

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



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

CASE NO: 41898/2019

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

Date: 14 June 2023

In the matter between:

LIZL SMITH NO obo T B W

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGEMENT

ALLY AJ

[1] This matter came before this Court on the basis of a default, the Defendant's defence as pleaded having been struck out by my brother Adams J¹ on 26 August 2021 and a further order for Plaintiff to proceed to trial by default.

[2] The Plaintiff was represented in these proceedings by a *Curator ad Litem*, Lizl Smith, an Attorney of this Court, who was appointed by this Court on 24 February 2022².

[3] At the outset this Court was informed that merits had been settled at 100% [one hundred percent] in favour of the Plaintiff and that general damages had also been settled in the amount of **R900 000-00 [nine hundred thousand rand]**.

[4] The only issue before this Court for determination accordingly, was the issue of loss of income or earning capacity and the ancillary matter of costs.

[5] The Court indicated to Adv. Den Hartog who represented the Plaintiff that it would be prudent for Ms Gibson, the Neuro and Educational Psychologist, to testify.

[6] Accordingly, the matter stood down to the following day, 9 March 2022 for the testimony of Ms Gibson to be heard, amendment of the pleadings as well as argument.

[7] The Patient, T B W, was born on [...] March [...] and was involved in a collision with the insured driver on 22 July 2012 when he was six years old and a pedestrian at the time.

[8] The patient is alleged to have suffered the following injuries arising from the abovementioned collision:

¹ Caselines: 0047-34

² Caselines: 0001-1

7.1. a major injury on the head.

[9] The hospital records³ at the time of admission indicate that the patient was 'found on seated position'.

[10] Dr Isigler⁴ on reading the ambulance report records that the GCS of the patient was 15/15.

[11] The patient received debridement and degloving for the scar on the forehead.

[12] Ms Gibson in her evidence, confirmed the reports that she authored. Her initial assessment of the patient occurred on 10 February 2020 when the patient was 13 years and 11 months old.

[13] She recorded that Dr Isigler reported that the patient, at the very least, sustained a 'mild traumatic brain injury' and noting that the patient had momentary post-traumatic amnesia for less than 24 [twenty-four] hours. It should be noted that this assessment by Dr Isigler was made after he questioned the paternal aunt of the patient regarding her observations at the time that she saw her 'son' at the hospital.

[14] However, the important evidence relates to the testimony of Ms Gibson regarding the educational potential of the patient. The reason for such importance is the reliance by the Industrial Psychologist on the report of Ms Gibson.

[15] Ms Gibson, as stated above, is a qualified neuro and educational psychologist. Ms Gibson maintains that the patient's scholastic ability post the collision is below average. Ms Gibson testified that the patient's school results were

³ Caselines: 0028-246 per the ambulance report

⁴ Caselines: 0028-198 at 201 at para 1.2.2.1.

consistent with her assessment of the patient, namely, that the patient was struggling and had to be progressed to the next Grade in accordance with the Basic Education progression system wherein a learner can only fail twice in a phase.

[16] The issue that arises however, is in relation to the comparison that Ms Gibson makes in respect of the patient. She opines that the patient's educational ability has deteriorated as a result of the injuries sustained in the collision and based on the expert reports of the neurosurgeon and the speech and language pathologist.

[17] At the time of the collision, the patient was in Grade 1. The only reports that were placed before Ms Gibson were that of Grade 8 and she observed that the patient had not failed a Grade up to Grade 8 which was seven years since the collision.

[18] The question that arises is whether it can be accurately determined as opined by Ms Gibson that the injuries sustained by the patient are related to the deterioration in the results of the patient. In my view, a Court must accept such evidence with caution and assimilate same into the consideration of a fair contingency in the circumstances of this case. In other words, the possible inaccuracy of Ms Gibson's testimony regarding the deterioration in academic faculties of the patient, must be one of the factors taken into account in arriving at an appropriate contingency in this case. This approach, in my view, aligns with the majority decision in **Road Accident Fund v CK**.⁵

[19] Accordingly, in my view, a higher contingency needs to be applied to the uninjured income of R8 489 968 [eight million four hundred and eighty-nine

⁵ 2018 ZASCA 181

thousand nine hundred and sixty-eight rand]. Furthermore, in my view, instead of applying a contingency for injured and uninjured, the amount for uninjured must be taken and a contingency applied to that amount. This approach in my view is fair and reasonable taking into account the totality of the evidence. The contingency percentage to be applied, which in my view, is fair and reasonable in this case is 45%[forty-five percent] of the uninjured loss amount stated above.

[20] In the result, it is my view that a fair and reasonable for amount for loss of earning capacity, in this particular case, is the amount of **R4 669 482 – 40 [four million six hundred and sixty-nine thousand four hundred and eighty-two rand and twenty cents]**.

[21] Having regard to the settlement of the amount for general damages in the amount of R900 000 – 00 [nine hundred thousand], the following Order will issue:

1. the Defendant is ordered to pay the Plaintiff an amount of **R5 569 482 – 40[five million five hundred and sixty-nine thousand four hundred and eighty-two rand and forty cents]** in respect of Plaintiff's claim and is comprised as follows:
 - 1.1. General Damages – R900 000 – 00 [nine hundred thousand rand] as agreed between the parties;
 - 1.2. Loss of earnings – R4 669 482 – 40 [four million six hundred and sixty-nine thousand four hundred and eighty-two rand and forty cents];
 - 1.3. The above amount shall be paid on or before 180 days from date of this order;

2. The Defendant shall provide the Plaintiff/Patient with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, as amended, in respect of future accommodation of the Plaintiff/Patient in a hospital or nursing home for treatment of or rendering of a service or supplying of goods to him to compensate the Plaintiff/Patient in respect of the said costs after costs have been incurred and on tendering of proof thereof;
3. The Defendant shall pay the taxed or agreed costs of the Plaintiff in this action which costs shall include 8 and 9 March 2022.

G ALLY

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the 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 for hand-down is deemed to be **14 June 2023**.

Date of virtual hearing: 8 and 9 March 2022

Date of judgment: 14 June 2023

Appearances:

Attorneys for the Plaintiff : **RENIER VAN RENSBURG INC**
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Counsel for the Plaintiff : **Adv. A den Haartog**

Attorneys for the Respondent : **No appearance**