

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 DIVISION, JOHANNESBURG**

Case Number: 13124/2019

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

In the matter between:

M[...] J[...] obo THE MINOR

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

MOLELEKI AJ

Introduction

- [1] This matter is a stated case as contemplated in Rule 33 of the Uniform Rules of Court. The parties agreed to submit a special case for adjudication on the contingency deduction applicable to the future loss of earnings.

Background Facts

- [2] The plaintiff claims for damages in her representative capacity as mother and natural guardian of her minor child. The minor child was a passenger in the motor vehicle that was driven by the plaintiff when an unidentified motor vehicle collided with the plaintiff's vehicle. The collision occurred on 17 September 2018, along Ikeyiki Street, Vosloorus.

- [3] The following was agreed upon:

- [a] The defendant is liable for 100% of the plaintiff's agreed or proven damages as per the offer of settlement dated 3 October 2023;
- [b] The defendant shall pay R800 000.00 (Eight Hundred Thousand Rand) in respect of the general damages, as per the offer of settlement dated 3 October 2023;
- [c] The defendant shall furnish an undertaking for future medical expenses in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996;
- [d] The parties agreed to the Diploma scenario as postulated by the Industrial Psychologist for the plaintiff in the actuarial calculation, dated 4 September 2023; and
- [e] The plaintiff's expert reports to be admitted into evidence by way of affidavit.

- [4] The expert reports filed on behalf of the plaintiff and admitted as evidence are of the following experts: the General Practitioner, Dr Makua; the Neurologist, Dr Townsend; the Neuropsychologist, Ms Da Costa; the Occupational Therapist, Ms Fletcher; the Educational Psychologist, Ms Mattheus; the Industrial Psychologist, Ms Liebowitz; and the Orthopaedic Surgeon, Dr Sher.

Evaluation

- [5] The approach in assessing damages for loss of earnings was set out in *Southern Insurance Association Ltd v Bailey NO* as follows:¹

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative”.

- [6] As a general rule, according to Koch, a sliding scale of 0.5% per year, over which the applicable income must be calculated, must be applied. For instance, 25% for a child, 20% a youth, and 10% in middle age.²

- [7] Contingency deductions allow for the possibility that the minor may have less than “normal” expectations of life and that she may experience periods of unemployment by reason of incapacity due to illness, accident, or labour unrest or general economic conditions.³

- [8] It is generally accepted that both favourable and adverse contingencies must be considered. As in the case of *Bailey*, the minor child herein has been deprived of normal life. According to the Neuropsychologist, the neuropsychological impairments negatively impacted her cognitive, emotional and behavioural functioning. The behavioural and psychological difficulties are likely to worsen as she becomes older. The minor child will not likely show any spontaneous recovery. She is not likely to return to a pre-accident level of mental functioning.

¹ 1984 (1) SA 98 (A) at 99A-E.

² Koch *The Quantum Yearbook* (Van Zyl, Rudd & Associates) 2009 at p 100.

³ *Van der Plaats v South African Mutual Fire & General Insurance Co Ltd*. 1980 (3) SA 105 (A) at 114-115.

- [9] A 25% contingency deduction for a child is not unusual. Of importance is that the award must be fair on both sides. As was stated in *S [...] obo Minor v Road Accident Fund*,⁴ the court “must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant’s expense”. The sympathy for the claimants, even where the case is distressing, cannot be allowed to influence the judgment.⁵
- [10] In *Road Accident Fund v Guedes*,⁶ the court stated “... [when] assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court”.
- [11] The striking portions of the plaintiff’s Educational Psychologist’s report, are as follows: pre-accident potential was deduced from various information such as developmental history; informal and formal schooling reports; family circumstances; parental educational levels and or patterns and employment history of parents and or siblings. According to the postulations by the Educational Psychologist, had the accident not occurred, the minor child would have exited the schooling system with a grade 12 level of education in 2033. With motivation and opportunity, she would have embarked on tertiary studies. As already stated, the parties agreed on a scenario of a Diploma qualification. However, the minor’s probable career progression, having regard to the collision, has been compromised.
- [12] Post-accident, the minor attends an LSEN (Learner’s with Special Educational Needs) school. The school caters for the needs of children with various difficulties and an adapted curriculum is followed. Pre-accident she would have continued working for approximately 45 years from age 20 to 65 years. Given the assessment findings, it is anticipated that the minor will exit the current schooling system with NQF1, with an opportunity to enter the

⁴ [2021] ZAGPPHC 558 at para 70.

⁵ See *Hulley v Cox* 1923 AD 234 at p 246.

⁶ [2006] ZASCA 19; 2006 (5) SA 583 (SCA) at par [9].

Work Experience Programme (WEP) to gain some vocational skills. It is, however, unlikely the minor would become fully independent.

[13] According to the actuarial calculations, the minor's future uninjured earnings were projected from Patersen B2/B3 at R 8 024 773.00 per year from 2036. A ceiling income would be from Patersen C3/C4.

[14] The plaintiff contended for the usual 25% deduction to be applied to the agreed scenario of a Diploma qualification on the R8 024 773.00. Based on this contingency deduction, the loss of earning would be an amount of R6 018 579.75. The defendant on the other hand contended for a 45% deduction.

[15] In considering what contingency deduction to apply to the minor child's postulated pre-morbid future earnings, I considered the minor's young age. At the time of the accident, she was two years old and ten months. The minor is 7 years old presently. I accept that it may not be easy for her to secure employment in future. If she does, it would have to be with an employer who would understand her limitations and be willing to accommodate her shortcomings. She would be restricted to a field that would be, physically, a non-demanding one. I consider that the minor child would be uncompetitive in the open labour market as compared to her peers who do not have the limitations she has. She will therefore remain largely unemployed. In addition, the vicissitudes of life such as illness; the prospects of unemployment or injury; and even the possibility that she could have experienced an earnings progression beyond that assumed, had the accident not occurred, have already been considered in the actuarial calculation.

[16] At the age of two years old, the minor child had not started schooling and had been at a pre-school for two months prior the accident. She is just at the start of her career. Given the limited information, it makes it difficult to assess her pre-accident intellectual functioning. There is nothing to reference on as to what her academic performance would have been like. However, a school report from 2021, Grade R, revealed that she had progressed well at the LSEN

School. She will exit school at NQF level 1 with an opportunity to enter the Work Experience Programme (WEP). The minor child's pre and post-accident life expectancy/longevity has not been affected by the head injury.

[17] I am alive to the sliding scale principle of 25% in respect of minor children. However, it is equally imperative that the award is fair to both sides. The plaintiff has to be compensated, however, the court is not to pour out largesse from the horn of plenty at the expense of the Defendant.⁷

[18] The court in *Hulley v Cox*⁸ cautioned not to allow our sympathy for the claimants, even where the case is distressing, to influence judgment.

[19] Consequently, I have applied a 35% contingency deduction to the pre-morbid earnings. I am satisfied that the contingency deduction applied is fair and reasonable in the circumstances.

[20] The calculations are as follows:

R8 024 773.00, applying 35% contingency deduction — the amount is reduced to R5 216 012.45

Conclusion

[21] The total amount of damages payable to the plaintiff is accordingly R6 016 012.45 calculated as follows:

[a] General damages of R800 000.00; and

[b] Future loss of earnings/earning capacity of R5 216 012.45.

Costs

[22] There is no reason to deviate from the general principle that costs follow the result.

Order

⁷ *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 at 287 E-F.

⁸ Above n 5 at p 246.

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

Judgment is granted in favour of the plaintiff as follows:

1. The Defendant is liable for 100% of the Plaintiff's damages pertaining to the collision that occurred on 17 September 2018.
2. The Defendant shall pay the Plaintiff in her representative capacity as mother and natural guardian of her minor daughter, the capital amount of R 6 016 012.45 within 180 days of this order, calculated as follows:
 - (i) R800 000.00 in respect of general damages;
 - (ii) R5 216 012.45 in respect of future loss of earnings.
3. Payment of the aforesaid sums are to be made to the Plaintiff's Attorneys of record within 180 days, by payment into their trust account, details as follows:

Mokoduo Erasmus Davidson Attorneys Trust Account
First National Bank, Rosebank Branch
Account Number: 62222488290
Branch Code: 253305.
4. The defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of the future accommodation of A O B M (hereinafter referred to as "the minor") in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the minor arising out of the injuries sustained by the minor in the motor vehicle collision of 17 September 2018, after such costs have been incurred and upon proof thereof.
5. In terms of the statutory undertaking referred to in paragraph 4 above, the defendant shall pay: the reasonable costs for the creation of the Trust referred to in paragraph 7 below, and the appointment of the

Trustee; the reasonable costs for the furnishing of security by the Trustee; the costs of the Trustee in administering the minor's estate, as determined by Section 84(1)(b) of the Administration of Estates Act 66 of 1965, as amended, according to the prescribed tariff applicable to curators; the costs of the Trustee in administering the minor's estate and the costs of administering the statutory undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, as determined by the Administration of Estates Act 66 of 1965, as amended, limited to the prescribed tariff applicable to a *curator bonis*, as reflected in Government Notice R1602 of 1 July 1991, specifically paragraphs 3(A) and 3(B) of the schedule thereto.

6. That the defendant will pay the agreed or taxed party and party High Court costs of the action, subject to the discretion of the Taxing Master, including the date on which the draft order was made an order of the Court, such costs to include: the costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 1 above; the trial costs; the reasonable costs of all the plaintiff's expert reports; and joint minutes, if any. Such expert reports to include, but not limited to, Dr. Scher; Dr. Townsend; Dr. Makua; Ms. da Costa; Ms. Mattheus; Ms. Fletcher; Ms. Leibotiwz; and Mr. Loots, if any as may be agreed or allowed by the Taxing Master. The plaintiff's attorneys shall serve the notice of taxation on the defendant's attorneys and shall allow the defendant 180 days within which to make payment of such costs.
7. 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 the minor and that such trust shall be formed within 6 (SIX) months of the date of this order.
8. The trust instrument shall provide for the following as a minimum: 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, an adult family member of the minor, more particularly the

minor's biological mother, J[...] M[...], shall be appointed as one of the trustees and she shall be exempt from providing security to the satisfaction of the master; if the number of trustees drops below the prescribed minimum, the remaining trustees are prohibited from acting other than to appoint a replacement trustee; 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; the powers and authority of the trustees shall not exceed those usually granted to trustees of special trusts; procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Court; 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; the separation of the property of the trustee/s from the trust property; ownership of the trust property vests in the trustee/s in their capacity as trustee/s; the independent trustee/s (other than the family member above) 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; amendment of the trust instrument shall be subject to the leave of this Court; 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; the minor shall be the sole income and capital beneficiary; the trust property is excluded from any community of property in the event of the marriage of the minor; the trust shall terminate on the minor attaining age of majority, whereafter the trust assets shall devolve upon the minor; the trust property and administration thereof is subject to annual reporting by an accountant.

9. The capital amount referred to in paragraph 1 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 plaintiff.

10. The statutory undertaking referred to in paragraph 4 above, shall be delivered by the defendant to the aforesaid Mokoduo, Erasmus, Davidson Attorneys within 14 (FOURTEEN) days of the date of this Order.
11. 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 utilised as may be directed by the trustee of the Trust, when created.
12. Mokoduo, Erasmus, Davidson Attorneys shall render an attorney and client statement of account to the trustee of the trust to be formed, in terms of the fees contract entered into between the plaintiff and Mokoduo, Erasmus, Davidson Attorneys.
13. The party and party costs referred to in paragraph 6 above, as taxed or agreed, shall be paid by the defendant directly into the trust account of Mokoduo, Erasmus, Davidson Attorneys for the benefit of the minor. After deduction of the legal costs consultant's fee for drawing the bill and attending to its settlement or taxation, the balance shall be paid into the trust unless same has not yet been created, in which event, such balance shall be invested 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 and shall be utilised as may be directed by the Trustee of the Trust, when created.

MOLELEKI AJ
Judge of the High Court
Gauteng Division, Johannesburg

Appearances

For the Plaintiff: Ms N Davidson
Instructed by: Mokoduo, Erasmus, Davidson Attorneys

For the Defendant: Ms T Tivana
Instructed by: State Attorney

Date of Hearing: 6 October 2023
Date of judgment: 3 November 2023