiou, occupational therapist; and
- k. Mr Saksenberg, actuary.

[9] Each of the medico-legal experts' reports have been supported by the necessary affidavits, wherein, the respective experts confirm their findings.

[10] Dr Kelly records, in his medico-legal report, that the minor child's main complaints were as follows —

- a. Headaches;
- b. Memory problems;
- c. Decreased visual activity; and
- d. Facial scarring.

[11] From the complaints reported to Dr Kelly by B[...] and based on the circumstances of how the minor child came to be injured, Dr Kelly concluded that the minor child had sustained a mild traumatic brain injury premised on her immediate loss of consciousness at the scene of the accident.

[12] Dr Kelly's examination and consultation took place some four years after the accident. Dr Kelly's prognosis for the minor child was that her post-concussion headaches would unlikely be spontaneously resolved. In Dr Kelly's opinion, the minor child has suffered severe long-term mental or severe long-term behavioural disturbances or disorders. He equates the minor child's whole person impairment to 9%.

[13] Ms Gibson assessed the minor child, 3 years and 11 months after the accident, and Ms Gibson provided a report consisting of a main and an addendum report. Prior to the accident, it was reported by B[...] that the minor child was confident, happy and a normal child. During Ms Gibson's evaluation of the minor child, she notes that the minor child appeared anxious and fearful. The minor child exhibited difficulty in communicating verbally with Ms Gibson.

[14] It was identified by Ms Gibson that the minor child suffered from language-based deficiencies as the minor child had language-based reasoning and expressive vocabulary issues which were indicative of at least mild dyslexia which was confounded by visual difficulties. In her main report, Ms Gibson

noted that the minor child's elder sister, aged 14, has some educational problems and has had to repeat two grades. The elder sister attends a fairly costly school as she has special needs. It was recommended that there should be a minor adjustment to the applied contingencies having cognisance of the minor child's young age and the learning difficulties experienced by the elder sister.

[15] It appeared to Ms Gibson that the minor child's younger brother was beginning to catch up to the minor child intellectually. Ms Gibson found numerous areas of severe cognitive deficiencies, such as; psychological and behavioural difficulties, expressive language, comprehension and learning difficulties, which were consistent with a brain injury. The minor child was required to repeat grade 1 and thereafter she progressed normally through grades 2, 3 and 4 and is currently in grade 5 as at 2023.

[16] In Ms Gibson's opinion, it is probable that the minor child would have achieved a diploma or a national diploma level had it not been for the injury sustained from the collision. Premorbid, the minor child was of average to above average functioning. Ms Gibson was also of the view that the minor child had an increased vulnerability to the adverse effects of trauma as a result of her father's death. The minor child enjoyed some improvements academically but remains an average learner.

[17] In Dr Voster's report, she notes that B[...] was not worried about her minor child's school performance as the minor child had done extremely well after having repeated grade 1. Despite B[...]'s lack of worry about the minor child's scholastic ability, Dr Voster confirmed that the minor child was cognitively impaired, perhaps at the equivalent of a 5-year-old when the minor child was in fact 8 years old at the time of Dr Voster's assessment.

[18] Dr Voster diagnosed that the minor child suffered from cognitive impairment secondary to the head injury sustained from the collision. In respect of psychiatric treatment, Dr Voster was of the view that the minor child did not require psychiatric intervention yet; however, the minor child may require treatment for anxiety at a later time. In conclusion, Dr Voster is of the view that

it does not appear to be probable that the minor child will have problems with academic progress or that this will impact negatively on her skills development and employment. Dr Voster does make reservation for deferment to the report of an educational psychologist.

[19] B[...] reported to Ms Georgiou, the occupational therapist, that the minor child was awake with slight drowsiness when B[...] arrived at the hospital. Thereafter the minor child was fully conscious. B[...] further reported to Ms Georgiou that the minor child experienced headaches two to three times per week following the accident. The minor child required assistance with dressing, bathing and feeding for a year after being involved in the accident. The minor child often wanted B[...] to carry her and did not want to eat by herself.

[20] During Ms Georgiou testing, she observed that the minor child tested low for visual perception and that there were delays in visual perception and visual motor integration, which could negatively affect various aspects of academic performance, including reading, writing, copying and mathematical ability. In Ms Georgiou's opinion, having regard to the results obtained, it is apparent that the minor child is not functioning at consistent age-appropriate levels for her Visual Motor Integration area.

[21] Further, Ms Georgiou opines that the minor child, in terms of the Narrative Test, sustained moderate injuries in the accident. She suffered a disruption to her life as a result of the sequelae of the injuries. The minor child is currently in Grade 5 and reportedly performs well at school, without any complaints from her teachers. In Ms Georgiou's opinion, whilst the minor child performs well currently, possible difficulties cannot be excluded as she enters higher grades. Ms Georgiou further expresses the opinion that the minor child will not be prevented from relying on her physical activities to secure or maintain employment in the future.

[22] Ms Du Plessis, the educational psychologist, reports that after having considered the genetic and familial educational predispositions, Ms Du Plessis considered that it is "suggested" that the minor child most probably comes from an average genetic predisposition towards academic and career achievement.

She premised this conclusion on the grade 12 National Senior Certificate qualifications obtained by B[...] and the minor child's biological and half-maternal aunts and uncles, as well as B[...]’s additional diploma in graphic design. Ms Du Plessis noted that B[...] was studying towards an additional diploma in teaching Grade R.

[23] In the result Ms Du Plessis predicts a similar or higher achievement level for the minor child. In Ms Du Plessis' opinion a minor contingency adjustment may be necessary in terms of the minor child's young age at the time of the injury and the fact that her eldest sister does have some educational difficulties.

[24] Dr Berkowitz, the plastic and reconstructive surgeon, interviewed and examined the minor child. On examination Dr Berkowitz identified a L-shaped scar measuring 60 mm × 4 mm overlying the minor child's frontal scalp and forehead to the left of the midline. He describes the scar as extremely unsightly and disfiguring but amenable to improvement by means of surgical revision.

[25] In Dr Berkowitz’s opinion the minor child has reached maximum medical improvement. In terms of the Narrative Test, Dr Berkowitz concluded that the minor child suffers from permanent serious disfigurement and equates the minor child's whole person impairment, due to skin disorders, to be 15%. A photo of the minor child’s injuries is included with Dr Berkowitz’s report.

[26] The actuarial report by Mr D Saksenberg is computed as follows —

Values below in Rands	but for the accident	having regard to the accident	net loss
Gross accrued value of income	0.00	0.00	
Less contingency	0.00	0.00	
Net accrued value of income	0.00	0.00	0.00
Gross prospective value of income	5,968,087.00	3,047,709.00	
less contingency	1,492,022.00	1,066,698.00	
Net prospective value of income	4,476,065.00	1,981,011.00	2,495,054.00
Total value of income	4,476,065.00	1,981,011.00	2,495,054.00

Contingency %		
accrued	0.0	0.0
prospective	25.0	35.0

The above values were calculated with the view that the minor child would retire at the age of 65.

[27] The following documents have been filed of record:

- a. Draft trust deed;
- b. Consent to act as trustee; and
- c. Signed contingency fee agreement.

Issues for Determination

[28] As the issue of merits had been previously disposed of between the parties, this default trial court was required to determine the quantum of damages suffered by the minor child, for whom B[...] was claiming on behalf of. The heads of damages claimed by B[...] are as follows —

- a. Future loss of earnings; and
- b. General damages

[29] Further thereto, this court was required to determine the admissibility of evidence on affidavit in terms of B[...]’s rule 38(2) application.

[30] In adjunct, this court was required to determine whether a trust should be formed to protect the funds for the minor child until she has attained the age of majority.

Evaluation and Applicable Law

[31] Rule 38(2) confers on the court the power to order that all or any evidence adduced, at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as it may seem meet: Provided that where it appears to the court that any other party reasonably

requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.

[32] At no material time were B[...] or the medico-legal experts called to be subjected to cross-examination by the fund and, in the interest of expediency to finalise such matters, this court finds no difficulty in ordering B[...]’s affidavit or the medico-legal experts’ affidavits and their respective medico-legal reports be admitted into evidence. In terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988, read with section 34(1)(ii) of the Civil Proceedings Evidence Act 25 of 1965 this court accepts into evidence the hospital and clinical records on which the respective medical-legal experts based their respective opinions on.

[33] The medico-legal reports span in excess of 380 pages. It would be ill behaved to attempt to incorporate the full contents of the medico-legal reports in this judgment. This court has taken into consideration all the evidence presented by B[...] and the above is merely a soupcon of the efforts of B[...]’s legal representatives and the appointed medico-legal experts. Much of the evidence and the opinions of the medico-legal experts has been well summarised by B[...]’s counsel, Adv G J Strydom SC, and the court is grateful to him for his detailed heads of argument.

[34] It is evident that the minor child suffers from lasting injuries after being struck by a motor vehicle on her forehead and that there are sequelae resulting therefrom which are consistent with a mild traumatic brain injury; however, not all the experts were in agreement with each other that it was probable that the minor child would have learning difficulties as a result of the accident. Despite the inconsistencies between the experts’ the court finds that on a balance of probabilities, a case has been made that there will be long lasting effects from the injuries sustained by the minor child from the accident.

[35] The mere fact that the laceration on the minor child’s forehead exposed her skull would be sufficient on its own for this court to draw the inference that the blow to the minor child’s head must have been quite significant. However, it is

less evident how these injuries and their sequelae will impact on the minor child's future earnings and on her capacity to earn but for the accident.

[36] It is practice to consider the intellect of a minor child's parents and the minor child's immediate family to attempt to predict the future potential of the minor child. The practice is equally applied to the minor child's parents' incomes in an attempt to quantify the future earning potential of the minor child.

[37] This court has found it difficult to separate the collateral evidence, that the minor child's eldest sister suffers from learning difficulties and is being accommodated at an expensive school and that the minor child likely suffers from dyslexia, from the fallout of the injuries that the minor child has suffered and which would affect the minor child's future capacity to earn.

[38] Added to this court's difficulty, is that the minor child suffered the injury at a young age and, as such, the trajectory of her life remains unpredictable. The experts have suggested that the unpredictability, which the court is having difficulty with, may be addressed by a slightly higher than normal contingency deduction or discount.

[39] It was observed in *Southern Insurance Association Ltd v Bailey* NO¹ that —

“The amount of any discount may vary, depending upon the circumstances of the case. The rate of discount cannot, of course, be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case.”

[40] Further, in *Hulley v Cox*² it was found that actuarial calculations should be tested by a consideration of the general equities of the case which are, effectively, the Judge's impression of the case.

[41] This court finds solace in resolving its difficulties by applying the *talem qualem* rule, otherwise referred to as the “thin skull” rule. As found in the matter of *Smit v Abrahams*³ the wrongdoer takes his victim as he finds him.

¹ 1984 (1) SA 98 (A).

² 1923 AD 234.

³ [1994] 4 All SA 679 (AD).

[42] In this application, the Fund must accept the minor child as it finds her. This will include the fact that the minor child may have inherent learning difficulties based on her elder sister's academic performance and the possibility of the minor child having dyslexia. Due to the young age of the minor child and the fact that the minor child may have had a predisposition of learning difficulties, this court accepts the respective experts' approaches that a slightly higher than normal contingency deduction should be applied. The actuarial calculations were based on a 25% contingency deduction being applied to the premorbid scenario, this court finds that a deduction of 30% to the minor child's premorbid potential earning capacity would be more just and equitable. The computation of this deduction is as follows —

Values below in Rands	but for the accident	having regard to the accident	net loss
Gross accrued value of income	0.00	0.00	
Less contingency	0.00	0.00	
Net accrued value of income	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>
Gross prospective value of income	5,968,087.00	3,047,709.00	
less contingency	<u>1,790,426.10</u>	<u>1,066,698.15</u>	
Net prospective value of income	<u>4,177,660.90</u>	<u>1,981,010.85</u>	<u>2,196,650.05</u>
Total value of income	<u><u>4,177,660.90</u></u>	<u><u>1,981,010.85</u></u>	<u><u>2,196,650.05</u></u>
Contingency %			
accrued	0.0	0.0	
prospective	30.0	35.0	

[43] This court finds it important to note that much has been said in the media, of late, about the management of claims against the Fund and about the executive leadership of the Fund. Both plaintiffs' attorneys and the leadership of the Fund, have taken jabs and upper cuts at each other and the courts have had the unenviable task of acting as referee rather than dealing purely with the merits of each case.

[44] With social legislation such as the Act, which facilitated the creation of the Fund wherein public finances are utilised to settle claims, it is difficult for one not to be tempted into unduly reducing valid and justifiable claims in the vane of attempting to protect those finances misguidedly.

[45] However, the object of the Fund is clear as per section 3 of the Act which reads as follows —

“3. The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles.”

[46] It is trite that a plaintiff is required to prove his claim and, where possible, to mitigate his damages. It is also incumbent on public office bearers not to allow fruitless and wasteful expenditure of public funds. These precepts and obligations must inevitably be balanced against the object of the Fund as stated in section 3. Accordingly, the slightly higher than normal contingency deduction applied by this court is not consequent to an arbitrary temptation to reduce the award but rather that the unpredictable circumstances of the minor child's life would be better accounted for by the higher contingency.

[47] In respect of B[...]’s claim on behalf of the minor child for general damages against the Fund, the Fund must first qualify whether the minor child's injuries are “serious” before there can be an eligible claim for general damages against the Fund. It is settled law that a court cannot make a determination whether a plaintiff's injuries are so serious that such a plaintiff is entitled to a claim for general damages against the Fund. The stipulation in Regulation 3(3)(c) of the Act is to the effect that:

“... the Fund shall only be obliged to pay general damages if the Fund – and not the court - is satisfied that the injury has correctly been assessed in accordance with the RAF 4 Form as Serious”⁴.

⁴ See *Makuapane v Road Accident Fund* [2023] ZAGPPHC 15 (19 January 2023); *Road Accident Fund v Duma* 2013 (6) SA 9 (SCA) (*Duma*) at para 19.

[48] The Fund must communicate to the plaintiff's attorney that the Fund accepts that the injuries are serious. It is settled that this communication may be explicit or tacit based on the Fund's actions.

[49] Prior to the hearing of this matter, the Fund had not yet determined whether the minor child's injuries are serious. On the day of hearing, B[...]s counsel submitted that an offer had just been made by the Fund, just before the matter was called, for the settlement of the claim for general damages. However, the offer was rejected by B[...]. It is on the basis of this submission that this court is willing to entertain the claim for general damages as the conduct of the Fund, in having made an offer to settle general damages, is indicative of the tacit acceptance that the minor child's injuries are serious.

[50] In quantifying the general damages, counsel proposed a number of cases wherein the injury suffered by a plaintiff, specifically injuries suffered by a minor child, are relatable *in casu*. Counsel submitted that the most relatable case is that of *Ramatsebe v RAF*⁵. In this case, a 3-years-and-9-months old minor child sustained a mild to moderate brain injury, a tibial fracture and post-traumatic stress disorder. The current value of the award in 2023 is R1,404,590-16.

[51] This court is in agreement with counsel in that the injuries in the *Ramatsebe* case are most relatable to those suffered by the minor child. *In casu*, it must be distinguished that the minor child was already suffering from some post-traumatic stress disorder from the loss of her father. Further, it is foreseeable that the minor child in *Ramatsebe* would have suffered with pain or mechanical disfunction from the tibial fracture. This court takes into consideration that *in casu* the minor child has visible and unsightly facial scarring which would likely affect the minor child negatively in the future. After having regard to the similarities and differences between the *Ramatsebe* case and the current matter, this court finds that R1,400,000 is a just and equitable award in respect of the general damages suffered by the minor child.

[52] In closing his argument, counsel submitted that he had perused the terms of the contingency fee agreement, concluded between B[...] and her attorneys,

⁵ Case number 36266/2009 GSJ delivered on 2 September 2011.

and argued that the terms were in order. This court is in agreement that the terms are in order after having considered same.

[53] This court has considered the terms of the draft trust deed, wherein Ferox Estate and Trust Administration Services (Pty) Ltd and B[...] are nominated as trustees, to protect the award for the benefit of the minor child until she attains the age of majority. This court finds that the draft trust deed is in order, including the remuneration of the independent professional trustee and the duration of the Trust.

[54] This court has also had sight of the nominated independent professional trustee's signed consent to accept appointment as a trustee and that the trustee is appropriately qualified.

Order

[55] In the result I make the following order:

1. The fund shall pay to the plaintiff, the capital amount of R3,596,650,05 less the previous interim payment of R500,000-00 in respect of the minor child's claim for loss of earnings and general damages, together with interest *a tempore morae* 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.
2. Payment of the aforesaid amount shall be made directly into the plaintiff's attorneys trust account within 180 (hundred and eighty) days from date of this order, the details of such trust account be as follows:

Holder:	[...]
Account Number	[...]
Bank & Branch	[...]
Code	[...]
Ref	[...]

3. The Fund is ordered, in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, to reimburse the plaintiff for 100% of the costs of any future accommodation in a hospital or nursing home, or treatment or rendering of service to him or supplying goods to him arising out of injuries sustained by the plaintiff in a motor vehicle accident, which occurred on 2 November 2019 after such costs have been incurred and upon proof thereof.
4. The plaintiff's attorneys of record shall retain the aforesaid amount, net of the attorney's costs and fees, in an interest-bearing account in terms of Section 78(2)(A) of the Attorneys Act, for the benefit of the minor child, pending the creation of the Trust referred to below and the issuing of the letter of authority: Provided that the plaintiffs' attorney of record shall pay the net amount due to the plaintiff, together with any accrued interest, over to the trustees of the Trust, upon the establishment of the said Trust.
5. The following shall be applicable to the Trust —
 - a. The Trust shall be created in accordance with the trust deed, which deed shall contain the provisions set out in Annexure "A" attached hereto, and which is to be established in accordance with the provisions of the Trust Property Control Act, number 57 of 1988, with the plaintiff as the sole beneficiary.
 - b. The Trust shall have as its trustees —
 - i. Johan Britz of Ferox Estate and Trust Administration Services (Pty) Ltd, registration number 2014/161824/07; and
 - ii. D[...] B[...], (ID number: [...]), the biological mother of the minor and Plaintiff in the matterwith those powers and duties as set out in Annexure "A" of the trust deed.
 - c. The trustees shall —

- i. be obliged to render security to the satisfaction of the Master of the High Court: Provided that the plaintiff is exempted from providing such security;
 - ii. be entitled to administer on behalf of the minor, the undertaking referred to above and to recover the costs covered by such undertaking for the benefit of the minor;
 - iii. at all times administer the trust for the sole benefit of the minor;
 - iv. liaise with the plaintiff at least every six months to establish the needs of the minor and will personally consult the Plaintiff on an annual basis;
 - d. The Deed of Trust shall not be capable of amendment, save with leave of the Court.
 - e. The contents of the trust deed are subject to the approval of the Master of the High Court.
 - f. The costs and charges relating to the administration of the trust and the costs and charges incidental to the formation thereof, shall be borne by the trust out of the capital and/or income, as the trustees may deem appropriate, subject to the above, which fees shall be limited in terms of the Trust Property Control Act, number 57 of 1988.
 - g. The trust shall terminate upon the minor turning 18.
6. The Fund shall pay the plaintiff's costs on a party-and-party scale, such costs to include, but not be limited to the following —
- a. the preparation, qualifying and reservation fees of the plaintiff's experts, including the costs of obtaining expert reports, including any addendum reports; and
 - b. the costs of counsel.

7. The plaintiff shall, in the event that costs are not agreed upon between the parties, serve the notice of taxation on the Fund and shall allow the Fund 180 (one hundred and eighty) days to make payment of the taxed costs, after service of the taxed bill of costs.

KOM AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Plaintiff:

Adv. G J Strydom SC
instructed by De Broglio Attorneys

For the Defendant:
Heard on: 26 July 2023
Delivered on:

Not Applicable