NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Date: 2007-04-18

Case Number: 30137/2003

In the matter between:

M.M. MAKANGU First Plaintiff

ANNALIE COETZEE NO Second Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

SOUTHWOOD J

[1] The plaintiff claims damages from the Road Accident Fund ('RAF') in terms of the Road Accident Fund Act 56 of 1996 ('the Act') for bodily injuries sustained in a motor vehicle collision on 30 May 1999. At the time of the collision the first plaintiff and her daughter, B.M.M. ('B.') who was born on [day/month] 1990, were passengers in the vehicle which collided with the vehicle in respect of which the RAF is liable.

[2] In October 2003 the plaintiff instituted an action against the RAF for

damages sustained as a result of the collision. In her personal capacity the plaintiff claimed damages in the sum of R140 000 and in the sum R1 638,81 for the burial costs of the driver of the motor vehicle in which she had been travelling. In her capacity as mother and natural guardian of B. the plaintiff claimed damages in the sum of R4 833 848.

[3] The action was enrolled for hearing on 9 June 2005. On that date the parties agreed that the RAF was liable for damages sustained by the plaintiff and B. and the court made the following order by agreement –

(1) The merits and quantum are separated;

(2) The merits are conceded, the defendant is to pay 100 % of the plaintiff's proved or agreed damages (claimed in both her personal as well as representative capacity);

(3) The question of quantum is postponed *sine die*;

(4) The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs on the high court scale.

[4] The matter was again enrolled for hearing on 6 March 2007. At the pre-trial conference held on 2 March 2007 the parties agreed on the following in respect of the plaintiff's claims:

(1) Plaintiff's personal claim

The defendant would pay to the plaintiff the sum of R60 000 in respect of general damages.

(2) Plaintiff's claim for funeral expenses

The defendant would pay to the plaintiff the sum of R1 688,81 in respect of funeral expenses.

(3) Plaintiff's claim as mother and natural guardian of B.

(i) The defendant would pay to the *curator bonis* to be appointed for B., the sum of R550 000 in respect of general damages;

(ii) The defendant would furnish an undertaking in terms of section 17(4)(a) of the Act:

(a) for the costs of the future accommodation of B. in a hospital or nursing home or treatment or of rendering of a service to her or supplying of goods

to her arising out of the injuries sustained by her in the motor vehicle collision on 30 May 1999, after the costs have been incurred and on proof thereof;

(b) the costs covered by the certificate will, without derogating from the generality thereof, specifically include 100 % of the fees of a *curator bonis* and *curator ad personam* (if necessary), as per Government Gazette as well as the costs of setting security by such *curator bonis*;

(c) for the costs of a care worker for B. as provided for in the medico-legal reports of Wilma van der Walt dated 28 February 2007 and Sonet Vos dated 23 February 2007 respectively;

(d) for the costs of B. attending the S… School for LSEN, or a similar special school, until the age of 21 years;

(4) The only issues to be decided in respect of B.'s claim, were –

(i) B.'s future loss of earnings or loss of earning capacity; and

(ii) the applicable pre-morbid contingency deduction;

(5) In respect of B.'s claim for future loss of earnings or loss of earning capacity B. is unemployable in the open South African Labour Market;

(6) The defendant would pay the plaintiff's taxed or agreed party and party costs of the action up to 2 March 2007 which costs shall include –

(i) the costs involved in recovering the amounts referred to in the pre-trial minute;

(ii) the costs of two advocates;

(iii) the qualifying fees of all of the plaintiff's expert witnesses in respect of whom the plaintiff had given notice in terms of Rule 36(9)(a) and (b);

(iv) costs of the *curator ad litem*;

(v) the costs of consulting with and the costs occasioned by their appearance in court of the

following expert witnesses called by the plaintiff:

(a) Dr Daan de Klerk;

(b) Dr Hermann W. Kluge;

(c) Dr Pieter Odendaal;

(d) Wilma van der Walt;

(e) Trevor Reynolds;

(f) Sonet Vos;

(g) Madelien Mills;

(h) Dr A.W. Stead;

(i) Friedol van der Westhuizen.

[5] At a second pre-trial conference on 5 March 2007 the parties agreed that the actuarial calculations of Robert J. Koch are correct, that the report of Robert J. Koch would be handed in by agreement and that the court must take the calculations into consideration.

[6] On 20 February 2007 the Pretoria High Court appointed Adv. Annelie Coetzee as B.'s *curator ad litem* and she became the second plaintiff for the purposes of B.'s claim. Adv. Coetzee attended the hearing of this trial on 6 and 7 March 2007.

[7] In dealing with a claim for future loss of earnings, or, more properly, loss of earning capacity - see ***Santam Versekeringsmaatskappy Bpk v Byleveldt*** **1973 (2) SA 146 (A)** at 150A-C: ***Southern Insurance***

Association v Bailey NO **1984 (1) SA 98 (A)** at 111C-F – where the plaintiff was a young child, the court in ***Bailey's case*** formulated the following guidelines –

(1) There is no general principle that in the case of a young child the Court is obliged to award a globular amount in respect of general damages including loss of earning capacity. The Court is entitled to do so if it considers such an approach appropriate (112H-113A);

(2) In every case the approach to be adopted is a matter for the judgment of the trial court (113A);

(3) Where the damages are large it is desirable (for a number of reasons not presently relevant) where it is possible to do so to itemise the amounts awarded in respect of pecuniary damages (such as a loss of earning capacity) and non-pecuniary damages (such as loss of amenities etc.) (113A-E);

(4) Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which

is often a very rough estimate, of the present value of the loss (113G-H);

(5) In making such estimate there are two possible approaches –

(a) The judge may make a round estimate of an amount which seems to him to be fair and reasonable. This is entirely a matter of guesswork and 'a blind plunge into the unknown';

(b) The judge may attempt to make an assessment by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends upon the soundness of the assumptions which may vary from the strongly probable to the speculative (113G-H);

(6) The mere fact that this exercise, using either approach, involves guesswork does not preclude the Court from making an award. Once it is clear that pecuniary damage has been suffered the Court must assess the amount making the best use of the evidence before it (114A-C);

(7) Where the Court has before it material on which an actuarial calculation can be made, the first approach does not offer an advantage over the second. Even if the result of an actuarial 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. On the other hand, the trial judge's 'gut feeling' as to what is fair and reasonable is nothing more than a blind guess (114C-E);

(8) In the case of a young child where the assessment of damages for loss of earnings is speculative in the extreme it is not wrong in principle to make an assessment on the basis of actuarial calculations (114E-F);

(9) Where the actuarial computation approach is adopted the trial judge is not 'tied down by inexorable actuarial calculations'. He has 'a large discretion to award what he considers right'. One of the elements in exercising that discretion is the making of a discount for 'contingencies' or the 'vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary depending upon the circumstances of the case and cannot be assessed on any logical basis. The assessment must be largely arbitrary and must depend upon the trial judge's impression of the case (116G-117A);

(10) The fortunes of life to be considered and taken into account may be favourable or adverse: e.g. a particular plaintiff may have prospects or chances of advancement and increasingly remunerative employment. Each case will depend upon its own facts. Sometimes the chance of good fortune may balance or even outweigh the risk of bad (117B-D).

[8] In dealing with the allowance for contingencies in ***Goodall v President Insurance Co*** **1978 (1) SA 389 (W)** at 392H-393B the court said:

> 'In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a

certain type of almanack, is not numbered among the qualifications for judicial office. In ***De Jongh v Gunther and Another*** **1975 (4) SA 78 (W)**, Nicholas J said at p80, opposite the letter F:

> "In a case where a plaintiff sues for his own future loss of earnings it is only contingencies which affect him personally which have to be considered. In his judgment in ***Van Rensburg v President Versekeringsmaatskappy*** (WLD 21.11.68) quoted in Corbett and Buchanan, *The Quantum of Damages*, Vol 2, at p65, LUDORF J referred to the fact that it has become almost customary, at any rate in this Division of the Supreme Court, for the Court to make a deduction for unforeseen circumstances of life of one-fifth. That is, it is true, a rough and ready approach, but the nature of the problem is such that one can do no better than adopt a rule of thumb of this kind.'"

[9] In the present case the plaintiffs have chosen the actuarial computation approach for the purpose of assessing B.'s loss of earning capacity. The defendant does not contend that it is not appropriate to do so. The defendant's contentions relate to the assumptions on which the calculations are to be based and the percentage of the general contingency deduction to be made.

[10] The plaintiffs did not tender any factual evidence as to B.'s background, development and education. The parties accepted the facts set out in the experts' summaries and reports filed in respect of the expert witnesses. The defendant does not object to this procedure and also relies on the facts established by the experts. As will be

pointed out some of this information is not correct. The plaintiff called three witnesses, Ms Madelien Mills, an Educational Psychologist, Trevor Reynolds, a Clinical Psychologist with a special interest in clinical neuropsychology and Sonet Vos, an Industrial Psychologist. The defendant called two witnesses, Dr Marina van der Ryst, an Educational Psychologist, and Tania Vermaak an Industrial Psychologist. All these witnesses are well qualified, knowledgeable and articulate. Apart from one or two factual errors there is no reason to doubt their reliability or credibility and none was advanced in argument. All attempted to be of assistance to the court. Their evidence must be assessed in the light of the disputes between them, which are matters of nuance rather than substance, and the general probabilities revealed by the common cause facts. Broadly speaking, the plaintiff's evidence supported what I would call an 'optimistic' approach to B.'s pre-morbid situation: i.e. the witnesses tend to emphasise the positive such as her strong motivation and desire to succeed and her physical attractiveness: whereas the defendant's witnesses supported what I would call a 'realistic' approach: i.e. the effect of B.'s disadvantaged background and socio-economic circumstances on her upbringing, education and work opportunities.

[11] The following facts appear from the expert reports of the Educational Psychologists, Madelien Mills and Dr Van der Ryst:

(1) B. was born on [day/month] 1990. She was the plaintiff's second child and she had a natural birth after a normal full-term pregnancy. There were no post-natal complications. B. reached the developmental milestones within the normal time. She sat at 7 months, crawled at 8 months, stood at 9 months and walked at 12 months. In short, she was a normal active toddler. She experienced no difficulty in speaking and by the age of two was able to speak short sentences in Zulu, her mother tongue. At the age of one year B. was enrolled at a crèche when the plaintiff started working again. B. attended this crèche for either two years or until the age of 6 when she was enrolled at primary school.

(2) B.'s family lived in a three bedroom house in Zithobeni, a village near Bronkhorstspruit, Mpumalanga. The plaintiff has a standard 3 education and was a domestic worker. B.'s biological father has a standard 5 education and was unemployed. B. was raised in poor socio-economic circumstances. Informal stimulation was of a poor quality. She was also subject to unstable socio-emotional circumstances. Her father abused alcohol and her mother and the children. At the crèche the stimulation was also poor. B. was not exposed to

educational toys and her pre-academic skills were not developed. B. failed grade 1 and after repeating grade 1 failed grade 2. She was repeating grade 2 at the time of the collision. B.'s older sister, Johanna, who is 7 years older than B., repeated grade 10, and passed grade 11 but failed grade 12. She left school without completing grade 12 and it is not clear what employment she has had since then. There is a suggestion that she works at a guest house. B.'s younger sister, Zodwa, died in the collision.

(3) The plaintiff left B.'s biological father in 2000 and he has not lived with the family since. The plaintiff entered into a new relationship and the family's socio-emotional and economic circumstances have stabilised.

[12] It is on the basis of this scanty information that B.'s loss of earnings/earning capacity must be calculated. It is common cause that B. suffered a major head injury and has a permanent loss of sight in her left eye as well as other sequelae which are not relevant. As already mentioned it is common cause that as a result of her injuries B. will be unemployable in the open labour market.

[13] In their minute of 27 February 2007 the educational psychologists agree on the following: B.'s development was normal and she achieved her developmental milestones at the appropriate ages. B. was raised in poor socio-economic and unstable socio-emotional circumstances. B.'s pre-

academic skills were not well-developed. She performed poorly at primary school. She repeated both grade 1 and grade 2. This may have been as a result of learning difficulties, poor informal stimulation and/or socio-economic circumstances. B. was repeating grade 2 when she was injured in the collision. Neither of B.'s parents completed their primary school careers. B.'s older sister left school after passing grade 11. However she failed grade 10 and grade 12. It is unclear whether she has obtained work since leaving school. As already mentioned she may have found employment at a guest house. At best, B. probably functioned in the average range but would probably have progressed to grade 11 or possibly grade 12. Dr Van der Ryst qualified this by stating that B. would have struggled and possibly would have failed once in the FET band (i.e. grades 10, 11 or 12). The other dispute is whether B. would have been able to pursue some other formal training. Madelien Mills considered this a possibility. Dr Van der Ryst is of the view that when considering this possibility B.'s circumstances, family background, educational history and family members' educational and employment history would have to be taken into consideration.

[14] In their minute of 28 February 2007 the industrial psychologists agree on the following: B.'s development was normal and her pre-academic skills were probably not well-developed. (Sonet Vos pointed out that because of the difference between the Performance and Verbal IQ scores it is possible that Betty's Verbal IQ was in the average range and this would have pushed her overall IQ score into the high IQ range. Sonet Vos also referred to a statement by B.'s standard 5 teacher that according to the school records B.'s performance was outstanding before she was involved in a car accident in 1999). B.'s family members did not achieve high levels of educational or occupational functioning. (Sonet Vos pointed out that the plaintiff reported that B.'s sister did very well at school until grade 11 but then ran away from home and got involved with the wrong friends).

[15] In their minute the industrial psychologists agree that there are two possible scenarios and recorded their differences regarding B.'s progression in these scenarios:

(1) B. obtains a grade 11 qualification and enters the informal labour market as an unskilled employee and after acquiring some basic skills secures employment in the formal labour market. Thereafter Betty receives further occupational training and experience. According to Sonet Vos Betty would enter the formal labour market at the Paterson A2 level and exit at the

Paterson B3 level. According to Tania Vermaak Betty would enter the formal labour market at Paterson A1 level and exit at the Patterson A3 level. There would be three to five year intervals between each level;

(2) B. matriculates and possibly joins an organisation/company in the formal sector. Sonet Vos is of the opinion that B. would enter the formal sector at a Paterson B1 level whereas Tania Vermaak considers that she would begin at the Paterson A2/3 level. Tania Vermaak also holds the view that in the light of the high unemployment rate in the country B. would probably work in the informal sector for a period before securing employment in the formal sector. The two witnesses referred to the Deloitte & Touche, National Remuneration Guide, which reflects that the Paterson A2/3 level includes occupations such as clerical assistant, switchboard operator, typist, catering assistant and security guard and that the Paterson B1 level includes occupations such as general clerk, filing clerk, receptionist and telephonist. They agree that B. could have received in-company training and experience which would have facilitated her progress through the remaining Paterson A/B levels. Sonet Vos considers that after following this career path B. would complete her career at the Paterson C1 level (skilled labourer) whereas

Tania Vermaak is of the view that B. would finish her career at the Paterson B3/4 level (semi-skilled labourer). They agree that there would be three to five year intervals between each level. They also adopted the earning assumptions for unskilled informal sector workers in the *Robert J Koch Quantum Yearbook 2007*.

[16] In evidence the four witnesses did not deviate from the standpoints adopted in the minutes. There is no dispute that it is a real possibility that B. would have matriculated. The plaintiff's witnesses continued to emphasise the positive: B.'s high motivation and drive to succeed, her attractiveness, race and gender: the defendant's witnesses continued to emphasise the realities of B.'s background and upbringing and their effect on her opportunities in the South African labour market: high levels of unemployment, competition for low level positions and the difficulty of obtaining and securing employment in the formal labour market. It appears that the plaintiff is not a reliable source of information about B.'s performance at school and that Madelien Mills wrongly accepted that she started school in 1998. B.'s reports reflect that she started school at the age of six and that three years later she had not passed grade 2. She performed poorly academically up to the time that she was involved in the collision and there is no truth in the reported statement of her grade 5 teacher that B.'s performance was

outstanding before she was involved in the car accident. At best she performed at an average level. Tania Vermaak conceded that Sonet Vos' reasoning about Betty's IQ is correct: i.e. her IQ was probably in the high average range before the collision. It was also accepted that Trevor Reynolds' assessment of B. as highly motivated with a strong desire to succeed is correct. However Betty's disadvantaged background is an important factor and the most appropriate approach is to take into account her poor socio-economic and socio-emotional circumstances, her low levels of stimulation pre-school, her lack of role models and lack of educational and occupational achievement in the family. In view of all these factors I conclude that the assumptions to be used for the purpose of the calculations are, with two exceptions, those proposed by the defendant's witnesses. The only real criticism I have is of Tania Vermaak's opinion of the entry and exit levels on the first scenario and her view that even with grade 12 B. would first work in the informal labour market. Her evidence on the first issue was not as cogent as that of Sonet Vos. It is also inconsistent with her acceptance of the levels shown on the table relevant to the second scenario. On the second issue B. would enjoy all the advantages of a female black matriculant and would probably enter the formal labour market after school but on the levels referred to by Tania Vermaak.

[17] I therefore accept the following assumptions for the purpose of Robert Koch's actuarial calculations –

(1) <u>First scenario</u> – grade 11

B. fails one year in the FET band. She therefore passes grade 11 in 2009 and commences work in the informal sector in 2010. The applicable entry and exit levels are those accepted by Sonet Vos and reflected in her table (p103 of the expert bundle). (Robert Koch's calculation of her earnings is R1 599 924,00).

(2) Second scenario – grade 12

B. fails one year in the FET band and passes grade 12 (i.e. matriculates) in 2010 and starts working in the formal sector in 2011. The applicable entry and exit levels are those accepted by Tania Vermaak and reflected in Sonet Vos' table. (Robert Koch's calculation of her earnings is R2 018 464,00).

[18] It is not disputed that an allowance must be made for the possibility of B. matriculating and this will increase the amount of the award – see ***Blyth v Van den Heever*** **1980 (1) SA 191 (A)** at 224E-226B; ***Jowell V Bramwell-Jones and Others*** **2000 (3) SA 274 (SCA)** para 22; ***Burger v Union National South British Insurance Company*** **1975 (4) SA 72 (W)** at 75D-G; ***Kwele v Rondalia Assurance Corporation of SA Ltd*** **1976 (4) SA 149 (W)** at 152H-153A. There is no dispute in the evidence that the possibility is high rather than low. The plaintiff's

estimate of 40 % is appropriate and fair. This percentage must be applied to the difference between Robert Koch's calculations for grade 11 and grade 12 (i.e. R2 018 464,00 and R1 599 924,00) which is R418 540,00. 40 % of R418 540,00 is R167 416,00.

[19] The total loss of earning capacity is therefore R1 767 340,00 (i.e. R1 599 924,00 plus R167 416,00). This figure must be adjusted for contingencies. The plaintiff contends for a contingency of 15-20 %. The defendant contends for 25-35 %. In argument the parties referred to the contingencies applied in decided cases. The plaintiff referred to the unreported judgment of Mynhardt J in ***Botha en 'n Ander v Santam Beperk*** TPD Case Number 10240/93 delivered 5 February 1997 (20 %) and the unreported judgment of Pretorius AJ in ***Susanna Magdalena Smit oho Zalizna v Road Accident Fund*** TPD Case Number 31684/2003 delivered 23 March 2006 (15 %). The defendant referred to the unreported judgment of Levy AJ in ***Bopape v President Insurance Co Ltd*** WLD Case Number 20831/88 delivered 10 December 1990 (reported in Corbett & Buchanan) (40 %) and the unreported judgment of Du Toit AJ in ***Mautla v Road Accident Fund*** TPD Case Number 5512/00 delivered 29 May 2001 (reported in Corbett & Buchanan) (20 %). None of these cases is on all fours with the present case. In ***Bailey's case*** the court applied a contingency of 25 % in the case of a child whose probable pattern of employment in

the future would be that of a labourer following in the footsteps of her mother. Although broadly similar to the present case the figure accords with the sliding scale of contingency allowances for a young child referred to by Koch in his work. In my view the figure of 20 % would be fair. B. is therefore entitled to 80 % of R1 767 340,00 which is R1 413 872,00.

[20] With regard to costs the defendant agrees that the plaintiff is entitled to the costs of suit, including the costs of two counsel, up to and including the date of trial: i.e. 6 and 7 March 2007.

The order

[21] The following order is made –

(1) The defendant is ordered to pay to the plaintiff in her personal capacity –

(a) R60 000 for general damages;

(b) R1 688,81 for funeral expenses;

(2) The defendant is ordered to pay to the *curator bonis* to be appointed for B.M.M. –

(a) R550 000 for general damages; and

(b) R1 413 872,00 for loss of earning capacity;

(3) The defendant is ordered to furnish an undertaking in terms of

section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 –

(a) for the costs of the future accommodation of B.M.M. in a hospital or nursing home or treatment or of rendering of a service to her or supplying of goods to her arising out of the injuries sustained by her in the motor vehicle collision on 30 May 1999, after the costs have been incurred and on proof thereof;

(b) the costs covered by the certificate will, without derogating from the generality thereof, specifically include 100 % of the fees of a *curator bonis* and *curator ad personam* (if necessary), as per Government Gazette as well as the costs of setting security by such *curator bonis*;

(c) for the costs of a care worker for B. as provided for in the medico-legal reports of Wilma van der Walt dated 28 February 2007 and Sonet Vos dated 23 February 2007 respectively;

(d) for the costs of B. attending the S… School for LSEN, or a similar special school, until the age of 21 years;

(4) The defendant is ordered to pay the plaintiff's taxed or agreed costs of the action up to and including the 6th and 7th of March 2007 which costs shall include –

(i) the costs involved in recovering the amounts referred to in the pre-trial minute dated 2 March 2007;

(ii) the costs of two counsel;

(iii) the qualifying fees of all of the plaintiff's expert witnesses in respect of whom the plaintiff gave notice in terms of Rule 36(9)(a) and (b);

(iv) costs of the *curator ad litem*;

(v) the costs of consulting with and the costs occasioned by their appearance in court of the following expert witnesses called by the plaintiff:

(a) Dr Daan de Klerk;
(b) Dr Hermann W. Kluge;
(c) Dr Pieter Odendaal;
(d) Wilma van der Walt;
(e) Trevor Reynolds;
(f) Sonet Vos;
(g) Madelien Mills;
(h) Dr A.W. Stead;
(i) Friedol van der Westhuizen;

(5) Pending the appointment of a *curator bonis* the amounts to which B.M.M. is entitled are to be paid into the Guardians Fund

for her benefit;

(6) The funds paid into the Guardians Fund together with interest earned thereon are to be paid to the *curator bonis* appointed for B.M.M. and are to be paid over to the *curator bonis* not later than 2 weeks of the appointment of the *curator bonis*.

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B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

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CASE NO: 30137/2003

HEARD ON: 2007-03-06 TO 2007-03-07

FOR THE PLAINTIFF: ADV. M.C. MARITZ SC
N.C. MARITZ

INSTRUCTED BY: Ms. M. Maritz of Van der Merwe & Ferreira Attorneys

FOR THE DEFENDANT: ADV. E. SEIMA

INSTRUCTED BY: Mr Chauke of T.M. Chauke Attorneys

DATE OF JUDGMENT: 2007-04-18