REPUBLIC OF SOUTH AFRICA

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

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

8 April 2020
DATE SIGNATURE

CASE NO: 41442/2015

In the matter between:

N[….]: L[….] obo Plaintiff

N[….]: O[….]

and

THE ROAD ACCIDENT FUND Defendant

HEARD ON: **12 FEBRUARY 2020**

JUDGMENT

MIA, J

INTRODUCTION

[1] This matter came before me as a stated case.

[2] In view of the facts placed before me and having in mind the purpose of Rule 33(4) of the Uniform Rules of Court, aimed at facilitating the convenient and expeditious disposal of matters I adjudicated the matter by way of the stated case as agreed between the parties. I was thus only requested to determine the quantum based on the appropriate contingency deductions to be applied to the minor's pre-accident and post- accident postulated earnings.

[3] The plaintiff in her capacity *nomine officio*, acting on behalf of the minor and defendant agreed that the dispute be adjudicated on the following agreed facts in the stated case as follows:

3.1 The plaintiff instituted action against the defendant in terms of the Road Accident Fund Act, 56 of 1996, (the Act) for injuries sustained by the minor child. The minor child was injured on 2 February 2015 when a bus drove over her. She was a pedestrian waiting with her fellow school mates for her lift to transport her home. Her friends, whilst jostling, accidently pushed her into the path of an oncoming bus which drove over her.

3.2 It was recorded the minor child was examined by the following experts:

	DISCIPLINE	**PLAINTIFF**	**DEFENDANT**
3.2.1	Neurosurgeon	Dr Ntimbane	Dr Chula
3.2.2	Orthopaedic surgeon	Dr Kumbirai	
3.2.3	Psychiatrist	Dr Vorster	
3.2.4	General Surgeon	Dr Molati	
3.2.5	Educational Psychologist	Ms Gibson	Ms Monyela
3.2.6	Neuropsychologist	Ms Gibson	Ms Moloisane
3.2.7	Occupational Therapist	Ms Mahlangu	
3.2.8	Actuary	Munro Actuaries	

Joint minutes were filed where the parties instructed experts in the same disciple, namely the neurosurgeon, neuropsychologist and educational psychologist.

3.3 Dr Z Shaik, an Industrial Psychologist report latter two scenarios were to be considered out of the four scenarios she proposed in respect of the employment prospects of the minor child.

3.4 The experts agreed that the minor child was physically fit and healthy prior to the accident and she had no previous head injury. They agreed further that she sustained a severe traumatic brain injury. She required emergency resuscitation and was admitted to the intensive care unit where an intercostal chest drain was inserted. She has memory impairment, neurocognitive deficits and post traumatic chronic headaches. Her risk of post traumatic epilepsy has increased to between 10%-15% which is three times more than the risk the average person faces.

3.5 She also suffered blunt chest trauma which fractured her ribs and right haemo-pneumo-peritoneum; a close fracture of the left humerus and an open book pelvic fracture. Whilst the fracture is united, she experiences pain in her left hip which is exacerbated by prolonged standing and walking. There is also shortening of her right lower limb. She sustained a diaphragm injury and a diaphragmatic repair was effected. She also sustained a serosal tear at the recto-sigmoid and a liver laceration was packed. It is envisaged that she may require a procedure for small bowel obstruction as a result of the laparotomy procedure which was performed.

3.5 In terms of an order dated 8 November 2017, the defendant previously acknowledged its liability 100% to compensate the minor child for all proved or agreed damages arising out of the accident which occurred on 2 February 2015. The issue of general damages in the amount of R900 000.00 was resolved previously and the defendant was directed to furnish an undertaking in terms of Section 17(4) of the Act. The formation of a Trust in favour of the minor child was also authorised

and the Trustee appointed with the approval of the Master. The Trust has been registered.

[4] The parties agreed that the following issues serve to be adjudicated during these proceedings:

1. Whether the minor child would have obtained a Grade 12 education and a 2 year Diploma(NQF 6) or whether she would have obtained a Grade 12 education and completed a 3 year degree (NQF 7);

2. The appropriate contingency to be applied to the pre- and post - accident earnings;

3. Whether the defendant is liable for punitive costs including costs *de bono propiis* for its obstructionist attitude since case management.

[5] The plaintiff's case, as set out in the stated case is that:

5.1 The minor child was rendered unconscious and taken to Lenasia South Hospital before being transferred to Chris Hani Baragwanath Hospital where she regained consciousness after three days. The minor child was hospitalised for a period of two and a half months and was at home thereafter recuperating for most of the academic year given the nature of her injuries.

5.2 The educational psychologists agreed that the minor child had above average intellectual abilities prior to the accident and her parents did not have any intellectual difficulties. It was thus likely that she would have been fully employable had it not been for the injury. They confirm what the neuropsychologists find with regard to the negative impact of the accident which is likely to derail her social, affective and scholastic functioning and intellectual area. Further that it will increase as she progresses into higher grades and impact on her educational limits. They foresee her only reaching an NQF 4 level at a TVET College.

5.3 The Industrial psychologist proposed four scenarios and having regard to the child's academic history, the two most probable optimistic scenarios are the following. The first scenario proposed that the minor child would reach matric and achieve a tertiary diploma (NQF 6). She would then enter the open market at Patterson Level B2/B3 and qualify for specialised or senior supervisory positions at Patterson Level B3/B4. In the second scenario the minor child would obtain a matric with a degree level (NQF 7) and enter the labour market at Patterson Level B3/B4 and qualify for employment at Patterson D1 Plus Level. Her earnings would plateau at around age 40 years old after which she would only receive inflationary increases. She would have worked until the normal retirement age of 65 years if the accident had not reduced her working capacity.

[6] Plaintiff's Counsel argued among others that :

In respect of the first question to be determined that in taking into account the assessment of the experts, the minor child was of above average intelligence prior to the accident with a bright future ahead of her. Given that both her parents were educated and had no educational difficulties and her father completed grade 11 it was likely that she would achieve a higher level. She argued that there was a changing landscape with opportunities being created for young students and especially for women by NGO's as well as the State. It was thus more likely in view of her above average academic ability before the accident and the opportunities being created for women that the minor child would have obtained a matric with a Bachelors Pass and would then have obtained a degree as opposed to a diploma. She referred to the decision in *Southern Insurance Association v Bailey N.O.*1984(1) SA 98 (A) which held that a court could calculate damages either by making an estimate depending on what is fair and reasonable or utilise mathematical calculations both of which amounted to guesswork. Regarding this decision she argued that Courts did not consider the inequities present within society and the position of the girl

child or the opportunities being presented to advance women when that case was decided.

[7] She argued further that in light of the above the Court should consider that not all contingencies were adverse. A particular plaintiff might have had prospects of advancement and in considering the contingencies the Court ought not ignore the rewards of fortune. Therefore she argued a contingency of fifteen percent should be applied to the minor's pre-accident earnings which would reduce her earnings by almost 55 months. This did not take into account the downward adjustments for mortality, inflation, taxation and capitalisation in the actuarial calculation. This would translate into a pre-accident loss of R8 703 187.60 calculated as R10 239 044.00-15 %(R1 535 856.60) = R8 703 187.60.

[8] In the alternative, she argued that if the Court adopted the alternative contingency deduction of half a percent per year for each year of the remaining working life of the plaintiff the contingency applicable would be twenty one and a half percent (21.5%) based on the Koch Quantum Yearbook. The loss of earnings would thus be calculated as R10 239 044.00 - 21.5% (R2 201 394.40) = R 8 037 650.00. If the contingency amount were rounded off to 20% the loss would be R8 191 235.20.

[9] Ms Docrat argued that the injuries were common cause and it was evident from all the experts' reports that the minor child had serious injuries resulting in extended hospitalisation and recuperation at home. She only returned to school the following year when she re-enrolled in Grade 2 having lost most of the previous year. She has serious neuropsychological and cognitive deficits due to the serious traumatic brain injury which affects all aspects of cognitive and mental functioning. This impacts her academic progression as she will at best now only realise a Grade 8 (NQF4) at a TVET College or a Special Education School due to the cognitive and psychological difficulties which impede her progress.

[10] This has implications for her career and earning progression as well. She will not be equipped for skilled labour. She has a leg length discrepancy affecting her ability to stand for long periods which limits her choice of employment. She has a 3-5% greater chance of developing epilepsy than the general population which precludes her from a range of work such as working with children, on roads, driving and working with sharp objects or with heat.

[11] She argued further that the physical injuries sustained as well as the cognitive and psychological difficulties she experiences will impede her progress and she will not progress as she would have had the accident not occurred. Her increased risk of epilepsy and declining health compromise her employment prospects on the open market. She may be prejudiced by having to take time off from work to attend treatment more frequently than had the accident not occurred, such as to adjust the shoe raise from time to time or psychotherapy when she realises the limits of her cognitive difficulties emanating from the accident.

[12] Ms Docrat argued that due to the above factors and having regard to the employments statistics of disabled persons it is unlikely that the minor child will secure continuous employment and suggested a higher contingency suggested by Dr Shaik be applied at between 60% - 70%. There is only a 30%-40% prospect that she will secure any form of unskilled labour over a working life of 49 years. She is 12.5 years old in Grade 5 and will likely leave school in Grade 8 having attended a Remedial School. Her post accident loss of earnings is thus calculated as R2 018 173.00 – 70 %(R1 412 721.00) = R605 452.00. The total pre-accident and post-accident loss would thus be R 8 703 187.60 – R 605 452.00 = R8 097 735.60.

[13] The defendant's case as set out in the stated case is that:

13.1 The facts as set out above are not in dispute. The defendant agreed to pay 100% of the plaintiff’s proven or agreed damages. The only issue in dispute at this point is the contingencies applicable. The

defendant argues that such contingencies are within the prerogative of the court.

13.2 The contingencies above will entail the court considering life expectancy, likelihood of illness, accident or unemployment that would have occurred and affected the minor child's life.

13.3 The defendant relies on a contingency of 25% for children (see *Bailey NO* 1984(1) SA (A) and *Road Accident Fund v Guedes* 2006 (5) SA 583 SCA) and 20% for youth. The defendant's view is nothing in the case warrants a departure from the normal contingencies because the injuries have not impeded the plaintiff's development and enjoyment of life to the point where she is dependent on ventilation for her existence and was coping with Grade 5 at an average level.

13.4 According to the minor child they had not commenced multiplication and division in Grade 3 and she would have required support to cope with academic work. It was not conclusive that the negative assessment could have been due to a pre-existing need. This rules out an entitlement to a higher contingency post the accident.

13.5 The defendant also challenged the placement in a remedial school to provide an educational intervention as it is contrary to what their expert advised independently and because the advice does not appear in the plaintiff's expert's report.

[14] It was argued on behalf of the defendant that it cannot be accepted that the minor child would obtain a degree. It was necessary to be realistic having regard to the current schooling environment the minor child was in. The child reported to the educational psychologist, Ms Monyela that they had not yet commenced with multiplication and division in Grade 3. This did not take account of her own performance but was a reflection of the standard of education available in the community the minor child lived in which would influence her future prospects.

[15] Ms Magano argued further that the Court could not ignore that the minor child hailed from a poor community. Whilst the argument made

on behalf of the plaintiff was that student bursaries were available which would enable her to pursue a tertiary education, media and news broadcasts indicated that students were not receiving funds as envisaged from NSFAS. Where students were receiving funds this covered academic tuition and parents were still required to cover the cost of books, and food and that there was a fifty percent dropout rate of students.

[16] Ms Magano did not distinguish between pre-accident and post-accident loss of income. She argued that the defendant agreed that having regard to the two probable scenarios proposed by the industrial psychologist it was more likely that the minor child would obtain a diploma. The experts agreed she would require remedial tuition and she argued this she could obtain at the school she attended and in doing so improve her results. She pointed out that it was contradictory for the educational psychologist to suggest that the minor child would drop out of school earlier in Grade 8 but then maintain that she would

achieve an NQF 4 level. She withdrew her submissions regarding the minor child's change in quality of life based on Professor Fleming's report as the report had not been filed.

[17] Ms Magano proposed an alternative manner to determine the child's loss of earnings. She provided the table below as the proposed calculation. This entailed taking the average of the loss between the two scenarios proposed by Dr Shaik and applying a 25% contingency to the median and then using the Munro Actuary post-accident projected loss and applying 25% yielding a total loss of earnings of R 5 204 839,88.

Defendant's Actuarial Calculation with Contingency Deduction		
Scenario 4 – Grade 12 and Degree	R10 239 044	
Scenario 3 – Grade 12 and Diploma	R 7 676 875	
Subtotal	R 17 915 919,00	
Median amount	R -8 957 959,50	
Pre-morbid Earnings (Had Accident not occurred)		
Future Loss of Earnings	R 8 957 959,50	R 8 957 959,50
Less Contingency	25,00%	R -2 239 489, 88
Total Pre-morbid Earnings	R 6 718 469,63	
Post-morbid Earnings (Having regard to the Accident)		
Future Loss of Earnings	R 2 018 173,00	R 2 018 173,00
Less Contingency	25,00%	R -504 543,25
Total Post-morbid Earnings	R 1 513 629,75	
TOTAL LOSS OF EARNINGS	R 5 204 839,88	

[18] In attempting to determine the appropriate contingencies to apply this Court must have regard to the basic principle that the compensation must be assessed so that it places the minor child in the position she would have been in had the accident not occurred.(see *Sandler v Wholesale & Coal Supplies Ltd* 1941 AD 194.) In *Road Accident Fund v Guedes* 2006 (5) SA 583 SCA the Court held at p586:

> " It is trite that a person is entitled to be compensated to the extent that the person's patrimony has been diminished in consequence of another's negligence. Such damages include the loss of future earning capacity ….
>
> By its nature such an inquiry is speculative, and a court can therefore only make an estimate of the present value of the loss that is often a very rough estimate (see, for example, *Southern Insurance Association v Bailey N.O.*1984 (1) SA 98 (A). The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right."

[19] In *RAF v Marunga* [2003] All SA 148 SCA at para [27] the Court referred to the difficulty and usefulness in considering the awards in previously cases

> "[27] In the *Wright* case (*Corbett and Honey* Volume 4 E3-36) Broome DJP stated:
>
> "I consider that when having regard to previous awards one must recognise that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than those in most other countries."
>
> [28] The *Wright* case (*supra*) at E3-34 to E3-37 is instructive. The learned trial Judge considered all the relevant circumstances and set out in detail the reasoning that motivated the award."

[20] The fund had already agreed to its liability 100% on the agreed or proven damages and on the basis of the facts before me I am required to apply the contingencies applicable to the pre-accident and post - accident projected income as determined by the actuarial calculation which the parties have agreed upon determined by Munro Actuaries.

[21] In deciding the first issue in dispute I have had regard to the defendant's submissions that the NSFAS has experienced difficulties. Without Ms Magano making submissions on the reasons for these problems and that they are insurmountable it would be too speculative to extrapolate the teething problems experienced to a date in the future. States and Non Government Organisations endeavour to realise the 3rd Millennium Development Goal which is "to realise equality and empower[ment] of women". Funding is crucial to this goal and the present problems cannot be extrapolated to the future without identifying the problems and indicating that there is no solution. It is also short-sighted to assume that this would be the only source of financial assistance in view of the opportunities being made available for young students and women.

[22] Regarding the finding by Ms Monyela that the child was not yet taught certain parts of the mathematics syllabus in Grade 3; I am of the view that this is a reflection of the Grade or particular teacher or school and not the minor child's ability. With the opportunities for extra tuition available online accessible through local libraries it is possible that the minor child could seek to improve her results through extra tuition at school, online or locally in the community. In applying herself she could improve her results so as to obtain her matric with a Bachelors Pass entrance. South Africa like many third world countries has undertaken, despite the scarcity of resources, to take steps to realise the 3rd Development Goal which speaks to promoting gender equality and empowering women. In view hereof it is likely that the minor child would have been the recipient of some form of assistance from the State or a Non-Governmental Organisation toward realising this goal of empowerment of women with regard to achieving equality. It is thus possible that she would have received the necessary financial and other assistance to obtain a degree.

[23] In assessing the compensation to be awarded, on the facts before me, I must consider what is just and equitable having regard to the various contingencies. The 25 % contingency which is applied by the defendant on the pre-accident calculation submitted by Ms Magano is usually applied to children and 20% to youth based on Koch's Quantum Yearbook. The alternative calculation of (.5%) half percent per year brings the contingency calculation to 21.5% on the plaintiff's calculation. At the age of 12 years old the 21.5 % contingency is appropriate having regard to all the factors namely her background, schooling and the challenges in the education system highlighted by Ms Magano.

[24] The defendant's application of the combination of the income of two scenarios is not useful as it does not take cognisance of the view s of the experts who are agreed in their joint minutes on the child's prospects. The defendant relies on the plaintiff's post-accident income but does not apply a higher contingency as indicated by the industrial

psychologist. The calculations proposed by the defendant thus do not adequately address the contingencies in a fair and equitable manner sufficiently as the median between two scenarios and the 25% contingency does not reflect her ability prior to and post the collision. On the other hand Ms Docrat argues for a 70% contingency deduction on the post-accident income. The industrial psychologist's findings support a higher post-accident contingency because of the minor child's reduced abilities which impact on her future earning potential negatively. I am of the view that 70% is too high a percentage as the reports do not indicate that the minor child is completely unemployable, consequently I have applied a contingency of 60% which calculates the post-accident future loss of earnings as R 2 018 173.00- (50%) R1 210 903.80 = R 807 269.20. This brings the total future loss of earnings to R 8 037 650.00- R 807 269.20= R 7 230 380.80.

COSTS

[25] Lastly the issue of costs.

[26] On the issue of costs, Ms Docrat submitted that the defendant had been obstructionist throughout the course of the matter. It is on record that the presiding judge at the case management conference identified this attitude of the defendant as one of the issues and ordered it to show reasons why it should not be liable for a punitive costs order. The defendant's attorney was to indicate before 6 February 2020 whether the issues identified at case management were resolved and they had failed to do so until the matter was allocated. The defendant's failed to do so until the matter was allocated on 11 February 2020. The Court noted the defendant's attorney had arrived late on the 12 February 2020; counsel was not present when the matter called. The matter had to stand down for forty five minutes while the defendant's team sought to ascertain whether Dr Fleming's report had been filed. The report had not been filed. It could hardly be relied on. It showed a lack of preparation. This conduct, counsel for the plaintiff submitted warranted

a punitive costs order on an attorney client basis. She abandoned her initial request for costs *de bonis propriis.*

[27] Counsel for the defendant submitted that a cost order *de bono propriis* could not be granted where there was no written case made out to which the defendant's attorney could respond to. According to instructions she received, her instructing attorney did contact the plaintiff's attorney as instructed by the presiding judge in the pre-trial conference. The defendant had made the necessary concessions as advised by counsel. The further difficulties experienced, she submitted, were due to both counsel not being able to meet the undertaking made in chambers because of reliance on typists, traffic and family responsibilities.

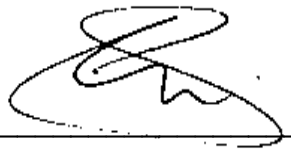
[28] It is trite that costs are within the discretion of the court and the party who is successful is entitled to costs. Ms Docrat abandoned her request for a costs order *de bonis propriis* despite her views on the conduct of the defendant's legal representatives set out earlier in this judgment. In my view, the communication between both counsel was difficult and strained which would have impacted on the ease with which the matter could have proceeded. None of parties nor the public purse should have to bear the costs for the difficulties counsel relied on for the delay in dealing with this matter as speedily as it was supposed to be. The reasons are private and should not have been allowed to have crept into dispensing justice speedily, even if counsel agreed on them. I however do not believe that a punitive cost order even on the attorney and client scale is necessary.

ORDER

[29] In the result, I grant the following order.

1. Judgment is granted in favour of the plaintiff for payment of the sum of R 7 230 380.80.(Seven million, and two hundred and thirty thousand, three hundred and eighty rand, and eighty cents)

2. The defendant to pay the costs on the party and pay scale.



S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant	:	Adv. F.F. Docrat
Instructed by	:	B Segaole Attorneys segoaleb@webmail.co.za
On behalf of the respondent	:	Adv. F. Magano
Instructed by	:	Z & Z Ngogodo Attorneys Inc. chepape@njhblaw.co.za
Date of hearing	:	11& 12 February 2020
Date of judgment	:	8 April 2020