

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2894/2010

In the matter between:-

K K MACHUMOLOTSA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON:

17 OCTOBER 2012

DELIVERED ON:

14 FEBRUARY 2013

JUDGMENT

MOCUMIE, J

- [1] The plaintiff is Ms Ann Keleabetsoe Machumolotsa, resident of Bloemanda in the Free State who sues in her capacity as the duly appointed curator *ad litem* of her son, Kagisho Kenneth Machumolotsa ("*Kagisho*") who was born on 24 March 1992. Kagisho referred to by the medical experts in all the reports as "*the patient*" is currently residing with his mother. The defendant is the Road Accident Fund ("RAF"), a statutory body established in terms of the Road Accident Fund Act 56 of 1996, with its head office in Cape Town.

[2] The parties have by consent dispensed with the adduction of oral evidence and have agreed upon a written statement of facts in the form of a special case for the court's adjudication in terms of the Rules of Courts. I set out hereunder the stated case as per the written statement somewhat paraphrased.

2.1 The patient was involved in a motor vehicle accident on 25 August 2007 wherein he sustained ***severe close head injury with intra ventricular hemorrhage*** as well as ***mild cerebral swelling*** being present, ***a cervical spine fracture involving the C2 vertebral body and dens, a degloving scalp laceration to the fore head, arms and thoraco-lumbar spine.***

2.2 The merits have been conceded.

2.3 The **neurosurgeons** were agreed that there will be no further improvement in the patient's level of functioning. His ability to work will depend on the extent of his intellectual fallout and the level of schooling he will achieve.

2.4 The **orthopedic surgeons** were agreed that the plaintiff was unable to do manual work.

- 2.5 The **occupational therapists** were agreed that the patient was restricted in the type of work that he can do in future. He could do sedentary work with accommodation to seating, work station layout, work heights and will have to apply back and neck care principles in the workplace.
- 2.6 The **plastic and reconstructive surgeon** was of the view that the inconspicuous 8 cm scar on the patient's head ,on the dorsum of both the left and the right hand, and two pen-point scars above each ear where the halo ring was affixed and can be revised.
- 2.7 The **speech and language pathologist** was of the view that the patient had difficulties in the accessing of specific and non-specific words, limitations in higher order linguistic thinking skills, a restricted auditory attention span and poor verbal selective attention, difficulties in mental tracking, deficit in the processing of auditory verbal information displayed problems which were consistent with the traumatic brain injury. The problems included the difficulties he was showing in his linguistic thinking skills and the difficulties of recalling of more detailed information which made it

possible that he would not finish Grade 12. Indeed he was unable to finish Grade 12 after failing Grade 11 in 2011.

2.8 The **clinical psychologists** were agreed that the patient had experienced a global drop in mental efficiency with associated deficits in the following areas: fluctuations in mental focus resulting in variability and inconsistency of performance, executive dysfunction and poor self monitoring, on verbal fluency and initiation, inhibition, monitoring and self-correction ability and planning and the use of strategy. They were also of the view that substantial improvements in the patient's cognitive abilities over time were unlikely. They further agreed that they anticipated no further improvement in the patient's cognitive abilities.

2.9 The **industrial psychologists** were agreed that in his uninjured state the patient would have successfully completed Grade 12, whereafter he would have obtained a 3 year tertiary qualification, whereafter he would have entered the labour market at Paterson Job Grade C1/C2, after a period of 5 to 7 years he would have progressed to Paterson Job Grade C3/C5, and

after 3 to 5 years he would have progressed to Paterson Job Grade D1/D2 where he would have progressed to Paterson Job Grade D1/D2 where he would have remained until the retirement age of 65 years. The industrial psychologists were also agreed that 5 to 7 years after entering the labour market “he will drift in and out of employment between jobs and he might be forced to work in the informal sector earning between R100, 00 and R120, 00 per day.”

2.10 The **actuaries**, Munro Consulting and Genesis Actuarial Solutions were agreed that the actuarial report of Genesis Actuarial Solutions dated 16 October 2012 be accepted by the parties. That the uninjured future income amounts to R8 287 290,00 and the injured future income amounts to R2 500 712,00.

2.11 The actuaries did not apply contingencies to the aforementioned uninjured and injured income.

[3] This Court was asked to determine the following.

3.1 The contingencies to be applied to the uninjured income and the injured income; and

3.2 The amount to be awarded for the general damages

- [4] The court in **Road Accident Fund v Marunga** 2003 (5) SA 164 (SCA) introduced a modernized process of thought when determining general damages. It introduced the updating of values found in general damages to contemporary times and present values.
- [5] It is common cause that Kagisho endured a great deal of pain and suffering as a result of the severity of the injuries and the resultant impairment that followed as set out and agreed upon by all experts.
- [6] Mr de Vos, on behalf of the plaintiff referred me to a number of cases for general comparative purposes for his submission that the Court should award the plaintiff general damages of R500 000,00. The cases are **Ngomezulu, Zamokwakhe Comfort v the Road Accident Fund (SGH)** Unreported case No 04643/2010; **Monia Raupert and the Road Accident Fund** Case no 2153/2008; **Alfred Kgomo v Road Accident Fund; Grobler v the Road Accident Fund** (GSJ) case No 9231/2008, dated 29 April 2010; **Xolani Bovungana and the Road Accident Fund** case No

2090/2007 and **LN v Minister of Safety and Security and Another** 2011(5) SA 512 (KZP).

- [7] In **Ngomezulu v the Road Accident Fund**, the plaintiff, a 25 year old clerk, was struck down by a hit and run motor vehicle so much that he lost consciousness and only came to his senses in hospital after treatment. He suffered injuries as follows: compound right tibia fibula fractures; closed chest injury with lung contusion; a 30cm laceration on the right thigh; and a moderate head injury. The court awarded damages to the amount of R600 000,00. The court further allowed contingencies of 40% on the injured income and 20% on the uninjured income.
- [8] In **Monia Raupert and the RAF**, the plaintiff, a 20 year old photographer, was knocked down by a motor vehicle in the parking area of the Board Walk Casino, Port Elizabeth. In the collision she sustained a serious head injury. The court awarded general damages to the amount of R750 000,00 taking into account that the plaintiff was aware of what she had lost and the unrelenting mental anguish associated therewith. The court further allowed contingencies of 20%

taking into account following the uncertainty as to the precise nature of career the plaintiff would have followed.

[9] In **Grobler and the RAF**, the plaintiff, a 15 year old child sustained a head injury with severe traumatic brain injury as well as a fractured tibia and fibula. The child suffered from a permanent educational disability and permanent employment disability with a permanent loss of amenities of life. The court awarded general damages of R800 000,00.

[10] In **Xolani Bovungana and the Road Accident Fund**, the plaintiff was struck by the insured vehicle whilst walking on the pavement of a bridge. The plaintiff sustained severe injuries to both his legs and as result was amputated above the knee on the left and below the knee on the right side. The court awarded damages to the amount of R750 000,00.

[11] In **Kgomo v RAF**, the plaintiff, a 14 year old Grade 7 pupil at the time of the collision in 2006, was knocked down by the insured vehicle whilst jogging along the road. He sustained severe head injury with progressive extra-dural hemorrhage

resulting in compression of the brain. The court granted damages of R800 000,00 which is R840 000,00 in present values.

[12] In **LN v Minister of Safety and Security and Another** the plaintiff was 30 years of age, HIV-positive, feeling well and with good energy levels. He had been taking Anti-Retro Viral (ARV) drugs, understood the need to continue taking his medication, and was expected to live for 30 to 40 more years. The court accepted the evidence of the expert witness that his hiv-positive status would not have a negative effect on his life expectancy and future loss of earnings. The court applied a contingency of 23% to the plaintiff's future loss of earnings based on the normal contingencies and an additional 8% by taking the possibility of reduced life expectancy due to his HIV-positive status into account.

[13] Mr de Vos submitted further that, the *sequelae* of the injuries suffered by the patient in this matter were similar to those suffered by the plaintiff in **Grobler** and **Kgomo** above where the courts awarded R800 000,00 for general damages. In

the circumstances, so he argued, R500 000,00 which the plaintiff was claiming was low and reasonable.

[14] Ms Smith for the defendant contended for a lesser award of R400 000,00 in respect of general damages. In support of this contention she relied on a number of judgments delivered prior to the SCA judgment in **RAF v Marunga** above where the modern tendency to award higher quantum of damages was taken into account in making of an award for general damages. In my view, the awards made in the cases relied upon by counsel for the defendant particularly **Wessels, Botha** and **Combrink** have been overtaken by the modern tendency of awarding higher amounts.

[15] She however also relied on **Makupula v Road Accident Fund** 2011(6) B4 Q 48EC where the court having considered what it called the application of both the conservative and modern approaches without undue emphasis of one approach above the other, awarded R300 000,00 to the plaintiff for general damages. It is however important to note that the basis of this award was that there was no clear

medical evidence available to assist the court in the assessment of compensation for an injured arm and thus such compensation was addressed together with other injuries that were clearly identified by the experts.

[16] In addition Ms Smith argued that this Court should apply a further contingency of 30% on the basis that there was no possibility that the patient who was born and bred in Bloemfontein in the Free State, would leave Bloemfontein in the future to work for a large corporation outside the province.

[17] Contingency deductions allow for the possibility that the plaintiff may have less than normal expectations of life and that (s)he may experience periods of unemployment by reason of incapacity due to illness, accident or labour unrest or even general economic conditions (see **Van Der Pylats v Southern African Mutual Fire & General Insurance Co** 1980(3) SA 105 (A) at 114-115). The underlying rationale is that contingencies allow for general hazards of life such as periods of general unemployment, possible loss or earning due to illness, savings in relation to travel to and from work

now that the accident has somewhat incapacitated or impaired him as well as the risk of future retrenchment. The general vicissitudes of life are taken into consideration when contingencies are considered. Both favorable and adverse contingencies must be taken into account.

[18] According to Dr Robert Koch, a well known and respected actuary in his book, Quantum, 2012

18.1 when assessing damages for loss of earning or support it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation.

18.2 The deduction is the prerogative of the court;

18.3 General contingencies cover a wide range of considerations which vary from case to case and may include taxation, early death, saved travel costs, loss of employment, promotion prospects, divorce, etc. The following guidelines are can be helpful:

(a) Sliding scale: $\frac{1}{2}$ % per year to retirement age .i.e. 25% for a child, 20% for a youth and 10% in middle age (See **Goodall v President Insurance**

1978 (1) SA 389(W); for child claims (See **Southern Insurance Association v Bailey** 1984

(1) SA 98 (A);

- (b) The RAF normally agrees to deductions of 5% for past loss and 15% for future loss, the so called “normal contingencies.”
- (c) A deduction for general contingencies is sometimes appropriate for future medical and other expenses (See **Van der Merwe v Premier of Mpumalanga** 2005 5 QOD 13-15(T); and
- (d) Every year of a person’s remaining working life should represent a 0, 5% contingency deduction.

[19] Mr de Vos, on behalf of the plaintiff, relied on the following cases to make his point that this Court should allow contingencies of 25%: **Southern Insurance Association v Bailey** 1984(1)SA 98(A); **Xolani Bovungana and the Road Accident Fund** Case No 2090/2007 and **Kgomo v Road Accident Fund (SGH) Unreported Case No 25846/10**.

[20] He submitted that in **Southern Insurance Association v Bailey** the court applied a contingency of 15% where the plaintiff was a 15 year old child with injuries similar to the patient's in this case. In **Xolani Bovungana**, the court allowed contingencies of 5% injured and 15% on uninjured income. In **Kgomo** where a 14 year old Grade 7 pupil sustained severe head injury with progressive extra-dural hemorrhage resulting in compression of the brain the court allowed contingencies of 20%.

[21] He further submitted that although the courts generally allow contingencies of 5% and 15%, in this case he urged this Court to make a discount for "*the uninjured income*" not more than 25%. In respect of the "*injured income*", he proposed a contingency deduction of 40% taking into account that all experts were agreed that the plaintiff will drift in and out of the labour market.

[22] Ms Smith on behalf of the defendant submitted that in the circumstances of this matter a discount of 25% was reasonable. However such discount should be in respect of both uninjured and injured income without any distinction.

She further urged this Court to consider an additional discount of 30% on the basis that there was no possibility that the patient will in the future leave the Free State to look for employment outside the province. She referred to a number of cases as well to substantiate her submissions.

[23] The plaintiff relied heavily on the case of **LN v Minister of Safety and Security and Another** for general damages similar to those of the plaintiff in this case. The defendant on the other hand pressed on the case of **Makupula v Road Accident Fund** in which the court awarded damages of R300 000,00. She contended that R400 000,00 is the high watermark in awards for general damages in this category of injuries in South Africa.

[24] As is always the case, the fact that Kagisho was still 15 years at the time of the collision and obviously unemployed makes it more difficult to predict with precision what he would have been had the accident not have happened. As is trite, courts can only make calculated estimation based on different aspects including the plaintiff's social economic background, his or her level of intelligence as seen from his

or her educational achievements and any other relevant factor that may be of assistance to come to a just decision.

[25] Kagisho comes from a middle class family. His father is a teacher at the local school. His mother, his appointed curator ad litem, is employed as a cleaner. His elder sister is studying BCom Human Resources at the University of Free State. He progressed well at school and wanted to become a chartered accountant. Due to his poor performance after the accident he struggled with school work, his esteem went low; he developed anxiety attacks, lack of concentration and other related *sequelae* and consequently had to settle to do a Diploma in Office Management at a local Technical College.

[26] In my view there is no reason to believe that Kagisho would not have become a chartered accountant judging from his family background of an educated family. Despite his parents not coming from a family of chartered accounts, there is nothing that indicates that he would not have become one but for this accident.

[27] I have carefully considered the plaintiff's case, Kagisho's injuries and the *sequelae* emanating therefrom and am of the view that although his probable career progression having regard to the accident has been compromised, it is not the worst case scenario. It is clear from the reports that although he has been deprived of his dreams of becoming a chartered accountant, he has already made plans to study for a Diploma in Office Management at a local Technicon to make himself employable. The likelihood of epilepsy as predicted by the neurologists means he will need the supervision of his mother and someone else later in his life in his mother's absence. But it is not as dire as seen from other comparable cases in which the plaintiffs relied entirely on others to feed, clothe and nurse them for the rest of their lives. With proper and close monitoring and patience from those around him he can lead a normal life. However a fair and reasonable sum can help to ameliorate his unfortunate position.

[28] I have considered all the cases I was referred to as well as others such as **Torres v RAF** 2010(6A4) QOD 1 (GSJ); **Van der Mescht v RAF** 2010 JDR 231 (GSJ) and **Megalane v RAF** [2007] 3 All SA 531 (W). I am however of the view that

the case of **Kgomo v RAF** referred to by both the plaintiff and the defendant is more appropriate and in line with the facts of this case and of real assistance *albeit* not on all fours. The plaintiff is very reasonable in not arguing for R800 000,00. My assessment of general damages in all the circumstances of this case is R500 000,00. The amount is not only fair but is reasonable to both parties.

[29] In so far as contingencies are concerned I am of the view that the appropriate contingency deduction for both the uninjured and injured income would be 25%. A contingency deduction of 25% is reasonable in the circumstances and in line with the normal general contingencies as Kagisho has recovered somewhat except the deficits referred to which are not as serious as in other similar cases. The fractures he had sustained had healed; the deficits such as neck pain or expected pain in the back due to sitting can be addressed through conventional treatment including physiotherapy not operations. The scar on his scalp can be covered up without any complications.

[30] The huge and unequal difference between the percentages on the contingencies to be applied as argued by Mr de Vos, 25% on uninjured income and 40% on injured income, is out of the ordinary and not justified by the facts of this case. However, I cannot agree with Ms Smith on the additional 30% to be deducted. None of the industrial psychologists mentioned the possibility that the plaintiff would not have been employed in the corporate sector or that he would be confined to Bloemfontein for the rest of his life despite the lack of opportunities of employment here. Nor is there any reason to take into account what Ms Smith refers to as *“the positive situation in light of the principle of transformation”*. Statistics in South Africa indicate that all youth in South Africa in 2012 and years to come, regardless of their background and whether they are graduates or undergraduates face the same bleak future of high unemployment across the country. In any event these submissions are unsubstantiated and have no basis at all.

[31] Applying some calculations at a 25% contingency deduction on the uninjured income amount given of R8 287 290,00 amount payable to the plaintiff could come to R6 215 467,50.

Applying a 25% contingency deduction on the injured income given the amount of R2 500 712,00 amount payable to the plaintiff could come to R1 875 534,00.

[32] Costs always follow a suit unless there are extraordinary circumstances which dictate otherwise. There are no reasons why this general rule should not be applied in this case. The plaintiff is entitled to her costs on party and party costs of suit.

[33] In the result I grant the following order.

ORDER

1. The defendant is ordered to pay the plaintiff **R6 215 467,50** in respect of uninjured income and in respect of injured income **R1 875 534,00**.
2. The defendant is ordered to pay the plaintiff the sum of **R500 000,00** in respect of general damages.
3. The defendant to pay the costs of this suit.

B.C. MOCUMIE, J

For the plaintiff: Adv JN De Vos SC
Instructed by:
Rosendorff Reitz Attorneys
Bloemfontein

For the defendant: Ms Smith
Instructed by:
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BCM/sp