



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

CASE NO: 16166/2019

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

14 November 2022

Date

K. La M Manamela

In the matter between:

SALOME LENONO obo MINOR

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **14 November 2022**.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] The plaintiff, Ms Salome Lenono, brought these proceedings to claim compensation on behalf of her minor child, born on 24 August 2007, as her mother and natural guardian. The minor was injured in the evening of 15 February 2008 at or around the N1 South Highway to Johannesburg. She was about six months old when the accident occurred. Two motor vehicles were involved in the accident, including a minibus taxi. She was a passenger in the other motor vehicle when the driver of this vehicle (“the insured driver”) lost control of the vehicle and overturned. The minor sustained the following injuries from the accident: left and right parietal bone fractures; bifrontal haemorrhagic contusion, and subdural haematoma. The minor suffered or is postulated to suffer patrimonial loss in the future as a result of the injuries sustained in the accident and/or their *sequelae*. The negligent driving of the insured driver was blamed to be the cause of the accident.

[2] On 12 March 2019, the plaintiff caused summons to be issued against the defendant, the Road Accident Fund, in terms of the provisions of the Road Accident Fund Act 56 of 1996 (“the Act”). She claimed compensation on behalf of the minor, initially, stated to be in the amount of R4 200 000.00 for the damages allegedly suffered by the minor, due to the injuries from the accident and/or *sequelae*. The defendant filed a plea denying liability, but on 06 September 2021, the defendant’s defence was struck out by an order of this Court *per* Strydom J. Thenceforth the matter proceeded towards the granting of default judgment at the instance of the plaintiff.

[3] This matter came before me on 06 October 2022 for a hearing through the mode of video-link. Ms S Cliff appeared on behalf of the plaintiff. There was no appearance on behalf of the defendant. I reserved this judgment after oral submissions by plaintiff’s counsel.

Counsel, also, had gratefully filed detailed written submissions in terms of the practice directives of this Division. She also urged the Court to consider submissions filed earlier for purposes of possible settlement of the issues in this matter.

Evidence and submissions regarding loss of earning capacity

General

[4] Counsel told the Court that the matter was only proceeding with regard to issues relating to *quantum* of the loss suffered by the minor with regard to her future earnings or earning capacity. Issues relating to liability or the merits of this matter and general damages have been agreed upon by the parties. Issues relating to liability or merits were finalised when the defendant fully conceded liability in favour of the minor or the plaintiff. Also, the defendant's offer in the amount of R1.2 million had been accepted by the plaintiff in full and final settlement of that aspect of the plaintiff's claim. The Court is requested to incorporate the agreement between the parties into the order to be made in this matter. This will be acceded to.

[5] The plaintiff filed medico-legal reports prepared by experts who had assessed the minor's injuries and their *sequelae*. These experts had also deposed to and filed affidavits to confirm their respective opinions and other contents of their respective reports, as envisaged by the practice directives of this Division and to qualify for an order in terms of Rule 38(2)¹ of the Uniform Rules of this Court. I allowed the reports accompanied by the affidavits to serve as evidence in terms of the aforementioned rule.

¹ Uniform Rule 38(2) reads as follows: 'The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be 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 to 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.'

[6] Following the accident the minor was treated at Chris Hani Baragwanath for 11 days. A CT-scan of the brain revealed the injuries referred to above.² Approximately one month after her discharge from the hospital, the minor had a convulsive episode and received treatment for epilepsy. She experiences this twice a month. Her current complaints included: epileptic seizures twice a month (although it is being treated); learning difficulties (goes to a special needs school); headaches; nosebleeds (about twice a month) and walks with shuffling gait. It is submitted that the minor's overall behaviour is that of a person with severe mental impairment

Expert medical opinion

[7] Expert opinion with regard to the injuries sustained by the minor in the accident and *sequelae* thereof include the following:

[7.1] The orthopaedic surgeon is of the opinion that the minor is experiencing the effects of traumatic brain injury which would profoundly limit her ability to work and earn an income. The minor would probably be effectively fully dependent for the rest of her life. No further healing is expected of the brain injury or the serious permanent damage caused by it. There is also no treatment available which could significantly improve the minor's impairments in this regard.

[7.2] The neurologist is of the opinion that the minor presents with permanent mental retardation, epilepsy and visual impairment. All these will negatively impact on the minor's ability to be independent.

² See par 1 above.

[7.3] The educational psychologist is of the opinion that the minor's cognitive functioning at 11 years can be compared to a child of between 3 and 4 years of age. The minor has emotional outbursts and would require special care for the remainder of her life. The minor's familial cognitive development and environmental circumstances are said to be suggestive of her pre-accident potential which fell within borderline to average range. Without the accident, it is opined that the minor's highest academic achievement would have been a grade 12 level of education. Her challenges include inability to do basic mathematics at a grade 2 level. Therefore, this expert opines that the minor is unemployable and would require special care for the rest of her life.

[7.4] According to the occupational therapist the following this material regarding the injuries sustained by the minor and *sequelae*. The assessment of the minor and her observations indicated significantly low cognitive, perceptual and basic scholastic skills. The minor, particularly, presents with significant difficulties in her attention, memory, following of instructions, task comprehension, task completion, visual motor integration and visual perception abilities. She also has disabilities with regard to naming or identifying basic concepts; to read or to write, including the earlier mentioned challenges with basic mathematics. This expert also opines that the minor's cognitive capacity has a negative impact on her ability to independently engage in her activities of daily living and academic performance. The minor's cognitive and perceptual difficulties appear permanent in nature, it is further opined. It is not recommended that she ever reside independently and it would be risky or unsafe for her to live independently.

[7.5] The assessment of the minor's scholastic ability is impacted by the fact that she was only a baby and, therefore, was not yet of school-going age, when the accident occurred. She is attending a school for learners with special needs and was in grade 2, albeit at the age of 12. She had to repeat grade 2. Had it not been for the accident, the minor would probably complete a grade 12 level of education. The minor has limitations in her basic scholastic abilities, as already stated above. Her impaired vision also has a bearing on her academic performance. She is bound to continue her schooling in a school for learners with special needs as her limitations would not permit a mainstream school setting. It is further opined that the minor ought to focus on vocational and life skills training.

[7.6] Regarding the minor's work ability, it is opined that, when taking her physical, cognitive, emotional and scholastic skills into consideration, she would be unemployable in the future. Although she may work in a protective employment environment, it is postulated that this would be purely for therapeutic reasons and with negligible income, mainly, to serve as a teaching tool for basic financial skills.

[7.7] The industrial psychologist expressed the following opinions in his report. He opined that pre-morbid the minor would have most likely obtained grade 12 qualification in 2025 at the age of 18. She would have most likely secured various temporary or contract positions working a maximum of six months per annum, and still securing a permanent position approximately 2 years after completing grade 12. This would have resulted in earning comparative to a semi-skilled worker in the non-corporate sector. Given her postulated level of education, the minor would have secured a permanent position relating to the entry level of an NQF level 04 qualification. Her

starting basic salary would have been equal to a Paterson A3 level for approximately 2 years. The minor would have earned a living as an unskilled worker or as a semi-skilled worker until normal retirement at age of 65, her health and motivation permitting.

[7.8 Factoring in the accident and its effects on the minor, the industrial psychologist's opinions and statements include the following. Given her age the minor had no past loss of earnings. Considering expert opinion on her physical, cognitive, and psychological impairments, the industrial psychologist is also of the opinion that the minor will not be able to obtain and maintain gainful employment in the future and, thus, is unemployable.

Actuarial calculations

[8] The actuarial report filed on behalf of the minor or the plaintiff accords with the recommendations by the industrial psychologist, it is submitted by counsel. The minor's total loss of income in the future is stated to be in the amount of R4 770 149.00. Counsel submitted that a contingency of 35% in the amount of R1 669 552.15 on the minor's future pre-accident income be applied, given all the variables and the fact that the minor has been rendered functionally unemployable. The net income to be awarded to the plaintiff as damages for the minor's loss of earning capacity is R3 100 596.85.

Conclusion

[9] The determination of an appropriate award in respect of future loss of earnings or loss of earning capacity is a relatively challenging task for the Court. Even more challenging is when such determination involves a minor child who had met the debilitating effect of a motor

vehicle accident when she was an infant of a few months of age, as in this matter. Satchwell J had the following to say in *Hlalele obo Hlalele v Road Accident Fund*³ when respectfully confronted with the task of determining loss of earning capacity involving a six year old child:

Notwithstanding that the future remains unpredictable, this court is still required to calculate and award compensation based on the unknown future –in respect of lives which may or may not be lived or in respect of disabilities which may or may not eventuate or persist or in respect of damages which may or may not eventuate. We do the best we can knowing that the future in the Republic of South Africa has not, in our lifetime, always been determined by the past and that change and transformation are all around us.⁴

[10] Some of the authorities suggest that the determination requires the steadfast consideration or regard of available information, as follows:

Where a minor’s loss of earning capacity is to be quantified, this is done using all available information and despite the uncertainties that may exist. In this regard, the use of family history may be contra-indicated and a lump sum awarded in accordance with the discretion of the court.⁵

[11] But the authorities appear to be unanimous on the use of contingencies to address any ‘imponderables’ and ‘uncertainties’ inherent in the determination of loss of earning capacity:

In preparing and submitting the claim it is the general practice not to make allowance for deductions generally regarded as falling within the ambit of imponderables or uncertainties. However, in presenting the case, provision has to be made, and this is usually provided for by the witnesses involved in quantifying a claim, such as actuaries,

³ *Hlalele obo Hlalele v Road Accident Fund* (41304/2013) [2015] ZAGPJHC 54 926 March 2015] (*‘Hlalele v RAF’*).

⁴ *Hlalele v RAF* par 10.

⁵ Klopper HB, *RAF Practitioners Guide* (LexisNexis, online version: September 2022) (*‘Klopper Practitioners Guide’*) C-6(1)-C-7 par 3.3.3., generally relying on *Hlalele v RAF*.

mathematicians or economists. They are able to give expert evidence on matters such as remarriage, life expectancy, investments, inflation and other like issues which are considered, to a lesser or greater degree, as falling within the ambit of contingencies.

Imponderables or uncertainties are traditionally termed contingencies. Since damages must be awarded once and for all for actual and prospective loss in a single action, this concept was introduced to denote all the uncertainties, hazards and vicissitudes of life. What the court effectively does, is, after having made the best possible estimate, admits that it may be wrong and adjusts the award accordingly. This it does by deducting a percentage from the damages which otherwise would have been awarded.⁶

[12] Back to this matter. It is submitted by counsel on the aspect of application of contingencies that, when consideration is given to the post-accident deficits the minor is settled with emanating from the injuries sustained in the accident and/or their *sequelae*, ably explained by the medical experts the 35% contingency applied to the minor's post-accident income is appropriate. Counsel, added that, this is the highest contingency that can be applied under the circumstances. I agree. Although, as the authorities show one cannot completely rule out the fact that the minor - despite medical opinion point to the other direction - may somewhat partially recover from the debilitating nature of her injuries or deficits to earn income of a non-negligible nature, either after progressing academically or by sheer application of herself in opportunities that life may present. But the 35% contingency suggested by counsel appears to be the appropriate and indeed the highest one could apply under the circumstances. Therefore, I will award to the plaintiff, as damages in respect of loss of earning capacity on the part of the minor, an amount of R3 100 596.85. Costs would follow this outcome .

[13] There is also an outstanding claim in respect of past medical, hospital and related expenses. It is submitted by counsel that due to the fact that there are no vouchers currently

⁶ Klopper *Practitioners Guide* C-19 par 10.

provided in this matter, this aspect should be postponed *sine die*. Although the Court would have preferred to finalise all outstanding issues or aspects in this matter, there is really no legitimate ground to deny this request from the plaintiff. Therefore, issues relating to the plaintiff's claim for past medical, hospital and related expenses will be postponed *sine die*.

[14] On the other hand, I find that the defendant is fully liable for those issues relating to future medical, hospital and related expenses in respect of the minor. This would be addressed by directing that the defendant furnish an undertaking in terms of section 17(4)(a) of the Act.

[15] Also, as indicated in the introduction, aspects which formed part of the settlement agreement between the parties would also be reflected as part of the terms of the order made in this matter.

[16] When counsel was making submissions regarding the draft order that the Court was being urged to consider granting, I enquired from counsel whether given the circumstances of this matter, there shouldn't be consideration given to the protection of the funds to be awarded to the minor. During the subsequent exchanges between counsel and the Court what appears in paragraph [17](g) of the order below was intimated, subject to the Court's final view on same. The Court is of the view that nothing firmer can be made without ample opportunity given to whoever may be interested in this aspect, including the plaintiff. Should the order as reflected in paragraph [17](g) not be considered fit for the purpose intended the plaintiff is urged to consider approaching the Court, perhaps by way of motion, for the preferred order(s). I have included a somewhat unconventional *proviso* to that part of the order in a quest to be accommodative.

Order

[17] In the premises, the following order is made, that:

- a) the defendant will pay 100% of the plaintiff's agreed or proven damages;
- b) the defendant shall furnish to the plaintiff an undertaking under section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in terms of which the defendant undertakes to pay 100% of the costs of future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him, pursuant to injuries sustained by her in a motor vehicle collision which occurred on 15 February 2008 after the costs have been incurred and upon proof thereof;
- c) the undertaking referred to in b) hereof, will further include the following:
 - (i) the agreed or taxed costs to be incurred in the formation of a trust to, *inter alia*, protect, administer and/or manage the proceeds of the capital amount referred to in d) and e) hereof above on behalf of the said patient;
 - (ii) the costs of a trustee of a trust to be formed on behalf of the said patient in administering the capital amount referred to in d) and e) hereof, which costs shall be in accordance with the statutory fee of a *curator bonis*, and
 - (iii) the costs of furnishing annual security or the obtaining of an annual security bond, if required by the Master of the High Court and/or if ordered by Court, or to meet the requirements of the Master of the High Court and/or to comply with the provisions of section 77 of the Administration of Estates Act 55 of 1965.
- d) as agreed between the parties, the defendant pays - in respect of the minor child's general damages - the amount of **R1 200 000.00 (one million two hundred thousand rand)** relating to the injuries sustained in the motor vehicle collision which occurred on 15 February 2008, payment of which will take place 180 days from date of this order;

- e) by way of default judgment, the defendant pays - in respect of the minor child's loss of earnings - the amount of **R3 100 596.85 (three million one hundred thousand five hundred and ninety six rand and eighty five cents)** relating to the injuries sustained in the motor vehicle collision which occurred on 15 February 2008, payment of which is due within 180 days from date of this order;
- f) subject to g) hereof, the plaintiff's attorneys may invest the amounts in d) and e) hereof on behalf of the minor child following having received the capital amount in an interest bearing account as envisaged in section 78(2)(A) of the Attorneys Act until a trust as set out hereinafter is established and registered;
- g) the plaintiff and plaintiff's attorneys are urged to consider paying the capital amount less provision for reasonable attorneys' fees in terms of the contingency fee agreement, expenses incurred and accounts rendered by experts and counsel employed to the Trustee of a Trust to be established of which 'the patient' is to be the sole capital- and income beneficiary following the registration of the said Trust with the Master of the High Court and following the furnishing of security by the Trustee to the satisfaction of the Master of the High Court as stipulated hereinafter: Provided, that the plaintiff may approach the Court for an alternative or supplementary order(s) in this regard.
- h) subject to g) hereof, the plaintiff's attorneys are authorised to make any reasonable and necessary payments, until such time as the trustee is able to take control of the capital sum and to deal with same in terms of the Trust Deed, to satisfy the needs of the patient that may arise and that are required in order to satisfy any reasonable need for treatment care and/or equipment as may be necessary in the interim period.
- i) subject to g) hereof, the plaintiff's attorney shall take all necessary steps to attend to the formation and registration of a trust for the benefit of the minor child.
- j) subject to g) hereof, that Mr WF Bouwer, a duly admitted attorney of this Court and having consented thereto, is appointed as trustee of the said trust to be established and registered;
- k) subject to g) hereof, the appointment of the trustee as envisaged, shall be subject to:

- (i) the Trustee furnishing security to the satisfaction of the Master of the High Court, and
 - (ii) the exercise by the Trustee of the aforesaid powers will be subject to the control of the Master of the High Court;
- l) payment of the amounts as set out in d) and e) hereof and the costs as set out in n) and o) hereof shall be made into the following bank account:

CAMPBELL ATTORNEYS

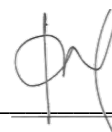
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- m) the defendant will not be liable for interest on the capital amount should same be paid before or on the date as it appears in d) and e) hereof failing which the defendant will be liable for interest calculated at the prescribed rate from date of judgment;
- n) the defendant pays the plaintiff's taxed or agreed party and party costs on the High Court scale up to the date hereof, subject to the following conditions:
- (i) the plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the defendant's attorneys of record;
 - (ii) the plaintiff shall allow the defendant 14 (fourteen) court days to make payment of the taxed costs, and
 - (iii) the defendant will not be liable for interest on the party and party cost except if not paid on or before the said agreed date in which case the defendant will be liable for interest at the prescribed rate from date of stamped *allocator*.
- o) costs will inter alia include:

- (i) the reasonable taxable costs which costs shall include the costs of obtaining expert reports, the preparation of joint-minutes, and the preparation, reservation, accommodation, travel costs and appearance fees, (if any), as the Taxing Master may determine on taxation, of the following expert witnesses:
 - aa) Dr. Williams, Orthopaedic Surgeon;
 - bb) Professor Magazi, Neurologist;
 - cc) Ms Grethe Jordaan, Occupational Therapist;
 - dd) Mr B. P. G. Maritz, Industrial Psychologist;
 - ee) Ms Paula Steyn, Educational Psychologist, and
 - ff) Mr Wim Loots, Actuary.
 - (ii) the reasonable costs of consulting with the client, to discuss the settlement offer made by the defendant;
 - (iii) the reasonable costs incurred of obtaining payment of the capital as well as taxed costs and section 17(4)(a) undertaking, and
 - (iv) the costs of counsel, where employed.
- p) there is what appears to be a valid contingency fee agreement between the plaintiff and the plaintiff's attorneys of record.



Khashane La M. Manamela
Acting Judge of the High Court

Date of Hearing : **06 October 2022**
Date of Judgment : **14 November 2022**

Appearances:

For the Plaintiff : Ms S Cliff
 Instructed by : Campbell Attorneys, Pretoria
 For the Defendant : No appearance