



(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: No

SIGNATURE

FARBER AJ

I propose granting in favour of the Plaintiff, who on behalf of her daughter Ms. S C ("S") sues in her capacity as her natural guardian, a judgment in terms of the draft order which is annexed

to it marked "X" and which has been initialed by me on the first page thereof.

It is perhaps well that I point out that the provisions of paragraphs 2,3,4,5,6,7 and 8 of the draft have been consented to by the Defendant [*"the Fund"*], save that the amount of R5 982 232.00 in respect of the loss of income referred to in paragraph 1.1, and the amount of R600 000.00 in respect of the general damages referred to in paragraph 1.2, thereof are in issue. As will clearly emerge the contest in regard to the quantification of these two amounts falls within a very narrow ambit.

Loss of Income

The Plaintiff originally claimed the sum of R6 000 000.00 on account of S's prospective loss of earnings. During the course of the hearing Mr Combrink on behalf of the Plaintiff reduced the amount claimed to R5 982 232.00. He did so by increasing the contingency percentage relied upon in the computation of this head of damages from 24% to 35%.

Mr Ndlovu on behalf of the Fund attacked the computation on a single ground. He contended that despite the injury which she had sustained in the motor accident and the consequences which had arisen therefrom in terms of her cognitive and intellectual skills and the impairment to her personality, S on the completion of her schooling, to the extent that she might have been able to complete it was capable of working under supervision, performing mechanical and repetitive functions. He made

reference to the evidence of Ms V Gaydon, an Educational Psychologist and a Neuropsychologist who had been called by the Plaintiff.

Ms L Theron, a Clinical Psychologist, in her evidence on behalf of the Plaintiff excluded that possibility. She opined that S in consequence of the accident was severely impaired in her ability to function cognitively. S, so she said, had a severe impairment of personality arising from the accident. She had become argumentative, aggressive, confrontational and resentful. She had difficulty in subordinating herself to authority. Ms Louw opined that even if S was able to find some modest form of employment, it was not likely to endure for very long.

In my view Ms Louw's opinion must trump that of Ms Gaydon on the central issue. Ms Louw is after all a Clinical Psychologist with a welter of experience and her evidence as to the prospects of S finding employment fell within the scope of her expertise. Ms Gaydon was also an impressive witness. However, her expression of opinion in relation to the employability of S did not fall within the ambit of her dedicated discipline, namely that of an Educational Psychologist and a Neuropsychologist.

In all events the contingency of 35% relied upon by the Plaintiff in assessing S's loss of prospective earnings addresses the issue. It constitutes a percentage figure well beyond that which is ordinarily used, and in my judgment adequately cater for any imbalance

which might arise in the event of S managing to secure some or other form of sheltered employment.

I consequently uphold the Plaintiff's claim for S's prospective loss of earnings in the amount of R5 982 232.00.

General Damages

The Plaintiff claimed general damages in the sum of R600 000.00. Mr Ndlovu on behalf of the Fund submitted that the sum of R500 000.00 would be more appropriate. He later in argument revised the figure to R575 000.00. There can be little doubt that the sequelae flowing from the brain injury which S sustained so many years ago are substantial and serious. Her education has been disrupted and she has certainly not been able to live the type of life which would have been open to her had she not been injured. She has not made the progression which would otherwise have been expected of her. The impact on her personality flowing from the injury was severe. She certainly has not, and will not be able, to interact socially with others. The constructive rearing of children by her will not be free of difficulty. She has become argumentative and aggressive, to the extent that she has engaged in physical altercations. The difficulties associated with her ability to work are demeaning to her. She will need to carry the burden of cognitive, intellectual and psychological deficiencies for many years to come. On this score she is a mere 17 years of age.

R600 000.00 for general damages is consonant with the awards which our Courts have made in recent years in similar cases. The amount is just and equitable.

The Result

In the result the draft order attached hereto which order I have initialed and marked "X", is made an order of court.


G FARBER

Acting Judge of the High Court

26 May 2023

X" (A)

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

On the 24th day of MAY 2023 before the Honourable Judge Farber AJ

CASE NO:14487/2019

Link No: 4176256

In the matter between:

MAGUBANE: SYLVIA BONISWA obo Plaintiff

MAGUBANE: SIYAMTHANDA CHANIQUE (*"the injured"*)

and

ROAD ACCIDENT FUND Defendant

DRAFT ORDER OF COURT

HAVING HEARD COUNSEL ON BEHALF of the Plaintiff and the Defendant it is ordered that:

1. The Defendant shall pay the amount of R6 582 232.00 (Six Million Five Hundred and Eighty Two Thousand Two Hundred and Thirty Two Rand) (*"the capital amount"*) to the Plaintiffs Attorneys, Erasmus de Klerk Inc., in settlement of the injured's claim, which amount is calculated as follows:

1.1 Loss of Income: RS 982 232.00

1.2 General Damages: R600 000.00

The capital amount referred to in *ad paragraph 1* shall be payable by direct transfer into their trust account, details of which are as follows:

ERASMUS DEKLERK INC

ABSA Bank

Account number: 406 383 9468

Branch number: 632 005

Rosebank

Ref.: J Erasmus/MAGUBANE obo MAGUBANE

2. The capital amount referred to in *ad paragraph 1*:
 - 2.1 will be payable within 180 days from date hereof;
 - 2.2 will bear interest at the rate of 10,75% per annum calculated from and including the 15 (FIFTEENTH) calendar day after the date of this Order to and including the date of payment thereof.
3. The Defendant shall provide the injured with an Undertaking as envisaged in Section 17 (4) (a) of Act 56 of 1996, for 100% of the costs of the future accommodation of the injured in a hospital or nursing home and such treatment, services or goods as the injured may require as a result of the injuries that the injured sustained as a result of the accident which

occurred on 16 October 2008, as set out in the medico legal reports obtained on behalf of the Plaintiff, after such costs have been incurred and upon proof thereof, which costs shall include:

- 3.1 The cost to be incurred in the establishment of a trust to *inter alia* protect, administer and/or manage the capital amount and the proceeds thereof referred to in paragraph 1 *supra*;
- 3.2 The remuneration of the trustee in administering the capital amount:
 - 3.2.1 Upon acceptance of appointment by the First Trustee and upon the issuing of Letters of Authority by the Master of the High Court, an amount calculated to be equal to 0,25% of the Trust Fund;
 - 3.2.2 During the existence of the Trust, the total amount calculated to be equal to 1% (one per centum) per annum of total funds under administration by the Trust;
 - 3.2.3 Upon termination of the Trust, 2% (two per centum) of the amount, (nett of all outstanding liabilities of the Trust as at the date of death of the Beneficiary) of the value the property of the Trust.
- 3.3 The costs of the furnishing of annual security in terms of section 77 of the Administration of Estates Act, Act 687 of 1965 (as amended).

4. That the attorneys for the Plaintiff, Erasmus de Klerk Incorporated, are ordered:

4.1 To cause a trust ("the trust") to be established in accordance with the Trust Property Control Act No. 57 of 1988, within six months of date of granting of this order and shall approach the above Honourable Court for condonation and further direction should the trust not be established within the said period of six months;

4.2 To deposit all proceeds in terms hereof in an interest-bearing account, for the benefit of the Injured, as contemplated in the Legal Practice Act, pending the establishment of the trust;

4.3 To pay all monies held in trust by them for the benefit of the Injured, immediately to the trust, upon creation of the trust.

5. The trust instrument contemplated above shall make provision for the following:

5.1 that the injured is the sole beneficiary of the trust during her lifetime and after her death, her lawful descendants;

5.2 that the first trustees shall be HJ van Heerden as representative of Enonix (Pty) Ltd;

5.3 that the trustee(s) are to provide security to the satisfaction of the Master during the lifetime of the Injured;

5.4 that the ownership of the trust property vest in the trustees of the trust in their capacity as trustees;

5.5 procedures to resolve any potential disputes;

5.6 that the trustees be authorised to recover the remuneration of, and costs incurred by the trustees, in administering the undertaking in terms of Section 17(4)(a) of Act 56 of 1996 in accordance with the certificate of undertaking to be provided by the Defendant;

5.7 that the amendment or termination of the trust instrument be subject to the leave of this Honourable Court during the lifetime of the Injured;

5.8 that the trust property and the administration thereof be subject to an annual audit during the lifetime of the Injured.

6 Subject to the discretion of the Taxing Master, the Defendant must make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale, which costs include (but not limited to):

6.1 The costs of senior-junior counsel (which is to include, *inter alia*, preparation,

perusal, and counsel's fees for 23 May 2023 and 24 May 2023);

6.2 All the cost in obtaining all medico legal/expert reports, as well as the Plaintiff's travelling in attending the Plaintiff's experts, of the following Doctors or Experts:

- 6.2.1 Dr Barlin (Orthopaedic Surgeon);
- 6.2.2 Dr PAG Botha (Urologist);
- 6.2.3 Dr M Close (Psychiatrist);
- 6.2.4 Dr JH Kruger (Neurosurgeon);
- 6.2.5 Vanessa Gaydon (Neuropsychologist & Educational Psychologist);
- 6.2.6 Dr M Joubert (Psychiatrist);
- 6.2.7 Alison Crosbie Inc - Kirsten du Tait (Occupational Therapist);
- 6.2.8 Lorette Theron (Industrial Psychologist);
- 6.2.9 Algorithm Consultants - G.A Whittaker (Actuary).

6.3 In addition the attendance and qualifying fees for the following experts:

- 6.3.1 Vanessa Gaydon (Neuropsychologist & Educational Psychologist);
- 6.3.2 Lorette Theron (Industrial Psychologist).

6.4 The above costs will also be paid into the aforementioned trust account.

7. The Plaintiff's attorneys shall be entitled to make payment in respect of:

7.1 the expert witnesses set out in paragraph 6.2 *supra*;

7.2 counsel employed on behalf of the Plaintiff;

7.3 Attorneys fees;

from the aforesaid funds held by them for the benefit of the Injured.

8. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-

8.1 The Plaintiff shall serve the notice of taxation on the Defendant.

8.2 The taxed or agreed costs will:

8.2.1 be payable within 180 days from date of taxation or settlement; and

8.2.2 bear interest at the rate of 10,75% per annum calculated from and including the 15 (FIFTEENTH) calendar day after the date of taxation to and including the date of payment thereof.

BY ORDER OF THE COURT

REGISTRAR

APPEARANCES

FOR THE PLAINTIFF:

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G Farber

Acting Judge of the High Court

26 May 2023

Date of hearing: 24 May 2022

Date of judgment 26 May 2023