

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



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

REPORTABLE
Case No: 749/2021P

In the matter between:

S[...] N[...] obo

A[...] N[...]

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT ELECTRONICALLY DELIVERED:- This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for the handing-down of this judgment is deemed to be **10h00** on **16 November 2023**.

JUDGMENT

Sibiya J:

[1] This matter was set down for trial on 13 to 16 November 2023. The plaintiff sues in his capacity as the father of A[...] who was born on 15 December 2006 ('A[...]').

[2] A[...] was involved in a motor vehicle accident as a passenger on 21 April 2019, in which he sustained injuries. He was 12 years old at the time of the accident, and in grade six. The trial was set down only for the determination of quantum, liability having been settled at 100% in favour of the plaintiff.

[3] At the start of the trial it was confirmed that liability had been settled as set out in the preceding paragraph, and that the defendant would tender an undertaking in terms of section 17(4) of the Road Accident Fund Act 56 of 1996 in relation to the future medical expenses. The defendant had accepted that the injury was serious and qualified for general damages.

[4] In addition, and in relation to the future loss of earnings, Ms *Moodley* advised that she held no instructions to make an offer of settlement. She submitted, however, that having regard to the medico-legal reports of the educational psychologists, the occupational psychologists and the industrial psychologists, as well as the joint minutes prepared by the relevant experts, she could not advance any legal argument in opposition of the composition of the amount.

[5] No actuary had been instructed by the defendant, and the plaintiff's expert, Human & Morris Actuaries, had calculated the future loss of earnings on the basis of the scenarios provided by each of the industrial psychologists, being Mr de Vlamingh for the plaintiff and Ms Moses for the defendant. These experts had indicated, in their joint minute, that they agreed that 'for settlement purposes, the mean between [their] postulations can be used' for pre-morbid earnings.

[6] In applying a contingency deduction of 25% to un-injured earnings and 30% to injured earnings, and the mean between the postulations of the industrial psychologists,

a figure of R1 263 541.35 was reached. Ms *Moodley* submitted that this figure was fair in the circumstances, and that in order to save on additional costs of bringing experts and running the trial, she believed that a settlement in this amount, in relation to future loss of earnings, was in the best interests of the defendant. Mr *Pillemer* agreed to the figure and the method used.

[7] I have also looked at the medico-legal reports of the industrial psychologists and their joint minutes, as well as the actuarial calculations dated 31 October 2023, and I am satisfied that the actuarial calculations are in line with the recommendations of the experts, and that the figure for future loss of earnings is reasonable.

[8] The only issue that I was then called to decide were the general damages. Both Mr *Pillemer* and Ms *Moodley* had prepared comprehensive heads of argument, for which I am grateful. Much of the argument advanced by these legal practitioners was in line with their heads of argument.

[9] It is trite that there is no mathematical method to determine what suitably compensates for the pain and suffering already experienced and that to be experienced in future. However, it has been accepted that past awards from similar injuries with similar sequelae, provide a useful guide. The undisputed evidence in relation to the sequelae of A[...]’s injuries is that he has cognitive deficits that diminish his everyday functioning and academic progress, as a result he reached his current grade at school through being condoned in spite of obtaining marks that fell below the pass mark, and will not be able to pass on his merit or proceed beyond grade 10.

[10] Mr *Pillemer* summarized the injuries sustained by A[...], as being moderate to severe. He had a head injury which was confirmed by Dr Nadvi on the basis that A[...] lost consciousness at the time of the accident, had evidence of direct impact to the head area, and was according to the hospital records diagnosed as having suffered a traumatic brain injury. In addition, the CT scan revealed a fracture of the skull with

subdural haematoma, he was treated as a head injury at the hospital and he had a period of post traumatic amnesia of about two and a half months according to his father.

[11] I noted that in the medico legal report of Dr Nadvi, he records on the third last paragraph of paragraph 3¹ that 'His period of Post Traumatic Amnesia was therefore in excess of a week, and this would define him as having suffered a severe traumatic brain injury according to this classification.' However, he qualified this by stating that if both the clinical and radiological factors are considered, the best definition is the Mayo classification which defines him as having sustained a 'definite moderate to severe traumatic brain injury'. Dr Nadvi then limited his definition to 'at least a moderate traumatic brain injury'.

[12] Mr *Pillemer* further listed the sequelae to the injuries as weakness of the legs, poor balance and altered gait, persistent headaches, reduced energy levels, memory impairment, mental fatigue and delayed processing and restless sleep. A[...] had been admitted to hospital on the day of the accident and discharged after a week, but was re-admitted 3 days later and hospitalised for an extended period of more than two months. During that period his Glasco Coma Scale fluctuated with the lowest being 9/15, one month after the accident. He did not return to school and failed grade six and had to repeat it the following year.

[13] Ms *Moodley* confirmed that the injuries and severity as stated by Mr *Pillemer* were correct.

[14] In support of his argument that the appropriate amount for general damages was R1 750 000, Mr *Pillemer* referred me to the following cases involving children who suffered head injuries:

(a) *Maribeng v Road Accident Fund*² where the injured was four years old at the time of the accident and in addition to the brain injury, suffered a fracture of the femur and was awarded a current value of R1 760 000;

¹ The papers: Expert Notices and Reports at 43.

² *Maribeng v Road Accident Fund* [2019] ZAGPPHC 1050; 2021 (8A4) QOD 39 (GNP).

(b) *Moneuoa v Road Accident Fund*³ where the injured was 15 years old at the time of the accident and sustained similar injuries and sequelae to Amukelani and the court awarded an amount whose current value is R1 749 000;

(c) *Pieterse obo JST v Road Accident Fund*⁴ where a 4-year old boy had, in addition to a brain injury, suffered many degloving injuries requiring a number of skin grafts, the court awarded an amount whose current value is R1 386 000; and

(d) *Minnie N.O. v Road Accident Fund*⁵ where a 5-year-old girl suffered a severe head injury with multiple degloving injuries requiring repeated surgery and permanent disfigurement, the court awarded an amount whose current value is R1 542 000.

[15] In turn, Ms *Moodley*, in seeking to persuade me that the appropriate amount was R950 000, referred to the cases in her heads of argument as follows:

(a) *Matthyssen v Padongelukkefonds*⁶ where the injured was an adult financial director who sustained a moderate concussive head injury with focal right parietal cerebral contusion, and the court awarded an amount the current value of which is R336 000;

(b) *Hurter v Road Accident Fund*⁷ where a 20-year old student with extensive facial fracturing in addition to the brain contusion with a fracture of the base of the skull was awarded an amount whose current value is R964 000;

(c) *Smit NO v Road Accident Fund*⁸ where a 12-year old girl suffered multiple fractures in addition to a severe diffuse brain injury and the court awarded an amount the current value of which is R1 549 000;

(d) *Myhill NO v Road Accident Fund*⁹ where an adult man who suffered a focal and diffuse brain injury was awarded an amount whose current value is R1 727 000;¹⁰ and

³ *Moneuoa v Road Accident Fund* [2020] ZAGPPHC 818; 2021 (8A4) QOD 68 (GNP).

⁴ *Pieterse obo J St I v Road Accident Fund* [2011] ZAGPJHC 73; 2012 (6A4) QOD 88 (GSJ).

⁵ *Minnie NO v Road Accident Fund* 2012 (6A4) QOD 82 (GSJ).

⁶ *Matthyssen v Padongelukkefonds* 1999 (4B4) QOD 23 (T); 1999 4 QOD B4-23 (T).

⁷ *Hurter v Road Accident Fund and another* [2010] ZAECPEHC 5; 2010 (6A4) QOD 12 (ECP).

⁸ *Smit NO v The Road Accident Fund* 2006 (5B4) QOD 251 (T); 2006 (5) QOD B4-251 (T).

⁹ *Myhill NO (obo RC Penga) v Road Accident Fund* [2008] ZAGPHC 279; 2008 (5B4) QOD 271 (T).

¹⁰ Ms *Moodley* had written R1 622 000 but I have used the 2023 amount in terms of P Corbet, C Potgieter and J Daffue *Quantum of Damages in Bodily and Fatal Injury Cases* (Revision Service 5, June 2023).

(e) *Torres v Road Accident Fund*¹¹ where a 20-year old male with a severe diffuse brain injury was awarded general damages whose current value is R 1 480 000.¹²

[16] I have had regard to the submissions of both counsel, the medico-legal reports, and the comparative cases referred to. The cases referred to by Ms *Moodley* related to people that were older, and thus would not compensate A[...] for the loss sufficiently, as he had his entire future ahead of him, in senior primary school, when the trajectory of his life was changed. This affected even his extra-curricular activities and him even reaching matric.

[17] The cases referred to by Mr *Pillemer*, although they relate to children of a similar age to A[...] at the time of the accident, the injuries they sustained were more severe in relation to other fractures sustained, than A[...], and their brain injuries were more severe than his.

[18] Having duly considered the arguments and records as indicated, and the sequelae of the injuries and the permanent effects thereof on the life of A[...] from the time he was 12 years old, I am of the view that an appropriate amount for general damages is R1 250 000 (one million two hundred and fifty thousand rand).

[19] I received a draft order prepared by Mr *Pillemer*, which was handed up in court. I then, in preparing this judgment, noticed that it made provision for interest at a much higher rate than the legal rate, both in relation to capital and to costs. I then considered the particulars of claim to see what interest had been claimed, and discovered that no provision for any interest had been made, and the prayer was as follows:

- a. Payment of the sum of R5 000 000.00
- b. Costs of suit;
- c. Vat at the prescribed rate;
- d. Other and or alternative relief.'

¹¹ *Torres v Road Accident Fund* 2010 (6A4) QOD 1 (GSJ).

¹² Ms *Moodley* wrote R1 447 000 but I have used the 2023 value in terms of P Corbet, C Potgieter and J Daffue *Quantum of Damages in Bodily and Fatal Injury Cases* (Revision Service 5, June 2023).

[20] Mr *Pillemer* did not sign the particulars of claim and is not responsible for the failure to claim any interest. Nevertheless, the plaintiff is entitled to interest on the judgment debt, as I am confident that both sides had not noticed the omission. Because the rate in the draft order was for 11.75%, whereas the last gazetted rate was 7.75%,¹³ I requested submissions from both counsel on what the correct rate should be.

[21] Interest on a debt that is not regulated by other law or agreement is calculated at the rate of the repurchase rate plus 3.5% per annum in terms of the provisions of s 1(1) read with s 1(2)(a) of the Prescribed Rate of Interest Act 55 of 1975. Section 1(2)(b) provides that the minister of justice must, whenever the repurchase rate is adjusted, publish the amended rate of interest in the *Government Gazette*. The gazetted rate is effective from the first day of the second month following the determination of the repurchase rate, according to s 1(2)(c).

[22] It is my view that on an ordinary meaning of the words, the interest rate in subsection 1(2)(a) is not dependant on the minister publishing an amended rate, as the prescribed rate is based on the repurchase rate set by the South African Reserve Bank ('SARB'), and section 1(2)(c) links the effective date of the prescribed rate to the SARB determination and not the ministerial publication.¹⁴ The failure of the minister to publish the amended rate as required by section 1(2)(b) does not have the effect of keeping the prescribed rate unchanged.

[23] The response submitted by Mr De Sousa (plaintiff's attorney) in response to my request for submissions, was in similar vein to what I have expressed in paragraphs 21 and 22 of this judgment, and he added that the latest repurchase adjustment was made in May 2023, and went up to 8.25%. He attached a 'screenshot' from the SARB website, which further indicated that the 'prime rate' is 11.75%. No response was submitted on behalf of the defendant.

¹³ See GN 2378, GG 46739 of 19 August 2022. However, it should be noted that this notice, as well as the two previous notices, namely GN 2345, GG 47197 of 5 August 2022, and GN 2326, GG 47133 of 29 July 2022, all read exactly the same.

¹⁴ Judicial Matters Amendment Bill B 2B—2015, ISBN 978-1-4850-0260-4, see para 3.3 in the Memorandum on the objects of the Judicial Matters Amendment Bill, 2015.

[24] In the result I make the following order:

1. The defendant is directed to pay to the plaintiff the sum of R 2 513 541.35 (two million five hundred and thirteen thousand five hundred and forty-one rand and thirty-five cent) in full and final settlement of the plaintiff's claim for loss of earnings and general damages within 180 days from the date of this order.
2. The defendant is directed to provide 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 all future accommodation of A[...] N[...] in a hospital or nursing home or hospital and medical treatment, or the rendering of a service or the supplying of goods to him, arising out of the injuries he sustained in the motor vehicle collision that occurred on 21 April 2019 and to compensate him therefor after they have been incurred.
3. Should payment of the amount referred to in paragraph 1 hereof not be made within 180 days from the date hereof, the defendant is directed to pay interest on the said amount at the rate of 11.75% per annum calculated from 181 days from date hereof to date of payment.
4. The defendant is directed to make payment of the plaintiff's taxed or agreed party and party costs up to 13 November 2023 on the High Court scale, which costs shall include the costs of plaintiff's counsel, attorney and the expert witnesses as determined by the taxing master or agreed.
5. The plaintiff is directed, in the event of the aforementioned costs not being agreed to:-
 - 5.1 to serve the Notice of Taxation on the defendant; and
 - 5.2 allow the defendant 180 days to make payment of the taxed costs.

6. The defendant is directed to pay interest on the taxed costs referred to in paragraph 5 hereof at the rate of 11.75% per annum calculated from 181 days of the taxation and/or settlement of the costs to date of payment.

7. The defendant is directed to make the payment referred to in paragraph 1 above directly to the Trust Account of the plaintiff's attorneys, namely A C De Sousa Attorneys, at:-

Account name: [...]

Bank: [...]

Branch code: [...]

Account no: [...]

Sibiya J

APPEARANCES

Counsel for the Plaintiff : Adv R Pillemer

Instructed by : A C De Sousa Attorneys

jade@acdsattorneys.co.za;

tony@acdsattorneys.co.za

Counsel for Defendant : Ms S Moodley
Instructed by : State Attorney
shatelm@raf.co.za
Date of Hearing : 13 November 2023
Date of Judgment : 16 November 2023