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

JUDGMENT

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

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DATE

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SIGNATURE

Case no: 038823/14

In the matter between:

MAHLANGU ELIZABETH

Plaintiff

And

ROAD ACCIDENT FUND

Respondent

Heard: 28 January 2016 and 29 March 2016

Delivered: 21 July 2016

JUDGMENT

MOLAHLEHI, AJ

Introduction

- [1] On the last day of the hearing of the oral evidence in this matter, the parties were directed to file their heads of argument within ten days thereafter. The plaintiff complied with that directive. The respondent has despite several reminders by my registrar failed to comply with the directive. I was also informed at the hearing of the arguments by Counsel for the plaintiff that he had on several discussions with the respondent's Counsel regarding the same to no avail. The matter was thus determined without the benefit of the heads of argument of the respondent.
- [2] The plaintiff in this matter claims damages, in her representative capacity as the mother and natural guardian of her son ("hereinafter referred to as "the minor child"), arising from bodily injuries he suffered on 26 January 2013, when he was knocked down by an insured vehicle while he and his friends were playing in the yard. The car went through the fence of the yard, killing two of his friends and injuring the other two
- [3] The minor child's twin brother was one of those who were injured in the accident. The twins were prematurely born at 35 weeks and the other twin suffered complications at birth which seems to have made him weaker and slower in terms of development. There is no evidence that the minor child was not a normal child at the time of the accident.
- [4] At the commencement of the trial, the parties informed the Court that they had agreed that:
1. The defendant would be liable for 100% of the proven damages suffered by the minor child.

2. The defendant shall furnish the plaintiff with the statutory undertaking in terms of the provisions of section 17 (4) of the Road Accident Fund Act number 56 of 1996.
3. An allowance in the amount of R658 693.76 be made in respect of Past Hospital and Medical Expenses. The respondent was to verify that amount.
4. In relation to the nature, extent and the severity of the injuries sustained by the minor child, the court may have regard to:
 - i. the joint minutes filed by the experts of the parties.
 - ii. opinions expressed by the uncontested experts employed by the plaintiff.
5. The actuarial calculation was done having regard to the joint minutes of the educational psychologist and the opinion of the plaintiff's industrial psychologist.
6. The court may request the actuary to do further calculation should it be necessary.

Common cause facts

- [5] It is common cause that at the time of the accident the minor who was six years old, was a Grade 1 learner in the mainstream school in Houghton. He sustained severe bodily injuries consisting of head injuries with a fracture to the base of the skull with subluxation of the TM joint, resulting in a significant brain injuries, a fracture of the right clavicle bilateral fractures of the right and left femur.
- [6] The joint minutes of the orthopaedic and the neurosurgeons reveal that consequent to the injuries suffered, the minor child lost consciousness, was intubated, ventilated and remained in coma on medical ventilation in the ICU for about six weeks and thereafter was transferred to rehabilitation. His GCS deteriorated to 7/15 because of the injuries he sustained.

- [7] The orthopaedic surgeons employed by the parties reveal that the minor child is also suffering from on-going headaches, shortness of breath, fatigue and has limited physical endurance as a direct consequences of the accident. This is likely to create difficulties for him as in future, the workload and tempo increases with his age
- [8] The neuropsychologists are in agreement that the minor child suffered a severe head injury which has further complicated the focal injury to the brain. They also agree that the injury occurred at the critical point of his development which also explains the drastic deterioration in his performance at school. They further note that due to the brain injuries, the minor child is unlikely to perform according his premorbid potential and will encounter scholastic difficulties and setbacks. This will have a negative impact on his sporting and occupational activities.

The issues in dispute

- [9] The real issue in this matter concerns the loss of earnings or future earning capacity of the minor child. The evidence presented by the parties was limited to this issue. The plaintiff in this respect presented the testimony of two expert witnesses, namely, Ms Prinsloo, the educational psychologist and Mr Linde, the industrial psychologist.
- [10] The qualification and experience of Ms Prinsloo was not disputed. In her testimony, she explained in details her report and the test she conducted on the minor child and the reasons for arriving at the opinion as she did.
- [11] In relation to the potential development of the minor child, Ms Prinsloo testified that had the accident not occurred, the minor child had the potential of completing Grade 12 (NQF4), and proceeding thereafter to a diploma qualification (NQF6). It was further her opinion that due to the accident, in all probability the minor will be able to progress to Grade 9 (NQF1) at the Sparrow School, where he currently together with his twin brother are attending.
- [12] In relation to the environment of the minor, Ms Prinsloo testified that the parents are middle class and the children have access to various amenities.

The parents have both Grade 11 and are doing well. The mother is currently studying a business course. The elder brother of the minor child failed maths at Grade 8 but generally did well in the other subjects, obtaining 82% in one of the subjects.

- [13] The twin brother who after birth remained longer in the incubator has learning difficulty. Before and after the accident, the minor child performed better than his twin brother. However, since the accident there has been signs of change in his performances. It is noted in the report that since the accident, his visual memory is low. The drinking problem of the father and the drug abuse by the elder brother was also noted by the report.
- [14] The key aspect of the testimony of Ms Prinsloo which was not seriously challenged during cross examination is that: Although born prematurely at 35 weeks, the minor was a normal, healthy child with an average ability. The premature birth at 35 weeks is not sufficient reason that he would have had learning difficulties. A different consideration would apply had he been born at 28 weeks or earlier. There were no factors pointing towards learning disability or attention deficit disorder that he suffered prior to the accident. The brain injury suffered is organic and permanent in nature and that no amount of treatment will cure or improve the neuropsychological, neurocognitive and neuro-behavioural deficit that he is suffering from. The fact that he was made to repeat Grade 1 cannot be regarded as a negative in his development. This was because of his move from an IsiZulu to English teaching school.
- [15] The second witness for the plaintiff was Mr Linde, the industrial psychologist whose qualification and experience was not in dispute. He testified that in formulating his opinion, he had regard to the medical opinions and joint expert's minutes which were made available to him.
- [16] Mr Linde testified that it is probable that the minor has suffered a severe future loss of earnings and earning potential as a result of the accident. As concerning prospects in education, he finds that but for the accident, the minor would have completed Grade 12 in the mainstream school, and would have furthered his studies with a three year diploma qualification. This would, in all probability, have earned him a Patterson A1 level in the labour market.

He would then have entered the labour market at Patterson B4 level and progressing further to Patterson C3/C4 levels.

- [17] He testified further that the consequences of the accident is that due to the injuries sustained, the minor will probably not attain his premorbid level functioning and is unlikely to succeed beyond grade 9 (NQF1).
- [18] The correctness of the conclusion of Mr Linde was neither challenged nor were alternative scenarios presented to him during cross examination to offer him the opportunities to express an opinion in that regard.
- [19] The defendant called one witness, Ms Sepenyane, the educational psychologist whose qualification and experience was not disputed. She testified that she conducted the test in IsiZulu and that that approach limit the margins of error that may arise because of what may be lost in translation.
- [20] In her testimony, Mrs. Sepenyane, did not dispute the opinion of Ms Prinsloo regarding the schooling career that the minor child could, prior to the accident, have followed; namely, proceeding with his studies up to Grade 12. She, however, disagreed that the physical attributes of the twins, namely, that they were not identical twins was not critical in the assessment of their individual future development. What is important in the assessment in cases of this nature is, according to her, a holistic approach which includes the assessment of the environment in which the child finds himself or herself in. In this regard, the family environment plays a critical role. In applying this approach, she took into account the following in assessing the minor child:
- both parents did not complete their matric,
 - the problem of alcohol use by the father,
 - the minor child had to repeat Grade 1,
 - the elder brother was not doing well at school,
 - emotional challenges arising from his mother's health relating to cancer. This is informed by the fact that the children have been browsing the internet regarding cancer.

- [21] During cross-examination, she conceded that children often outperform their parents. She also conceded that with appropriate remedial measures in place the minor could probably achieve NQF4.

Evaluation

- [22] The case of the plaintiff which was not seriously challenged during cross-examination is that except, as stated earlier, for the fact that the minor child was born prematurely at 35 weeks, he was a normal child with least average ability. There is no evidence that shows that the fact that he was born prematurely may have made him to suffer any learning disabilities. In this respect, I am persuaded by the submission made by Ms Prinsloo that the risk for premature children occurs when they are born at 28 weeks or earlier.
- [23] There is also no evidence that prior to the accident, the minor child had any problem in his development. He was always doing better than his twin brother who is not identical to him. He also outperformed the twin brother even after the accident.
- [24] It has not been disputed that the brain injury he suffered was consequent to the accident is organic and permanent in nature. His neuropsychological, neurocognitive and neurobehavioral arising from the accident is incurable.
- [25] In relation to the schooling, it is clear that the curriculum at the school where he is presently attending is lower than that of the mainstream. He will in terms of the present circumstances attend the school with only Grade 9 (NQF1) qualification and in all probability remain unemployed with medial earnings from part-time employment.
- [26] The industrial psychologist, Mr Linde after considering all the other experts reports concludes that the minor has suffered future loss of earning potential as a result of the accident. The scenario that he sets out for the minor before the accident is that he could have earned a Paterson A 1 level and would thereafter entered the labour market within Paterson B level and progressing

further to reach his career ceiling at the age 40-45 years and reaching retirement at the age of 65.

- [27] The scenario outlined following the accident is that the minor child will not reach his premorbid level of functioning and is unlikely to succeed beyond Grade 9 (NQF1). In general individuals who leave school at this level tend to rely on their physical abilities to secure and maintain employment. In the case of the minor, the evidence indicate that he will only be able to function in work of light physical demand. In this respect, he will have to compete with better qualified and abled bodied persons for this type of work. The accident and the injuries that he suffered consequent thereto has rendered the minor unemployable in the formal labour market. The best scenario for him is to generate income through the informal sector.
- [28] The opinion of Mr Linde was similarly not challenged. The proposition that he made regarding the scenario of the minor child following the accident was not countered with any alternative career by the respondent. His evidence was clear and persuasive and thus should be accepted as the most reliable and plausible.
- [29] Turning to the evidence of Ms Sepenyane, I am of the respectful view that, for the brief reasons that follows, it deserve to be rejected. The factors that she took into account in contending that the minor child could, post the accident, obtain Grade 12 are not backed by facts. She, during cross examination, conceded that the minor will probably, as expressed in the opinion of Ms Prinsloo obtain a Grade 9 at Sparrow school. It appeared, during her cross examination, that she had limited experience with brain injuries and its consequences on children who has been affected as a result. She further could not provide any factual basis for the factors that she relied on for the purpose of her opinion.
- [30] I find Ms Sepenyane to have been an unsatisfactory witness and in most instances in this respect avoided simple questions during her cross examination.

Conclusion

- [31] It is trite that in considering what damages to award in a damages' claim, the court exercises discretion.¹ In doing so, the court has to ensure that the award for damages made is fair and just. The court is in this respect generally guided by decided cases. The decided cases are also relevant to the contingency deductions to be applied on the actuarial calculated loss of earnings.²
- [32] In *Kgomo v Road Accident Fund*,³ a fourteen year old child was knocked down by a car whilst jogging. His progress at school was average and he had learning disability. It was found that prior to the accident, he had the potential of obtaining N2 or N3 qualifications. It was agreed that, post the accident, he would obtain Grade 9 level of education. The court in that matter awarded damages in the amount of R800 000,00 as fair and just compensation and this, it did after taking into account the previous decisions of the court.
- [33] Having regard to the injuries suffered by the minor child, I am of the view that a just and fair compensation for general damages is R1.1 million.
- [34] As concerning loss of earnings or earning capacity the actuarial calculation of the current day value of the minor child's lifetime earnings, but for the accident, based on the assumption that he would have obtained a diploma (NQF6) qualification is R5 284 398.00. Applying the 20% contingency deduction the amount is reduced to R4 60612.00. I agree with the plaintiff that the 20% contingency deduction is fair, reasonable and similar to that applied in the *Kgomo* matter.
- [35] In relation to the post-accident income or earnings based on the assumption that the minor child will be employed until the age of 65 years, the probable amount of R767 686.00 is applicable. Applying the 20% higher contingency deduction post-accident result in the net loss of R3 766 906.00.
- [36] In the circumstances I find that the balance of probabilities favours awarding compensation for loss of earnings or earning capacity in the amount of R3 766 906.00.

¹ See *Radebe obo TD v Road Accident Fund* [2013] ZAGPPHC 84 (18 March 2013) at para 12.

² *Protea Insurance Company Ltd v Lamb* 1971 (1) SA 530 (A).

³ (25846/10) [2011] ZAGP 103 (2 September 2011).

[37] In conclusion I am persuaded that the plaintiff has on the balance of probabilities successfully shown that the amount payable to the minor child as damages arising from negligent driving of the insured driver is R5 525 599.00, calculated as follows:

a.	Past Medical and Hospital Expenses:	R 658 693.76
b.	Loss of Earning Capacity:	R 3 766 906
c.	General Damages	R 1 100 000.00
	Total:	R 5 525 599.76

Order

[38] In the circumstances, the following order is made:

1. The Defendant shall make payment to the Plaintiff of the amount of R 5 525 599.76 ("the capital amount") into a trust account of the Plaintiff's Attorneys, Joubert Botha Incorporated, for the sole benefit of the minor child whose identity number is: 0, pending the formation of a trust to be formed as contemplated in paragraph 5 hereunder:

1.1 Details of the trust account aforementioned are as follows;

1.1.1 Account Name: Joubert Botha Incorporated

1.1.2 Bank: Standard Bank

1.1.3 Branch Code: 0

1.1.4 Account Number: 2

2. Payment of the aforesaid amount shall be paid within fourteen days of date of this order failing which interest a *tempore morae* is payable on the capital amount at the prescribed rate per annum from the said date to date of payment.
3. The Defendant shall forthwith furnish the minor child Bandile Jabu Mahlangu (born 16 February 2006), with an undertaking to compensate

him, in terms of Section 17(4)(a) of the Road Accident Fund Act No. 56 of 1996, for the payment of 100% (One Hundred per centum) of the costs of future accommodation of the minor child in a hospital or nursing home, or for the treatment of, or rendering of service, or for the supplying of goods to the minor child, including the costs attended to the creation of trust to be formed and appointment of the Trustee(s) thereof, and the services rendered by such Trustee (including the costs incurred in providing security to the satisfaction of the Master of the High Court), after such costs have been incurred and upon proof thereof. The undertaking shall further include the costs of the Trustee(s) in respect of future administration of the Trust which costs recoverable from the Defendant shall be limited to such costs chargeable by a *curator bonis* as contemplated in the Administration of Estates Act, No 66 of 1965 as amended as well as the costs of the Trustee(s) in respect of future administration of the said undertaking.

4. The Defendant shall make payment of the Plaintiff's costs, as agreed or taxed, which costs shall include;

4.1 The reservation/qualifying/preparation/join minutes (if applicable) fees of the following expects:

4.1.1 Dr H E T Van Den Bout (Orthopaedic Surgeon);

4.1.2 Dr T Bingle (Neurosurgeon);

4.1.3 Mrs A Cramer (Clinical/Neuropsychologist);

4.1.4 Dr M Close (Psychiatrist)

4.1.5 Mrs E Prinsloo (Educational Psychologist);

4.1.6 Mrs I M Hattingh (Speech/Language Pathologist & Audiologist);

4.1.7 Mr L Linde (Industrial Psychologist);

4.1.8 Mrs K Du Toit (Occupational Therapist);

4.1.9 Mr G A Whittaker (Actuary);

4.1.10 Dr D Irsigler-RAF4

4.2 The cost of Counsel on a scale of senior junior counsel including his day fee of 28 January 2016, 29 January 2016 and 29 March 2016;

4.3 The costs incurred by the Plaintiff in respect of the attendance of all medico legal examinations (to include accommodation and travel expenses if applicable);

4.4 Any costs attendant upon obtaining payment of the capital amount referred to above;

4.5 Any costs attendant upon obtaining payment in terms of the undertaking referred to in paragraph 3 above;

5. The attorneys of the Plaintiff, Joubert Botha Incorporated of Block 3, Suite 13, Bergzicht Office Park, Rooibok Avenue, Allens Nek, Roodepoort, are ordered:

5.1 To cause a trust ("the Trust") to be established in accordance with the Trust Property Control Act No. 57 of 1998;

5.2 To pay all monies held in trust by them for the benefit of the Minor, to the Trust, after deduction of their fees and disbursements, in accordance with their mandate and free agreement.

6. The Trust instrument contemplated in paragraph 5 above shall make provision for the following;

6.1 That the Minor is to be the sole beneficiary of the Trust;

6.2 That the trustee(s) is/are to provide security to the satisfaction of the Master;

- 6.3 That the ownership of the trust property vest in the trustee(s) of the trust in their capacity as Trustees;
 - 6.4 That the powers of the trustee(s) shall specifically include the power to make payment from the capital and income for the reasonable maintenance of the Minor, or for any other purpose which the trustee(s) may decide to be in the Minor's interest, and if the income is not sufficient for the aforesaid purpose, that the trustee(s) may utilise capital;
 - 6.5 Procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Honourable Court;
 - 6.6 That the trustee(s) be authorised to recover the remuneration of and costs incurred by the trustee(s), in administering the undertaking in terms of Section 17(4) (a) of Act 56 of 1996 in accordance with the certificate of undertaking to be provided by the Defendant in accordance with paragraph 3 above;
 - 6.7 The exclusion of any community of property in the event of the Minor's marriage;
 - 6.8 The suspension of the Minor's contingent rights in the event of sequestration, attachment or insolvency, prior to the distribution or payment thereof by the trustee(s) to the Minor;
 - 6.9 That the amendment of the trust instrument be subject to the leave of this Honourable Court;
 - 6.10 The termination of the Trust upon the death of the Minor, in which event the trust assets shall pass to the estate of the Minor;
 - 6.11 That the trust property and the administration thereof be subject to an annual audit.
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Molahlehi, AJ

Acting Judge of the South Gauteng High Court

Appearances

For the Plaintiff: Advocate J C Pieterse instructed by Joubert Botha Inc

For the Respondent: Advocate Louw instructed by Duduzile Hlebela Inc

GAUTENG LOCAL DIVISION