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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

4059/2013

Case No:

In the matter between:-

MPOTSENG MARIA DUDA obo K

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

CORAM:

MBHELE , J

HEARD ON:

27 MARCH 2019

DELIVERED ON:

13 JUNE 2019

- [1] On 06 March 2010 Makoatha Street, Freedom Square , Bloemfontein a collision occurred when a motor vehicle with registration numbers F [...] GP (the insured vehicle) collided with a six year old K (the plaintiff) who was a pedestrian (the collision). As a result of the collision the plaintiff suffered severe bodily injuries.
- [2] Plaintiff issued summons against the defendant under case number 4059/2013 for damages suffered as a result of the collision on the basis that the collision was caused by the sole negligence of the insured driver .
- [3] The defendant conceded the merits and was found liable for 100% of the plaintiff's proven or agreed damages resulting from the collision. The defendant, further, made an undertaking in terms of section 17 (4) (a) for the plaintiff's future medical costs. Future loss of earnings were settled at **R 1 702 955.00**. The matter serves before me for determination of Plaintiff's general damages.
- [4] The defendant admitted the following reports of the plaintiff's experts:
- Dr. L. Jedeiken (Plastic and Reconstructive surgeon)
 - Dr. Badenhorst (Neurologist)
 - Dr. Jaffe (Orthopaedic Surgeon)
 - Dr. Domingo (Neorosurgeon)
 - Dr. Ogilvy (Speech and language therapist)
 - Ms. E. Burke (Neuropsychologist)

- [5] The plaintiff's injuries were described as follows by Dr. Jaffe, an orthopaedic surgeon:

The plaintiff sustained a head injury with a severe lacerations of the chin and forehead. He has lacerations on both knees. He is self conscious of his facial scarring and has severe headaches in the temporal region. He has mood swings and has become extremely aggressive. He turns very aggressive when playing with friends. He has on one occasssion stabbed one of his friends with a pen. He did not display such behaviour premorbid.

- [6] Dr Jedeikin (Plastic and reconstructive surgeon) gave the following account of the plaintiff's disfiguring scars and their significance: The left eyebrow scar is situated on the inner medial aspect of the left eyebrow and it extends upwards into the forehead with a curvilinear shape. He noted further scars in the following body parts: lower lip and chin, neck right lower abdomen, right central abdomen, right knee and left knee.

He opines that revisionary surgery is required for the left eyebrow scar and lower lip and chin scar, which will require 3 different operations. Mild improvement only will be gained in respect of the lower lip and chin scar.

In his view no revisionary surgery can be undertaken for the neck scar, right lower abdomen scar, right central abdominal scar, right knee scar and left knee scar.

- [7] Dr Badenhorst (Neurologist) is of the opinion that the plaintiff sustained a moderately severe concussive head injury, which will be in keeping with moderate changes in cognitive function and poor performance at school. The minor's aggressive behaviour makes it difficult for him to associate with his peers. He opines that the change in his behaviour is directly linked to the head injuries he sustained. .
- [8] Dr Domingo (Neurosurgeon) opines that although the plaintiff's brain injury may be described as mild he is left with behavioural problems, memory and concentration impairment. As a result of problems associated with memory and concentration he has performed poorly at school and has had to repeat grades. The headaches are consistent with post traumatic headaches which will persist way into the furuture. He is of the view that due to these permanent deficits the minor will not progress to high school.
- [9] Dr Ogilvy (Speech and Lanuage therapist) completed speech and language assessment. She is of the opinion that the Minor present with normal speech production, semantics, syntax and pragmatics. However, he presents with marked receptive cognitive-communication deficits. More specifically, the plaintiff presents with significant difficulties in the processing, comprehension and recall of auditory verbal information when the information increases in length, amount of detail and complexity, as well as poor application of higher order, a cognitive linguistic

thinking skill that is in processing the gestalt and making successful inferences.

Dr Ogilvy found that the plaintiff's ability to process, interpret, and execute oral commands are poor. He presents with reduced verbal information processing capacity and difficulties at the working memory. He has difficulties in the immediate recall of auditory verbal information. He has poor complex comprehension skills, both at factual and at an inferential level. He struggles to hold commands in memory and sustaining auditory attention.

Dr Ogilvy is of the opinion that the plaintiff's scholastic difficulties are consistent with the brain injuries he sustained and that this will be exacerbated as he progresses to further grades where demands placed on the processing, comprehension and recall of auditory of verbal information of increased length and complexity and on the application of higher order cognitive- linguistic thinking increase substantially from one grade to the other. She opines that the plaintiff will not cope in the mainstream secondary education. In her opinion the Minor is at high risk of not being able to sustain employment in future.

- [10] Ms Burke (Neuropsychologist) defers to Dr Ogilvy in respect of the plaintiff's speech and language problems. She indicates that her neuropsychological test results revealed wide areas of preserved functioning. She found that he had difficulties with sustaining attention and concentration. He requires constant supervision. She opines that her results are consistent with the

minor's reported behaviour post accident and that the problems will persist into the minor's future."

[11] CONTENTIONS BY THE PARTIES

Parties are in agreement that the Plaintiff suffered severe injuries which impacted on his scholastic abilities. His life has been negatively altered.

Mr du Toit, on behalf of the plaintiff, submitted that the minor's life has been tremendously destroyed by the collision. He will most probably remain unemployable in his injured state in the long term. He contended, further, that the minor should be compensated for general damages in the amount of R 900 000 , 00.

[12] DEFENDANT'S CONTENTIONS

Mr. Sanders, on behalf of the defendant, submitted that the plaintiff's injuries in the current matter are not worse than in most cases referred to in support of his case. His view is that the sequelae of the parties in the relevant cases were more serious than the plaintiff's. He contended that the fact that he was too young when the accident occurred he has with time grown accustomed to the scars and limitations imposed on his life. He submitted, further, that the appropriate amount for the minor's general damages is R300 000. 00

[13] **APPLICABLE LEGAL PRINCIPLES**

A trial court has a wide discretion to award what it considers to be fair and adequate compensation in an action for damages based on loss of income which cannot be assessed with any degree of mathematical accuracy. (See **AA Mutual Insurance Association v Maqula 1978 (1) SA 805 (A)** at 806).

[14] When dealing with general damages it must be taken into consideration that the pain, suffering , loss of amenities of life suffered by a victim cannot be measured and calculated in monetary terms. The amount to be awarded as compensation can only be determined by the broadest general terms. (See **Sandler v Wholesale Coal Supplies Ltd 1941 AD 194**).

[15] Plaintiff submitted psycho-legal, neurological and orthopaedic reports detailing the extent of the plaintiff's injuries. All evidence shows that the plaintiff's life has been permanently interrupted. He has to live with facial scarring that continues to affect his confidence and self esteem. He will not be able to cope with the demands of academic life. He will struggle to cope with secondary education because of the resultant cognitive defects. He has become aggressive and will struggle to maintain healthy relationships in future as a result of the brain damage he sustained. He will struggle to sustain employment and compete in an open labour market. His dreams have been shattered.

[16] The undisputed evidence shows that the minor was a motivated and hardworking pupil before the accident. His scholastic performance took a knock after the accident resulting in him

repeating most of his grades. The evidence shows that he was likely to obtain a post matric qualification had he not been injured in the collision.

[17] In determining quantum for damages I am called upon to exercise a broad discretion to award what I consider fair and adequate compensation. I have considered the extent of plaintiff's injuries and how his life has been affected by the said injuries. His injuries were severe and have negatively affected his life.

[18] I have also considered the cases I was referred to by Messrs . du Toit and Sanders. I have noted that none of the cases fits squarely with the circumstances of the current matter. Most of them are distinguishable because of the nature of injuries sustained by the victims and their sequelae. The sequelae in the cases referred to were either more serious or less serious than in the current matter.

[19] In the case of **Sigournay v. Gillbanks, 1960 (2) SA 552 (AD) at p. 556**, the following was said:

"Nothing like a hard and fast rule or definite standard is to be found in a matter so closely linked with the particular circumstances of each case, but some guidance is to be derived from the notion that fairness to both parties is likely to be served by a large measure of continuity in size of awards, where the circumstances are broadly similar. As was said by INNES, C.J., in *Hulley v. Cox*, 1923 AD 234 at p. 246, a comparison with other cases though never decisive is instructive. I respectfully agree in this connection with the statement of ORMEROD, L.J., in *Scott v. Musial*, (1959) 3 W.L.R. 437 at p. 446, that there emerges 'a general idea of the sort of figure which, by experience, is regarded as reasonable in the circumstances of a particular case' to which general idea a Court of appeal should give regard."

- [20] It is so that past awards only serve as a guidance to assist the court not to come to an award that is not in harmony with past awards in matters of similar nature. The evidence shows that the minor's life has been permanently compromised by the collision. His career, social and family life is greatly compromised.

In view of the severity of plaintiff's injuries, prolonged severe pain and suffering, I am of the view that an appropriate, fair and reasonable amount for general damages is R 650 000.00.

Loss of earning capacity	R 1 709 955.00
General damages	R 650 000.00
Less	R 300 000-00

- [21] ORDER:

I grant the judgment in favour of the Plaintiff as follows:

1. Defendant shall pay the plaintiff the sum of R 2 059 955 (two million and fifty nine thousand nine hundred fifty five rands) which amount is compiled as follows:
 - 1.1 the sum of R 650 000.00 (Six Hundred and Fifty Thousand rands) in respect of general damages;
 - 1.2 The sum of R1 709 955.00 (One million seven hundred and nine thousand nine hundred and fifty five rands) in respect of loss of income;
 - 1.3 Minus the sum of R 300 000 (three hundred thousand rands) paid to the plaintiff as part payment of the capital amount and received by plaintiff's attorneys.

Into the plaintiff's attorneys' bank account with the following details:

Bank: FNB

Account Holder: DSC ATTORNEYS

Branch: PORTSIDE

Account Number: [...]

Branch Code: 210651

2. The Defendant shall pay the full capital sum within 30 calendar days of the date of this order, by way of electronic transfer into the trust account, details of which are set out above.
3. The Defendant shall not be liable for interest on the capital amount timeously paid.

COSTS

4. The Defendant shall pay the Plaintiff's taxed or agreed costs on the High Court scale as between party and party, but not limited to the costs as set out hereunder.
5. In the event that costs are not agreed, the Plaintiff shall serve the notice of taxation on Defendant's attorneys of record and shall allow Defendant 30 calendar days to make payment of the taxed costs.

GENERAL COSTS

6. The Defendant shall pay the taxed or agreed costs and any other costs attendant upon obtaining payment of the capital amount and costs.
7. The Defendant shall be liable to pay the travelling, accommodation and related costs incurred by the Plaintiff's counsel, experts and attorney.
8. The Defendant shall pay the taxed or agreed costs of the interpreter.

EXPERT WITNESSES

9. Regarding the expert witnesses listed herein below ("the experts"), the Defendant shall pay the taxed or agreed costs and qualifying fees and expenses of such experts, as well as the costs attached to the procurement of the reports prepared by these witnesses, the costs of attending all medico legal examinations and any other related costs, including x-rays and travelling costs to and from such examinations (travelling costs to and from the examinations to be determined by the taxing master):
 - a) Dr R Jaffe (Orthopaedic Surgeon);
 - b) Dr L Jedeiken (plastic & Reconstructive Surgeon);
 - c) Dr F Badenhorst (Neurologist);
 - d) Ms E Burke (Neuropsychologist);

- e) Dr D Ogilvy (Speech & Language Therapist);
- f) Ms E Cloete (Occupational Therapist);
- g) Dr R Hunter (Industrial Psychologist);
- h) Munro Consulting Actuaries.

COUNSEL'S FEES

10.The Defendant shall pay the taxed or agreed fees of the Plaintiff's counsel.

NECESSARY WITNESS

11. MM Duda is declared a necessary witness.

COSTS OF CURATORS and/or TRUST

12. The plaintiff shall apply for the appointment of a curator ad litem and thereafter for the appointment of a curator bonis or create a trust subject to the provisions below.

12.1.COSTS OF A CURATOR AD LITEM

12.1.1.The Defendant shall pay the costs of the application to appoint the Curator ad Litem on the High Court scale, as between party and party, including the costs of the medical reports filed as part of the said application, as taxed or agreed, plus VAT;

12.1.2. The Defendant shall pay the costs of the Curator ad Litem on the High Court scale, as taxed or agreed, plus VAT.

12.2. COSTS OF A CURATOR BONIS

12.2.1. In the event of the High Court, or other competent Court having Jurisdiction, appointing a Curator Bonis to the Plaintiff, the Defendant shall pay the costs of the Curator Bonis, as taxed or agreed, such costs including for the sake of clarity, but not limited to:

12.2.1.1. The costs of the application to appoint the Curator Bonis on the High Court scale as between party and party, as taxed or agreed, plus VAT ("the application costs");

12.2.1.2. The costs, if any, incurred by the Curator Bonis in furnishing security to the Master;

12.2.1.3. The fees and costs of the Curator Bonis in respect of administering the capital and the undertaking.

12.3. COSTS OF A TRUST

In the event of the creation of a Trust:

12.3.1. The costs of the creation of a Trust, and the appointment of the Trustee to, inter alia, protect, administer, and/or manage the capital amount referred to in paragraph 3 above shall be

recoverable in terms of the Undertaking referred to in paragraph 1 above;

12.3.2. The aforesaid Undertaking shall further include the following:

- 12.3.2.1 The costs of the Trustee in administering the Patient's estate and the costs of administering the Statutory Undertaking furnished in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, such costs to be limited to the prescribed tariff applicable to Curators as reflected in Government Notice R1602 of 1 July 1991, specially paragraphs 3(a) and 3(b) of the Schedule thereto; and
- 12.3.2.2 The costs of the Trustee furnishing annual security and obtaining an annual security bond to meet the requirements of the Master of the High Court in terms of the Trust Property Control Act 57 of 1988, as amended.
- 12.3.2.3 It is recorded that in the event of the creation of a Trust as aforesaid, the costs in administering the said Trust shall not exceed those cost as stipulated in paragraph 12.2.1.3.

PAYMENT PROVISIONS

13. Payment of the taxed or agreed costs reflected above shall be effected within 30 days of agreement or taxation ("the due date") and shall be effected by electronic into the Plaintiff's attorneys trust banking account, listed herein below.
14. Should the aforementioned capital amount and costs not be paid on the due date, the Defendant shall be liable for interest thereon at the prescribed statutory rate.

NM MBHELE, J

On behalf of the plaintiff:
Instructed by:

Adv. AJ du Toit
ROSENDORFF REITZ BARRY.
BLOEMFONTEIN

On behalf of the defendant:
Instructed by:

Adv. Sanders
MADUBA ATTORNEYS
BLOEMFONTEIN

