

**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION, MAHIKENG**

**CASE NO: RAF 209/15**

In the matter between:

**G. M. LEKANYANE obo O.E. LEKANYANE**                      Plaintiff

And

**ROAD ACCIDENT FUND**                                      Defendant

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**JUDGMENT**

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**DJAJE J**

[1]     The Plaintiff instituted action against the Defendant on behalf of the minor child for damages as a result of injuries sustained from a motor vehicle accident. On **19 January 2013** the minor child was a pedestrian at or near Pheseke section in Tlhatlhaganyane and while crossing the street he was hit by a car. As a result of the accident the minor child sustained a head injury. The merits had been conceded 100% in favour of the Plaintiff on **7 March 2017** and the matter was only for quantum on general damages and loss of earning.

**Loss of earning**

[2]     The parties relied on joint minutes by the educational psychologist, industrial psychologist and the neurosurgeons. The submission for the Plaintiff during the hearing was that the reports of the Defendant's experts were accepted including the actuarial calculations of the Defendant. No witnesses were called to testify. The argument on loss of earning was centred on the contingencies to be applied pre morbid and post morbid.

- [3] In the neurosurgical joint minutes both Dr Mazwi and Dr Segwapa agreed that the minor child sustained a mild concussive brain injury. Further that the chronic headaches experienced by the minor child can be managed with analgesics. They both deferred further assessment to the clinical and educational psychologists.
- [4] The educational psychologists agreed that pre accident the minor child had normal birth and milestone development, normal speech and language development and satisfactory fine and gross-motor development. The minor child had failed grade 2 prior to the accident which might suggest pre-existing learning difficulties. However, they both noted that he would pass grade 12 and continue to study at college or university. They deferred to the industrial psychologist with regard to his pre morbid career prospects. On post-accident, the educational psychologists agreed that the minor child's intellectual potential is estimated to fall in the below average range of intellectual functioning. Further that he had deficits in the areas of attention, concentration, memory, abstract reasoning and processing speed. These would impact negatively on his educability and that the accident could have worsened the challenges he had before. They deferred to the industrial psychologist to comment on his future career prospects.
- [5] The industrial psychologists also had joint minutes. Having considered the educational psychologists report they are both in agreement that the minor child would have completed grade 12 pre accident and continued with his studies to obtain a higher certificate or diploma. Ms Kheswa noted that the minor child would have continued working until normal retirement age of 65. On post- accident the industrial psychologists agreed as follows:
- "We agree that based on expert reports on hand, O's (minor child) employment prospects in areas requiring tertiary qualifications, a higher level of cognitive ability and which are paying more may thus be significantly reduced. Hence, should he not complete grade 12 as it is indicated by an educational psychologist, he will be employable in the unskilled categories of employment. Again, should he secure*

*employment, it can be estimated that the would have been able to earn at between the median and higher quartile for unskilled labourers as per Koch 2017 earning scales by age 40-45 years with applicable inflationary increases thereafter. However, with lower levels of education, more especially without grade 12, he would also be a candidate for prolonged periods of unemployment. According to the quantum year book (2017), unskilled non-corporate workers earn between R8 100-R20 600-R59 000 per annum.”*

- [6] It is evident from the reports of the industrial psychologists that they are in agreement that the accident has reduced the minor child's future employment prospects and that the probabilities of unemployment are high. This means that the issue is what contingencies are to be applied comparing the pre and post-accident potential earning scenarios.
- [7] As stated earlier on in this judgment during argument counsel for the Plaintiff submitted that the calculations of the Defendant's actuary were accepted. The following were the Defendant's actuarial calculations having considered the joint minutes of the industrial psychologist: *“Income had the accident not occurred R5 105 166 and income having regard to accident R680 191 and the loss of income R4 424 975”*.
- [8] The submission for the Plaintiff was that a contingency of 20% pre accident should be applied and 50% post-accident. It was argued for the Plaintiff that the reason for the high percentage for post-accident was based on the opinions of the industrial psychologists that the minor child is likely to lose his employment due to the sequelae of his injuries. In contention the argument for the Defendant was that the pre accident contingency should be 50% and post-accident percentage be 25%. It was argued on behalf of the Defendant that due to the minor child's educational challenges before the accident it cannot be determined how he would have performed had the accident not occurred.

- [9] The object of the RAF is to give prejudiced plaintiffs the fullest possible compensation by placing them, insofar as possible, in the same position in which they were before the damage-causing event. **See Pretorius v Road Accident Fund 2013 JDR 1096 (GNP).**
- [10] It is trite that contingency deductions are within the discretion of the court and depends upon the judge's impression of the case. **See Southern Insurance Association v Bailey No 1984 (1) SA 98 (A) at 113 (G)** and **Robert Kock: IHE Quantum Yearbook 2011 at p104.**
- [11] Contingencies are usually described as "*the hazards that normally beset the lives and circumstances of ordinary people.*" **See AA Mutual Insurance Association Ltd v Van Jaarsveld 1974 (4) SA 729 (A).**
- [12] In deciding the appropriate contingency percentage in this matter I am mindful of what was stated in the case of **Legal Insurance Company Ltd v Botes 1963 (1) SA 608 (A)** at 614 F-G that: "*In assessing the compensation the trial judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations.*"
- [13] Factors which the court must take into consideration, when determining contingencies, are: the possibility that the minor may eventually 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 the discount may therefore vary, depending upon the circumstances of each case. **See SOUTHERN INSURANCE ASSOCIATION v BAILEY NO supra at 116G -H.**
- [14] In this instance, as per the joint minutes of the Industrial Psychologists, which opinion I am inclined to accept, the accident has compromised the minor child's prospects of employment. However they do not rule out that the minor child might be able to find employment although not be able to sustain it. As far as the challenges of the minor child pre accident, it has not been

established as a fact that he had learning disabilities that could have disabled him from completing grade 12 and securing employment.

[15] The court in the matter of **Albert Kgomo obo LMK v Road Accident Fund [2011] ZAGPJHC 103 ( 25846/10)** found that the contingency allowance of 20% post- accident was reasonable and appropriate. The factors considered by the court were that the possibility of unemployment of the minor could be discarded as he would have had some form of education and qualification upon entering the labour market which would have elevated him above the ordinary high incidence of unemployment in the unskilled labour market.

[16] In the opinion of the industrial psychologists,  
*“the minor child might enter the open labour market probably with Grade 12 and would be employed within the informal sector. However, his pain and discomfort including headaches will have a detrimental effect on his concentration and may negatively influence his ability to work to his full potential, and will render him more prone to error or negligent mistakes which might affect his work quality and competence.”*

These circumstances, in my view, should serve to increase the contingency deductions in favour of the minor child post-accident unlike in the case of **Albert Kgomo obo LMK v Road Accident Fund (supra)**.

[17] Under these circumstances my view is that a fair, just and reasonable contingency of 35% pre-morbid and 30% post-morbid should be deducted from the minor’s earnings. The calculations are therefore as follows:

Value of income uninjured	R 5 105 166-00
Less 35%	R3 318357-90
Value of income injured	R 680 191-00
Less 30%	R 476 133-70
<b>Total amount of loss</b>	<b>R 2 842 224-20</b>

## **General Damages**

- [18] The argument on behalf of the Plaintiff in respect of general damages was that considering the injuries sustained by the minor child he will not have a normal life. During argument counsel for the Plaintiff referred me to various cases similar to the current case and submitted that general damages should be awarded between the amounts of R441 000 - R520 000. There were no concessions made on behalf of the Defendant regarding the suggested amount for general damages.
- [19] In dealing with the determination of general damages it is trite that the court must have regard to previous comparable cases. However, a court has to exercise its discretion based on the facts of the case at hand. **See: De Jongh v Ou Pisani 2004 (2) All SA 565 (SCA) at 6821.**
- [20] In exercising my discretion I have to take into account the injuries sustained by the minor child and the effects thereof in his daily life including his future.
- [21] In the case of **Makupula v Road Accident Fund 2011 (684) QOD48 (ECM)**, a minor five year old boy who was injured presented the following synopsis of injuries and after effects. He had a mild to moderate diffused axonal concussive brain injury. Neurocognitive deficits with attention deficit hyperactivity disorder, memory dysfunction, uncooperative and aggressive behaviour, poor concentration, poor executive functioning and poor scholastic performance. The court awarded an amount of R441 000.00 in current terms.
- [22] In **Mallela v Road Accident Fund 2013 (6C3) QOD 17 (GNP)**, the synopsis of the injuries and after effects were:
- “Plaintiff sustained a small haematoma to her forehead and soft tissue injuries of the neck. After the accident she was taken to hospital where she received painkillers and was discharged. She suffers from headaches, shoulder and neck pains, cannot perform certain household duties and does not take part in sport no longer as a result of her injuries. Plaintiff sustained a loss of work capacity of 3% and a 3% to 4% chance of requiring cervical surgery as a result of the collision exists. Extra effort is needed by Plaintiff to maintain her employment.”*

The court awarded general damages of R199 000-00 in current terms.

[23] According to the neurosurgeon in the current matter Dr L F Segwapa, the minor child sustained a mild concussive brain injury. He presents with symptoms of posttraumatic stress disorder and memory problems. Dr Mazwi, also a neurosurgeon noted that the minor child presents with behavioural changes but cognitive changes were not identified.

[24] In the current case the injuries of the minor child are not as severe as in the matter of **Makupula supra**. The mild injury in this instance without any cognitive impairment puts the minor child in that arena similar to that in the matter of **Mallela supra**. Taking into account the age of the minor child and the developmental milestones still to come, the effect on the minor child's current and future educational and vocational prospects, I am of the view that an award of R300 000.00 be awarded for general damages.

### **Order**

[25] Consequently the following order is made:

1. The Defendant is ordered to pay the following amounts

Loss of earnings R 2 842 224-20

General damages R 300 000-00

Total R3 142 224 -20

To the Plaintiff in settlement of the Plaintiff's claim into the Plaintiff's attorneys trust account, the details of which are as follows:

#### **CHUEU ATTORNEYS TRUST ACCOUNT**

Bank: ABSA BANK

Branch Code: 334547

Account no: 405...

TYPE: CURRENT ACCOUNT

2. Defendant is not liable for interest on the aforesaid payment if timeously made;

3. Defendant is ordered to furnish Plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act limited to 100% for the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of a rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision which occurred on **19<sup>th</sup> JANUARY 2013**, after such costs have been incurred and upon proof thereof;
4. The abovementioned funds will be deposited to Guardians Fund to the benefit of the minor child in terms of S90 of the Administration of Estates Act, 1965 (Act 66 of 1965)
5. The Defendant is ordered to pay Plaintiff taxed or agreed costs on the High Court scale as between party and party, which costs shall include the costs of counsel for the following dates: **29<sup>th</sup> March 2017, 19<sup>th</sup> June 2017, 04<sup>th</sup> September 2017, 05<sup>th</sup> September 2017**;
6. There is no Contingency Fee Agreement;

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**J T DJAJE**  
**JUDGE OF THE HIGH COURT**

**APPEARANCES**

**DATE OF HEARING : 05 SEPTEMBER 2017**  
**DATE OF JUDGMENT : 05 OCTOBER 2017**

**COUNSEL FOR THE PLAINTIFF : ADV HATTINGH**  
**COUNSEL FOR THE DEFENDANT : ADV MOGOLEGA-DICHABA**