




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

CASE NO: 27583/2019

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: NO</u>
(3)	<u>REVISED: YES</u>
[4 June 2024]	
 SIGNATURE	

In the matter between:

ADV J M KILIAN N.O.

In his representative capacity as Curator *ad litem* to
SIYABONGA LEBU ZIQUBU

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

J U D G M E N T

NEL AJ:

[1] This action arises from a motor vehicle collision that occurred on 5 January 2014 on the N3 Highway, in the vicinity of Heidelberg, Gauteng.

- [2] The action has been instituted by Advocate Johan Kilian, in the capacity as curator *ad litem* of the minor Plaintiff, **Siyabonga Lebu Ziqubu** ("Siyabonga").
- [3] Both Siyabonga and her mother were passengers in the motor vehicle involved in the collision. Siyabonga's mother passed away at the scene of the collision, as a result of the injuries sustained in the collision.
- [4] Advocate Kilian ("the Curator"), on behalf of Siyabonga, instituted action in terms of which Siyabonga seeks financial damages in respect of claims under the headings: Loss of Support, Past and Future Medical Expenses, Future Loss of Earnings and General Damages.
- [5] The Defendant's Plea was essentially a bare denial, on the basis that the Defendant had no knowledge of the allegations contained in the Particulars of Claim.

THE MERITS

- [6] On the day that the trial was to commence, the Defendant conceded the merits of the action and accepted full liability for any proven claims arising from the collision, in respect of Loss of Support and the Duty to Support.
- [7] The Defendant has made an offer to the Plaintiff in respect of the Loss of Support claim, which offer the Curator is willing to accept. The Defendant has also agreed to make payment of all Past Medical Expenses and has provided a Section 17(4) Undertaking in respect of Future Medical Expenses, which the Plaintiff has accepted.

THE ISSUES TO BE DETERMINED

- [8] I was informed that the only issues that remain to be determined related to Future Loss of Earnings and General Damages.
- [9] The Curator also seeks the leave of the Court to accept the Defendant's Offer of Settlement in respect of the Loss of Support claim, as referred to above.
- [10] I was advised by the Plaintiff's counsel that agreement had been reached between the Plaintiff's counsel and the Defendant's counsel that the Reports of the Plaintiff's Expert Witnesses could be admitted as evidence without further proof, as envisaged by Rule 38(2) of the Uniform Rules of Court and as allowed in terms of the Practice Directive.
- [11] In such regard the Plaintiff had prepared an Application in terms of Rule 38(2) which had been filed prior to the agreement being reached. I pointed out to counsel that a Notice of Opposition to the Rule 38(2) Application had been filed earlier on the day of the commencement of the trial. I accordingly enquired from Defendant's counsel whether such Notice of Opposition was being withdrawn as a result of the agreement that had been reached between counsel.
- [12] Defendant's counsel advised me that the Defendant opposed the leading of expert evidence by way of Affidavit. Defendant's counsel indicated that she would need a postponement in order to prepare an Answering Affidavit in the Rule 38(2) Application.

[13] After an adjournment, the Plaintiff elected to abandon the Rule 38(2) Application, in order to avoid the postponement of the trial, and indicated that the Expert Witnesses would be called to give evidence.

[14] The Defendant had not filed any Expert Reports and indicated that it would not be calling any Expert Witnesses.

THE RELEVANT EVIDENCE OF VANESSA GAYDON

[15] Ms Gaydon is a qualified Clinical Neuropsychologist and Educational Psychologist. The Defendant admitted that Ms Gaydon qualified as an expert witness in her field.

[16] Ms Gaydon confirmed the contents of her expert reports and gave extensive evidence as to the documentation she had been provided with, and her consultations with Siyabonga.

[17] Ms Gaydon stated that post-collision Siyabonga complained of experiencing headaches twice a week, which is unusual, that she is easily startled, has volatile moods, cries easily and struggles with grief.

[18] Ms Gaydon's evidence was that Siyabonga struggles to finish a full day at school, and that the loss of her mother has significantly impacted on her life, which has caused Siyabonga to suffer from depression, which in turn impacts on her cognitive functioning.

[19] Ms Gaydon indicated that she was in agreement with the report of Dr Kruger (a neurosurgeon) that Siyabonga had suffered, *inter alia*, a "moderate to severe" brain injury.

- [20] Ms Gaydon's evidence was that Siyabonga was compromised in her learning and educational abilities, and that she would not gain access to a remedial school, and even if she could, it would take at least 2 years.
- [21] Having considered the family history of Siyabonga, it was Ms Gaydon's opinion that the family valued education, and that it was reasonable to postulate that, but for the collision, Siyabonga could have achieved an NQF6 or NQF7 qualification.
- [22] Ms Gaydon's evidence was that post-collision Siyabonga is probably limited to an NQF2 or NQF3 qualification.
- [23] Despite opposing the Expert Reports filed on behalf of the Plaintiff, Defendant's counsel asked only one question of Ms Gaydon, being whether the academic and educational difficulties faced by Siyabonga were not pre-existing challenges that would have hampered her, regardless of the collision. Ms Gaydon refuted such suggestion.

THE EVIDENCE OF MARINDA JOUBERT

- [24] The next witness called to give evidence was Dr Marinda Joubert, a psychiatrist. I was then advised that the Defendant accepted all of the Expert Witness Reports and the contents thereof, except for the Reports of Ms Gaydon and Ms Theron. Dr Joubert was then excused, as it became unnecessary to lead her evidence.

THE RELEVANT EVIDENCE OF LORETTE THERON

- [25] Ms Theron is a qualified Industrial Psychologist. Her qualifications and expertise were accepted by the Defendant.
- [26] Ms Theron confirmed her Reports, and gave evidence that she had read the Reports of the other Expert Witnesses provided to her, and that she had consulted with Siyabonga and prepared three separate Reports.
- [27] Ms Theron gave evidence that an employee normally reaches his or her career ceiling at approximately age 45, whereafter such an employee would only get inflationary increases.
- [28] Ms Theron's evidence was that assuming that Siyabonga reached an NQF2 or an NQF3 educational level, she would be able to gain employment at the Paterson A1 level, and would probably progress to Paterson B1 level. Ms Theron stated that it was unlikely that Siyabonga would reach the Paterson B4 level, by the ceiling age of 45.
- [29] The cross-examination of Ms Theron did not alter her evidence in any way, and she reiterated that Siyabonga would commence employment at the Paterson A1 level, and would progress to a Paterson B1 level and over time and with experience she may be able to progress to semi-skilled or automated work.

THE DEFENDANT'S CASE

- [30] The Defendant did not call any witnesses, and relied only on the cross-examination of the Plaintiff's witnesses, and legal argument.

THE INJURIES TO SIYAOBONGA

[31] At the time of the collision Siyabonga was six years old, and lost consciousness immediately after the collision and is uncertain as to the duration of being unconscious. Siyabonga has a partial recollection of the accident, and recalls regaining consciousness at the Heidelberg Provincial Hospital. Siyabonga suffered the following injuries during the collision:

[31.1] a left occipital scalp laceration, thereby confirming an impact to Siyabonga's head;

[31.2] a moderate/severe traumatic brain injury; and

[31.3] a lumbar back injury.

[32] As a result of the injuries sustained during the collision, Siyabonga suffers from:

[32.1] chronic back pain, which is aggravated by physical activity;

[32.2] chronic headaches, which is aggravated by the weather and psychological stresses;

[32.3] psychological and psychiatric complaints with symptoms of travel anxiety and depression;

[32.4] short-term memory loss;

[32.5] difficulties with impulse control and avoiding conflict with other persons;

[32.6] social and emotional difficulties;

- [32.7] cognitive difficulties;
- [32.8] mild to moderate neurocognitive deficits, including:
 - [32.8.1] lack of sustained and complex attention;
 - [32.8.2] memory and learning difficulties;
 - [32.8.3] difficulties with the precision of motor tasks;
 - [32.8.4] difficulties with planning and problem solving; and
 - [32.8.5] higher level executive functioning.
- [32.9] psychiatric disorders; and
- [32.10] physical deficits of *inter alia*, the neurological system, sensory system and academic deficits.

ASSESSMENT OF THE EVIDENCE

- [33] In addition to the expert testimony provided by Ms Gaydon and Ms Theron, I also had regard to the expert witness summaries of Dr Barlin (orthopaedic surgeon), Dr J H Kruger (neurosurgeon), Dr M Joubert (psychiatrist), Dr Bouwer (ENT), Lizelle Wheeler (occupational therapist) and Mr Gregory Whittaker (actuary).

THE ACTUARIAL CALCULATIONS

- [34] The actuarial calculations were performed by Mr Gregory Whittaker, a qualified Actuary, employed at Algorithm Consultants & Actuaries CC. Mr

Whittaker prepared the calculations based on the contents of the Reports of Ms Theron, whose evidence was not contradicted.

LOSS OF SUPPORT

[35] As regards the Loss of Support claim, the Defendant has offered an amount of R195 448.85. The Curator has considered the offer for Loss of Support, and is satisfied that it is a fair and reasonable offer. The offer appears to be approximately R3 000.00 more than the amount calculated and proposed by Mr Whittaker, after taking account of contingencies.

[36] In the circumstances, I see no reason why I should not allow the Curator to accept such offer on behalf of Siyabonga.

FUTURE LOSS OF EARNINGS

[37] There is no reason to doubt or discount the evidence of any of the Plaintiff's Expert Witnesses, and particularly the evidence of Ms Gaydon and Ms Theron, who were of the opinion that Siyabonga would have, but for the collision, obtained at least a diploma, and more likely, a degree.

[38] Both Ms Gaydon and Ms Theron were of the opinion that it is highly probable that Siyabonga would have reached an employment level at the Paterson D1 level. There is no reason to find that Ms Theron's opinion that Siyabonga's career ceiling would be the Paterson B1 level, is inaccurate.

[39] The actuarial calculation carried out by Mr Whittaker, taking such assumptions into account, reflect a Total Future Loss of Earnings in the amount of R5 344 542.00.

- [40] Plaintiff's counsel submitted that such amount would be an appropriate award, particularly having regard to the fact that the Actuary applied a higher-than-usual contingency percentage, in respect of potential injuries.
- [41] Defendant's counsel submitted that the amount of R747 890.00 would be an appropriate award, on the basis that there is no certainty that Siyabonga would have obtained a diploma or a degree, and as Siyabonga is currently doing well in her current school. There was no evidential basis provided in support of the calculation of the amount of R747 890.00.
- [42] I have no reason to find that the actuarial calculation of Mr Whitaker in respect of the claim for Future Loss of Earnings and the contingency percentage utilised, is inaccurate or should be reduced, and accordingly find that an appropriate award would be R5 344 542.00,

GENERAL DAMAGES

- [43] Whilst Courts attempt to be as objective as possible, in determining general damages awards by having regard to awards made in other judgments, there is always an element of subjectivity in determining an appropriate award, as each matter has its own peculiar set of facts.
- [44] The Plaintiff has submitted that an appropriate award for general damages would be R1 300 000.00 with reference to a number of authorities and

summaries, including *Hall v Road Accident Fund*¹, *Mofokeng v Road Accident Fund*², *Molai v Road Accident Fund*³ and *Madibeng v Road Accident Fund*⁴.

[45] The Defendant has submitted that an appropriate award for general damages would be R650 000.00, with reference to the matter of *Smit v Road Accident Fund*.⁵

[46] In the matter of *Road Accident Fund v Marunga*⁶ the Supreme Court of Appeal confirmed the dictum in the matter of *Wright v Multilateral Motor Vehicle Accident Fund*, which reads as follows:

"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 the 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."

[47] In the matter of *Protea Assurance Company Limited v Lamb*⁷, it was stated as follows:

"Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court at arriving at an award which is not substantially out of general accord with previous awards which can be used as a yardstick."

[48] It is of course trite that each case must be adjudicated upon its own merits and it is unlikely that any one case will be factually identical to another. In the

¹ 2013 (6J2) QOD 115 (KZN).

² 2015 (7B4) QOD 12 (GSJ).

³ 2021 (8A4) QOD 82 (GSJ).

⁴ 2019 (8A4) QOD 39 (GND).

⁵ 24883/2008 [2012] ZAGPPHC 294 [16 November 2012].

⁶ [2003] 2 All SA 148 (SCA).

⁷ 1971 (1) SA 530 AD at 535H to 536A.

circumstances, previous awards only offer guidance in regard to the assessment of general damages.

- [49] Having regard to the authorities cited by both the Plaintiff and the Defendant, and having regard also to the following matters: *Noble v The Road Accident Fund*⁸, *Modisana v The Road Accident Fund*⁹ and *Mudau v Road Accident Fund*¹⁰, I am of the view that an appropriate award for general damages would be R900 000.00.

COSTS

- [50] Having regard to the manner in which the action was conducted by the Defendant, which resulted in unnecessary expenses, the delay of the Action and the standing down of the matter on at least two occasions, I am of the view that such conduct can be regarded as vexatious, and it is appropriate for the Defendant to pay the costs of the Action on the attorney/client scale.

TRUSTEE

- [51] Mr Hendrik Jacobus van Heerden, of Enonix (Pty) Ltd Trust Administration has been approached to act as Trustee, and has consented to such appointment.
- [52] I have seen the draft Deed of Trust, and am satisfied that it will protect the best interests of Siyabonga.

⁸ 2011 (6J2) QOD 54 (GSJ).

⁹ (3303/2009) [2012] ZANWHC 19 (26 April 2012).

¹⁰ [2003] ZAGPPHC 316; 14129/2017 (25 May 2023).

ORDER

[53] In the circumstances, I make the following order, which must be read in conjunction with the separate Order made:

[53.1] The Defendant is to make payment to the Plaintiff of the amount of R5 344 542.00 in respect of Future Loss of Earnings;

[53.2] The Defendant is to make payment to the Plaintiff of R900 000.00 in respect of General Damages;

[53.3] The Curator is authorised to accept the offer of R195 448.85 in respect of the Loss of Support claim;

[53.4] The Defendant shall provide the Plaintiff with an Undertaking as envisaged in Section 17 (4) (a) of Act 56 of 1996, for 100% of the costs of the future accommodation of the minor in a hospital or nursing home and such treatment, services or goods as the minor may require as a result of the injuries that the minor sustained as a result of the accident which occurred on 5 January 2014, as set out in the medico legal reports obtained on behalf of the Plaintiff, after such costs have been incurred and upon proof thereof, which costs shall include:

[53.4.1] the costs to be incurred in the establishment of a Trust to *inter alia* protect, administer and/or manage the capital amount and the proceeds thereof referred to in paragraph 1 above;

[53.4.2] The remuneration of the trustee in administering the capital amount:

[53.4.2.1] upon acceptance of appointment by the First Trustee and upon the issuing of Letter of Authority by the Master of the High Court, an amount calculated to be equal to 0.25% of the Trust Fund;

[53.4.2.2] during the existence of the Trust, the total amount calculated to be equal to 1% (one per centum) per annum of total funds under administration by the Trust;

[53.4.2.3] upon termination of the Trust, 2% (two per centum) of the amount, (net of all outstanding liabilities of the Trust as at the date of death of the Beneficiary) of the value the property of the Trust.

[53.4.3] The costs of the furnishing of annual security in terms of Section 77 of the Administration of Estates Act, Act 687 of 1965 (as amended;

[53.5] that the attorneys for the Plaintiff, Erasmus de Klerk Incorporated, are ordered:

[53.5.1.] to cause a trust ("the Trust") to be established in accordance with the Trust Property Control Act No. 57 of

1988, within six months of the date of granting of this order and shall approach the above Honourable Court for condonation and further direction should the trust not be established within the said period of six months;

[53.5.2] to deposit all proceeds in terms hereof (including the capital amount) in an interest-bearing account, for the benefit of Siyabonga, as contemplated in the Legal Practice Act, pending the establishment of the Trust;

[53.5.3] to pay all monies held in Trust by them for the benefit of Siyabonga, immediately to the Trust, upon creation of the Trust.

[53.6] The Trust instrument contemplated above shall make provision for the following:

[53.6.1] that Siyabonga is the sole beneficiary of the trust during her lifetime and after her death, her lawful descendants;

[53.6.2] that the First Trustee shall be H J van Heerden as representative of Enonix (Pty) Ltd;

[53.6.3] that the Trustee(s) are to provide security to the satisfaction of the Master during the lifetime of Siyabonga;

[53.6.4] that the ownership of the trust property vests in the trustees of the Trust in their capacity as trustees;

[53.6.5] procedures to resolve any potential disputes;

[53.6.6] that the trustees be authorised to recover the remuneration of, and costs incurred by the trustees, in administering the undertaking in terms of Section 17(4)(1) of Act 56 of 1996 in accordance with the certificate of undertaking to be provided by the Defendant;

[53.6.7] that the amendment or termination of the trust instrument be subject to the leave of this Honourable Court during the lifetime of Siyabonga;

[53.6.8] that the trust property and the administration thereof be subject to an annual audit during the lifetime of Siyabonga.

[53.7] Subject to the discretion of the Taxing Master, the Defendant must make payment of the Plaintiff's taxed or agreed attorney and client costs on the High Court scale, which costs include (but are not limited to):

[53.7.1] the costs of senior-junior counsel (which is to include, *inter alia*, preparation, perusal, and counsel's fees for 14 August 2023 and 15 August 2023;

[53.7.2] All the costs in obtaining all medico legal/expert reports, as well as the Plaintiff's travelling in attending the Plaintiff's experts, of the following doctors or experts:

[53.7.2.1] Dr Barlin (Orthopaedic Surgeon);

[53.7.2.2] Dr JH Kruger (Neurosurgeon);

[53.7.2.3] Vanessa Gaydon (Neuropsychologist & Educational Psychologist);

[53.7.2.4] Dr M Joubert (Psychiatrist);

[53.7.2.5] Dr Bouwer (ENT);

[53.7.2.6] Alison Crosbie Inc – Lizelle Wheeler (Occupational Therapist);

[53.7.2.7] Lorette Theron (Industrial Psychologist);

[53.7.2.8] Algorithm Consultants - G A Whittaker (Actuary).

[53.7.3] the above costs will also be paid in to the aforementioned trust account.

[53.8] The Plaintiff's attorneys shall be entitled to make payment in respect of:

[53.8.1] the expert witnesses set out in paragraph 53.7, *supra*

[53.8.2] counsel employed on behalf of the Plaintiff;

[53.8.3] fees of the Curator *ad litem*;

[53.8.4] attorneys' fees;

from the aforesaid funds held by them for the benefit of Siyabonga.

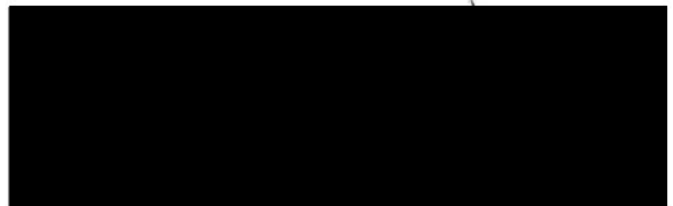
[53.9] The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:

[53.9.1] the taxed costs will:

[53.9.1.1] be payable within 180 days from date of taxation or settlement; and

[53.9.1.2] bear interest at the then prevailing legal interest rate, calculated from and including the 15 (fifteenth) calendar day after the date of taxation to and including the date of payment thereof.

[53.10] I was informed that no contingency fee agreement was concluded between the Plaintiff and his attorneys.

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G NEL
[Acting Judge of the High Court,
Gauteng Local Division,
Johannesburg]

Heard: 14-16 August 2023
Judgment: ~~03~~ June 2024
04

APPEARANCES

For Plaintiff: Lizl Smith
Instructed by Erasmus de Klerk Inc.

For Defendant: Talenta Tivana
Instructed by The State Attorney