

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

(1) NOT REPORTABLE

Case No 83732/2015

22/9/2017

ADV HUGO MARTIN obo A N

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Judgment

Chesiwe AJ

- [1] This is an action for damages in terms of the Road Accident Fund Act 56 of 1996 as amended (the Act), pursuant to a motor vehicle accident that occurred on 4 January 2014.
- [2] The plaintiff sues the defendant for damages resulting from the injuries he sustained in the collusion.
- [3] On the day the matter was heard, the parties informed the court that the merits were fully settled and consequently the only issue for determination was the plaintiffs claim in respect of loss of earnings and/or earnings capacity.
- [4] Adv M Hugo was appointed as the curator *ad litem*. He filed a curator's report dated 11 May 2017.

- [5] The parties differ on whether the plaintiff would have attained a matric certificate or an NQF5 certificate pre or post the accident.
- [6] The summary of the matter is briefly that, on the 4 January 2014 the plaintiff was a passenger in a vehicle which overturned when the insured driver lost control of the vehicle. The plaintiff sustained the following injuries.
- 6.1 Severe head injuries
 - 6.2 Open wound on scalp
 - 6.3 Multiple lacerations to the forehead
 - 6.4 Injury to the right forearm
 - 6.5 Injury to the left elbow
 - 6.6 Injury to the right shoulder
 - 6.7 Injury to the right eye
 - 6.8 Injury to right ear
 - 6.9 Injuries to the face
 - 6.10 Psychological shock and trauma
 - 6.11 Sequelae of the above injuries
- [7] Oral evidence was to be led by experts from both parties.

PLAINTIFF'S EVIDENCE

- [8] The plaintiff first witness was Mr Lazarus Kgwete, an Educational Psychologist. He testified that he assessed the plaintiff on 25 February 2017 and the purpose of the assessment was to determine the plaintiff cognitive functioning, educational potential and establish his post-accident level of educability. He informed the court that the plaintiff before the accident failed different grades three times and that before the accident the plaintiff's academic performance was below average.
- [9] Under cross examination by Adv. Mohamed he said the plaintiff would have pre-accident, achieved matric between ages 22-23. And that the plaintiff would have taken approximately two to three years to complete NQF 5 qualification.

- [10] The plaintiff called the second witness Mr Tshepo Tsiu, an Industrial Psychologist. He testified that he assessed plaintiff on 19 January 2017, he said the plaintiff had learning difficulty but had the potential to pass senior certificate and to pass a one year post matric qualification. He concludes that the plaintiff is post-accident unemployable.
- [11] Under cross examination, Mr Tau said it was possible for the plaintiff to progress to post matric qualification, if the plaintiff had financial support as he was financially depended on his mother. He concluded that the both scenario one and scenario two were possible but that scenario 2 is highly improbable for the plaintiff.
- [12] That was the plaintiff's case.

DEFENDANT'S EVIDENCE

- [13] The defendant called Mr Henry Van Blerk, an Industrial Psychologist. He testified that the plaintiff's mother could not provide a clear history of the school reports from Grade 1-7 as the mother was not sure between Grade 1-7 which three grades the plaintiff had failed. He said the plaintiff would have required remedial action or special school. He testified further that the plaintiff would probably be an unskilled labour earning between R48 000 - R81 000 per annum. He indicated that the plaintiff would find it extremely difficult to go beyond an income of R97 000.00. This could possibly happen after acquiring more than 10 years of work experience.
- [14] Under cross examination, Mr Van Blerk said the plaintiff with his below average performance and after failing certain grades, the plaintiff could possibly work as a general worker. But disputed that the plaintiff would have earned R97 000.00. He said the plaintiff was already engaged as a farmworker earning R100, 00 per day by packing potatoes, which is a common thing in South Africa. He concluded that both scenarios one and two are unlikely, unrealistic and improbable but maybe possible, taking into consideration that many people have matric but are not employed.
- That was the defendant's case.

- [15] The counsel for "the plaintiff in closing agreement submitted that the injuries of the plaintiff are not in dispute and that the general damages have been referred to Health Professional Council of South Africa. That the court must decide in which scenario would the plaintiff fall in. He submitted that if contingencies are applied, a fair and reasonable amount on first scenario with 20% contingencies the plaintiff should be awarded R2 469 820,00 and on the second scenario with NQF5 with 25% contingency plaintiff should be awarded R4 246 555. 00. The average payment between these two amounts to be awarded would be R3 571 870 and that this will be a fair amount for loss of income.
- [16] Adv. Mohamed on behalf of the defendant, in his closing argument submitted that the plaintiff would have completed matric but there exist an uncertainty to that effect, taking into account the plaintiff's failures and below average performance. He further submitted that it was inconceivable that the plaintiff could have achieved a Grade 12 or obtained a NQF5 certificate. He submitted that contingency of 50% to be applied on the basis that the plaintiff would have been unable to complete matric or an NQF5 certificate. He said the plaintiff should be awarded R3 571 870 less 50% contingency equals R1 923 875, 00.

EVIDENCE OF SURGEONS

- [17] Dr Ramasuvha, an orthopaedic surgeon, interviewed the plaintiff on 6 September 2016. His report shows that the plaintiff was a passenger in a car which was involved in an accident and 10 of the passengers died. The plaintiff was admitted at the Polokwane Hospital on the same day of the accident. The main complaints the plaintiff had at the interview on post-accident was right shoulder pain, pain on the dorsum of the right hand, pain on the right side of the scalp and left elbow pain. He said the plaintiff informed him that the pain is exacerbated by heat and hot weather.
- [18] He said on observation of the X-rays it showed right shoulder and left shoulder appeared normal. There is a small calcification at the radial aspect of the joint of the right middle finger and no other abnormalities

were noted.

- [19] Dr Ramasuvha concluded that the injuries sustained by the plaintiff left him with multiple scars on his body. Further that the plaintiff have sustained a serious mental and behavioural disturbance after the accident as the plaintiff stopped schooling after the accident. The plaintiff's life expectancy was not affected by the accident.
- [20] In respect of disability, Dr Ramasuvha expressed the opinion that the plaintiff is currently having chronic pain and activities of daily living are curtailed because of the constant pain, which limits the plaintiff of doing most things.

NEUROSURGEON'S EVIDENCE

- [21] The plaintiff neurosurgeon, Professor P. Lekgwara, in his opinion he states that the plaintiff had soft tissue injuries which caused scars that can be referred to a plastic surgeon and that the Plaintiff suffered Grade 3 concussion (mild traumatic brain injury). The plaintiff had lost consciousness for more than five minutes and is suffering from post-concussion headaches.
- [22] The neurosurgeon, Dr Chula on behalf of the defendant concluded that the plaintiff suffered a mild head injury in the form of a concussion. The plaintiff has 2% risk of seizures anticipated in relation to the cranial injury in relation to the general population. But in the two years post the accident the plaintiff has not suffered any seizures. That the plaintiff life expectancy was not affected, and he has not suffered loss of earning capacity. Dr Ngobeni, Orthopaedic Surgeon on behalf of the defendant confirmed that the plaintiff is not disabled nor has he suffered loss of income.

OCCUPATIONAL THERAPIST'S EVIDENCE

- [23] The plaintiff's OT, Ms Tshitake indicates that the plaintiff will be best suited for either protective or supportive employment. The plaintiff will struggle in the open labour market as a result of his cognitive and psychological functioning. The plaintiff during the evaluation demonstrated body fatigue

and this will have an impact on his ability to handle manual tasks. This will as a result limit his choice of occupation and render the plaintiff an unequal competitor for full spectrum work when compared to his peers in the open labour market.

- [24] The defendant's occupational therapists Ms Success Moagi stated that the plaintiff could not safely manage heavy to very heavy types of activities. The plaintiff overall execution of the work sample was observed to be slow. The plaintiff could safely manage sedentary light to medium types of work.
- [25] The joint minutes between the OTs of both the plaintiff and the defendant, agreed that: The plaintiff presented with limited cognitive limitations. He demonstrated general cognitive problems, vision problems or visual perceptual disturbances. They agreed that the plaintiff does not have the capacity to complete Grade 12 or to pursue any form of further studies due to the injuries he sustained and will have challenges with learning and studying as a result of his cognitive and psychological functioning. They further agreed that the plaintiff is not employable in an open labour market.
- [26] Mr Tshepo Tsiu, the plaintiff industrial psychologist in his report stated that the plaintiff is a candidate for working under supervision and in sheltered employment. This will also be increasing the risk of continued unemployment, therefore increasing the risk of continued unemployment.
- [27] The industrial psychologist for the defendant Dr Sugreen indicates that the plaintiff's pre-accident employability career and earning potential is relatively weak and it is more likely that he would have remained unemployed for the major part of his potential life. He is further of the opinion that the plaintiff was already vulnerable for finding and sustaining any possible employment in the open labour market and that post accident he no longer appears to be employable at all.
- [28] The joint minute meeting between Dr Mphuti and Dr Maye, clinical psychologist, they both agreed that the plaintiff suffered brain injury at the time of the accident. The test results show evidence of reduced capacity and functioning compared to the pre-accident capability. They are of the

opinion that the plaintiff, in the light of the injuries and sequelae, the plaintiff's prospects of securing gainful employment in the open labour market are very poor and therefore recommended that the plaintiff's loss of potential future income resulting from the accident be calculated by a competent party.

[29] The plaintiff has suffered loss of earnings and earning capacity as a result of the accident. The plaintiff has been occupationally impaired and that he was rendered unemployable in the open labour market. The plaintiff's injuries, the related treatment and sequelae thereof is best described and considered in the expert reports of the respective experts instructed by both the plaintiff and the defendant.

[30] The plaintiff injuries which are common cause are summarised as open degloving wounds of the scalp, contusion right eyelid and peri-orbital area, multiple wounds to the right shoulder and to the left elbow. The plastic surgeon Dr S. Selahle, stated in his report that the scars the plaintiff suffered are unsightly and disfiguring. With some revision techniques there are prospects of improvement. That the plaintiff feels embarrassed and uncomfortable with these scars. He is of the opinion that scar revision treatment will be beneficial for improving the scars.

[31] In respect of the plaintiff's employability, the occupational therapist of the plaintiff confirmed that the plaintiff was not suited for sedentary to light work. That is the plaintiff does not competently meet the physical requirement for heavy duties nor does he have the agility, stamina, body range of motion and reduced work motivation, as a result the plaintiff's overall execution of work sample that was observed is very slow.

[32] The legal position relating to a claim for diminished earning capacity is trite¹ and the principles were articulated in **Dippenaar v Shield Insurance Co Ltd**² by the learned Judge, Chetty J in the following terms:

"In our law, under the *lex Aquilia*, the defendant must make good the difference

¹ *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A) and see also *Prinsloo v Road Accident Fund* 2009 (5) SA 406 (SE)

² *Dippenaar v Shield Insurance Co Ltd* 1979 (2) 204 (A)

between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate."³

[33] There are several Supreme Court of Appeal judgments that confirm the principle that there exist a relationship between a claim for loss of earnings and a loss of earning capacity and that one cannot exist without the other⁴.

[34] In **Rudman v Road Accident Fund**⁵ the court emphasised that:

"...Where a person's earning capacity has been compromised, 'that incapacity constitutes a loss, if such loss diminishes the estate... and he is entitled to be compensated to the extent that his patrimony has been diminished ...'"⁶

[35] The plaintiff was a scholar in Grade 11. The experts agreed that the plaintiff's performance before the accident was of below average. The plaintiff could have proceeded to grade 12 but would have taken longer to complete it. The plaintiff's loss of earning depends on whether or if the plaintiff would have passed grade 12 and whether he would have obtained an NQF5 certificate. The OT on behalf the plaintiff testified that the plaintiff would have achieved grade 12 and a NQF5 certificate, but would have taken longer than his peers. Mr Van Blerk disagrees that the plaintiff would have obtained grade 12 or a NQFS certificate. He said the plaintiff academic performance was below average as a result thereof; the plaintiff could not have achieved those qualifications and would have been unemployable in any event.

[36] The expert all confirmed that the plaintiff was unemployable and if he has to be employed he has to compete in an open labour market of which his chances of competing in an open labour market are very low.

As the clinical psychologist Ms Linda Maye put it:

³ Ibid at 917A- B

⁴ *Road Accident Fund v Delport* NO [2006] 1 All SA 468 (SCA), *Saayman v Road Accident Fund* 2010 (2) SA 539 (SCA) and *Bane and Others v D'Ambrosi* 2010 (2) SA 539 (SCA)

⁵ *Rudman v Road Accident Fund* 2003 (2) SA 234 {SCA}

⁶ Ibid at para [11]. See also *Road Accident Fund v Delport* NO[2006] 1 All SA 468 {SCA} and

"the plaintiff results fall within the very low range, suggesting likely neurocognitive deficit and impairment. Because his head/brain injuries would generally be expected to result and possibly mild to moderate cognitive deficits

Based on the history obtained, we conclude that his tests results can be attributed to cognitive deficits due to a combination of at least mild traumatic brain injury."

[37] Based on the above as well as the views expressed by the experts which were largely common cause, the pertinent question, is what award would be fair and adequate compensation for the plaintiff in respect of loss of earnings.

[38] The courts have emphasised the fact that any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future and all that the court can do is to make a very rough estimate, of the present value of the loss.⁷ It is now accepted that in the assessment of these kind of damages, which cannot be assessed with any amount of mathematical accuracy the court has a wide discretion to award what it considers to be a fair and adequate compensation.⁸

[39] In Bailey *supra*, Nicholas JA added that:

"In a case where the court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantages over the second. On the contrary, while the result of an actual computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis, whereas the trial judge's "gut feeling" as to what is fair and reasonable is nothing than a blind guess."⁹

[40] In the present matter, the plaintiffs loss of income and earning capacity was calculated by Mr JJ Sauer, a consulting actuary firm and consultation based in Johannesburg.

The calculation are summarised as follows:

President Insurance Co Ltd v Mathews 1992 (1) SA 1 (A)

⁷ *Southern Insurance Association Ltd v Bailey* No 1984 (1) SA 98 (A) at 113F-G

⁸ *AA Medical Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A) at 806H

⁹ *Southern Insurance Association Ltd v Bailey* above at 114C-D and also

Future earning had the accident not happened would be R3 084 775 less contingency deduction between 10%/36% (Page 414) which is R308 477 and the awarded would be R2 776 297. Now that the accident has happened future earnings will be R374 916 less 10%/ 36% contingency the award would be R239 946. Taking into consideration that the plaintiff had obtained a matric the total loss of earning for the plaintiff would be R2 536 351.

- [41] With regard to the post-accident loss of earning, the plaintiff was a scholar and had no potential income and remained unemployed post the accident. Except that the plaintiff used to work part time at a potato farm during school holidays and earned R100, 00 a day. Consequently, the parties are not in agreement with regard to contingency adjustments, which ought to be made. Counsel for the plaintiff submitted that 20% contingency to be deducted for scenario one and 25% to be deducted for scenario two. Counsel for the defendant submitted that 50% contingency be deducted on the basis that the plaintiff would not have completed matric.
- [42] Counsel the plaintiff submitted that the added risks with the particular circumstances and assumptions of the calculation warranted a fair and reasonable deduction of contingency. He stated that for scenario 1 with a matric certificate a 20% contingency deduction will be fair and reasonable. Scenario 2, NQF5 a 25% contingency deduction will cater for all the risk that might have to be taken into consideration. He submitted that an amount of R3 571 870.00 would be a fair and reasonable amount for loss of earning.
- [43] Counsel for the defendant submitted that with the risk of the plaintiff not completing grade 12 or going as far as an NQFS, the applicable contingency deduction would warrant a 50% on both scenarios. Calculation being as follows: R3 847 754 with a deduction of 50% contingency, the plaintiff be awarded an amount of R1 923 877.
- [44] It is trite law that no two cases are always similar since it is difficult to find a comparable case that is in all fours in respect of the facts. Past decided

comparable cases, although useful, merely served as guidelines. The need to adjudicate each case on its particular merits was always present.

[45] It is now well settled that contingencies, whether negative or positive, are an important control mechanism to adjust the loss suffered to the circumstances of the individual case in order to achieve equity and fairness to the parties. There is no hard and fast rule regarding contingency allowances.

[46] Kock in the Quantum Yearbook 2011 at 104 said:

"General; contingences cover a wide range of considerations which many vary from case to case and may include taxation, early death save travel costs, loss of employment promotion prospects, divorce etc. There are no fixed rules as regards general contingencies."

[47] In my view, in the present matter, the established facts of the plaintiffs history of unemployment and poor school performance as the expert put it that it was below average performance, must not be held against him. It is indeed trite that the rate of unemployment in our country especially among unskilled and uneducated members of the population is very high. As Mr Van Blerk, Industrial Psychologist of the defendant also indicated that the plaintiff would find it extremely difficult to be employed without a matric certificate. He further disagreed that the plaintiff could possibly fall in the earning bracket of R97 000.00 with the given history of the plaintiff academic performance. He testified that scenario 1 and 2 in the plaintiffs case are unrealistic, unlikely and not probable. He further stated that in an open labour market the plaintiff would not be employable even pre-accident and even worse post the collision, the plaintiff would still have found it difficult to secure employment with a grade 11.

[48] According to the medical evidence and in view of the head/brain injury, the plaintiffs depressed mood swings and for the fact that some people died in the accident and the plaintiff has not received any counselling. The clinical psychologist recommended that due to the plaintiff depressive disorder, a multi-disciplinary team should be considered to establish the precise pre-post-accident psychological effects on the plaintiff. In this regard I agree

that the plaintiff be further assisted with further counselling to help him deal with the effects and impact of the accident on him.

[49] The defendant's submission that 50% contingency deduction be apply is unfair and unreasonable. He argued that plaintiff was in any event financially dependent on his mother, the plaintiff would not have achieved a matric certificate nor would the plaintiff have achieved NQF5 certificate. According to the defendant, it therefore does not justify that a lower contingency be applied. In my view, given the continuous support and the motivation that the plaintiff received from his mother, it can be concluded that the plaintiff would have finished grade 12, though he would have taken longer to compete it. It would therefore mean that in spite of the plaintiff slow progress at school, the plaintiff was determined and resilient. In spite of having failed three (3) grades he still continued to go to school pre-accident. There was no evidence that the plaintiff dropped out of school pre-accident, except that post-accident the plaintiff did not return to school.

[50] For all of the above reasons, I came to the conclusion that with regard to the plaintiff's loss of earning taking into account all of the circumstances of the matter including the medical evidence it would be fair and just that scenario 1 is applied with matric and 20% contingency deduction is applied in respect of future loss of earning and earning capacity and the total loss of future earning is R2 536 351 with a deduction of 20% contingency = R2 029 080, 00.

[51] The inherent difficulty and uncertainty in these calculations is generally accepted that it is a preferable to make an assessment based on an actuarial calculation rather than to take blind plunge into the unknown mathematical calculations. Having considered the actuarial calculations and the relevant assessment of the damages, my view is that the award granted under the circumstances is reasonable, fair and just.

COSTS

[52] Counsel for the plaintiff submitted that punitive costs order should be

granted against the defendant. The defendant was in a position to assess the matter and make a settlement. The Industrial psychologist of the defendant was late and was argumentative during his oral evidence. Counsel further submitted that the court should take cognisance of the fact that the defendant is working with public funds and has thus unnecessary incurred costs. Counsel submitted that cost be awarded on an attorney and client scale.

[53] Counsel for defendant disputed that a punitive costs is unwarranted and that the matter was before court for the first time. The defendant had legitimate points to argue and should not be intimidated for having to raise these points. The defendant submitted that costs should be on awarded on party and party scale.

[55] I am inclined to agree with the plaintiff that the defendant is dealing with public funds. But it would not be in the very same public interest to award a punitive cost against the defendant. Costs will therefore be granted on a party and party on a high Court scale.

[56] I therefore make the following order:

The draft order as amended marked X and initialled by me is made an order of court.

Chesiwe AJ

Acting Judge of the High Court
of South Africa
North Gauteng Local Division

APPEARANCES:

Counsel for Plaintiff: Adv Mthembu

Instructing Attorneys: Masweneng Attorneys

PRETORIA

Counsel for Defendant: Adv Mohamed

Instructing Attorneys: Diale Mogashoa Attorneys

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

On 11 MAY 2017 BEFORE THE HONOURABLE MRS ACTING JUSTICE
CHESIWE, COURT 8G.

Case No: 83732/2015

In the matter between:

ADV MHUGO N.O. obo

Plaintiff

A N N

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

Having heard evidence and arguments by counsel on behalf of the parties, an order in the following terms is hereby made:

1. It Is recorded that the defendant was previously ordered to compensate the plaintiff for damages suffered as a result of his bodily injuries sustained during the motor vehicle collision on 4 January 2014, and as recorded in the order issued by his Honourable Mr Acting Justice Diedericks, dated 14 April 2016.
2. The issue of general damages is separated and postponed *sine die*, and Is it recorded that the defendant on 10 May 2017 rejected the plaintiff's serious bodily injuries assessment and indicated that the qualification

thereof ought be referred to the Appeal Tribunal of the Health Professions Council of South Africa.

3. The defendant is ordered to pay to the plaintiff. in relation to his claim for loss of earnings (past and prospective):

R 2 029 080

(R2 536 351 DEDUCTION OF 20% contingency = R 2 029 080

payable within 14 (fourteen) days after this order, into the plaintiffs attorney's trust account. the details of which are as follows:

ACCOUNT HOLDER: MASWENENG INCORPORATED ATTORNEYS

BANK: FIRST NATIONAL BANK

ACCOUNT NUMBER: [...]

BRANCH CODE: 250655

REFERENCE: MAS/RAF/N0001/16

4. The defendant is ordered to furnish to the plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act. Act 56 of 1996 (as amended,) for the costs of the future accommodation of A N N Identity Number [...], in a hospital or nursing home or treatment or rendering of a service to the plaintiff, or the supply of goods to the plaintiff, arising out of the injuries sustained by the plaintiff in the motor vehicle collision on 4 JANUARY 2014. after such costs have been incurred and upon proof thereof.
5. The defendant is ordered to pay the plaintiff's taxed or agreed party to party costs on a High Court scale, until date of this order, including but not limited to:
 - 5.1. the reasonable taxable fees in respect of examinations and reporting,

special investigations and/or reporting, attendance to and issuing of joint expert minutes, preparation, reservation and trial attendance, If any. of the following experts that the plaintiff gave notice of:

- 5.1.1. Or B Ramasucha (orthopaedic surgeon);
 - 5.1.2. Professor P L Lekgwara (neurosurgeon);
 - 5.1.3. Or L L Mashayamombe (specialist psychiatrist);
 - 5.1.4. Dr S S Selahle (plastic & reconstructive surgeon);
 - 5.1.5. Mr S F Mphuti & ML Maye (clinical psychologists);
 - 5.1.6. Mrs R S Tshitake (occupational therapist);
 - 5.1.7. Mr Kgwete (educational psychologist);
 - 5.1.8. Mr T Tsiu (industrial psychologist);
 - 5.1.9. Radiologists report;
 - 5.1.10. Mr JJC Sauer (actuary).
- 5.2. The costs of obtaining such expert medico-legal reports / addendum reports from the above experts, inclusive of the plaintiff's reasonable travelling and/or accommodation costs In respect thereof;
- 5.3. The full cost of counsel;
- 5.4. The plaintiffs full trial costs for 10 and 11 May 2017 , inclusive of the reasonable travelling and/or accommodation costs for trial preparation and trial attendance, as well as such costs for any witnesses of the plaintiff, and are the following witnesses declared necessary **witnesses:**
- 5.4.1. The claimant, A N N;
 - 5.4.2. The claimant's mother, S M N;
 - 5.4.3. Mr T Tsui (expert industrial psychologist) ;
 - 5.4.4. Mr Kgwete (expert educational psychologist).
- 5.5. The plaintiffs costs in trial preparation;
- 5.6. All costs in the application for the appointment of the curator *ad litem*;
- 5.7. The trial attendance costs of the curator *ad litem* for both 10 and 11 May 2017 and the costs In the consideration and preparation of the report by the curator *ad litem*, inclusive of perusal, consultation and consideration

fees;

- 5.8. The trial attendance costs on 10 and 11 May 2017 of the plaintiff's attorney of record.
6. The plaintiffs attorney is ordered to cause a trust to be established and is authorised to sign all documents necessary for the formation of the trust for the benefit of A N N, Identity Number [...]. such trust to be held by ABSA TRUST LTD in accordance with the written undertaking, dated 12 May 2017 hereto attached as **ANNEXURE "A"**.
7. The defendant is ordered to pay. for as long as the trust remains in existence:
 - 7.1. the costs of the appointment of the trustee(s), such costs to be limited to the costs of a curator *bonis*;
 - 7.2. the costs, remuneration and disbursements of the trustee(s) in the administration of the trust; and
 - 7.3. the costs of furnishing annual security.
8. The defendant's liability for such costs as stipulated in paragraph 7 above shall not exceed the costs of the appointment and remuneration of a curator *bonis*.
9. The trustee (s) is to pay the plaintiffs attorney's costs. and it is recorded that:
 - 9.1. The curator *ad /item* ratified the contingency fee agreement entered into between the plaintiff and the plaintiffs attorneys of record, dated 23 Mach 2015;
 - 9.2. That the contingency fee agreement dated 23 May 2015 complies with the Contingency Fees Act, Act 66 of 1997;
 - 9.3. That the plaintiffs attorneys of record is authorised to deduct from the capital amount received their professional fees and disbursements. subject to review and taxation by the trustees to be appointed.
10. The plaintiffs attorneys of record is authorised to, upon receipt of the

capital sum awarded, pay directly to the plaintiff's mother. S M N, for purposes of maintenance of the plaintiff, the amount of R30 000, 00 (thirty thousand Rand), the remainder thereof less the fees and disbursements referred to in paragraph 9.3 to be payable to the trust to be formulated.

11. The plaintiff's attorney of record is authorised, pending the formulation of a trust, to invest the remaining capital sum in an interest bearing account in terms of Section 78(1) of the Attorneys Act, Act 56 of 1978.
12. The trustee(s) shall be entitled to call for an appropriate taxation of the plaintiff's attorneys (attorney-and-own-client) cost disbursements if deemed necessary.
13. The trust instrument contemplated here above shall make provision for. *inter alia*, the following:
 - 13.1. that **A N N** be the sole beneficiary of the trust;
 - 13.2. that the trustee(s) of the trust to be formed shall take all the requisite steps to secure an appropriate bond of security to the satisfaction of the Master of the High Court for the due fulfilment of his/her obligations and to ensure that the bond of security is submitted to the Master of the High Court at the appropriate time as well as to all other interested parties if so required by the Master of the High Court;
 - 13.3. the duty of the trustee(&) to disclose any personal interest in any transaction involving the trust property;
 - 13.4. the termination of the trust shall occur when A N N Identity Number [....], dies. otherwise subject to the leave of the High Court upon application;
 - 13.5. the trustee(s) shall be entitled, if he/she deems it necessary, to utilise the income of the trust for the maintenance of A N N Identity Number [....], and/or his spouse and maintenance dependent children;
 - 13.6. that the trustee(s) to be appointed to provide security to the satisfaction of the Master of the High Court;
 - 13.7. that ownership of the trust property shall vest in the trustee(s) of the trust

in their capacities as trustee(s);

- 13.8. procedures to resolve any potential disputes. subject to the review of any decision made in accordance therewith by the honourable Court:
- 13.9. that any amendment of the trust instrument be subject to approval and leave of the Master of the honourable High Court and/or this honourable Court;
- 13.10. in the event of the death of A N N. Identity Number [...], such trust shall terminate and the trust assets shall pass to the estate of A N N, Identity Number [...];
- 13.11. that the trust property and the administration thereof be subject to an annual audit
14. That the provisions of such trust document referred to here above shall be, in accordance with the provisions of the Trust Property Control Act. Act 57 of 1988, subject to the approval of the Master of the High Court.
15. The plaintiff, **A N N**. Identity Number [...], is declared unfit to manage his own affairs and is his mother. S M N, appointed as his *curator bonis ad personam*.
16. The plaintiff shall -
 - 16.1. if the costs of suit are not agreed upon. serve a notice of taxation on the defendant's attorneys of record; and
 - 16.2. allow the defendant 14 (fourteen) court days, after the *allocatur* has been made available to the defendant, to make payment of the agreed or taxed costs.

BY ORDER:

REGISTRAR

Counsel for Plaintiff: Ms N Mthembu 082 258 6148

Instructed by Masweneng Attorneys

Counsel for Defendant : _____

Instructed by Diale Mogashoa Attorneys