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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

CASE NO: 76476/15

8/4/2019

In the matter between:

N. MTSHULANA obo S

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

COLLIS J:

INTRODUCTION

1. This is an action wherein the Plaintiff claims damages arising from injuries sustained by her child as pedestrian (*"the minor"*). in a collision which occurred on 17 September 2012. At the time of the collision, the minor was 6 years old and at present is 12 years old.
2. In the particulars of claim at paragraph 6 thereof, the Plaintiff alleges to have sustained the following injuries:

- 6.1 Moderately sever diffuse axonal head injury with a focal brain injury and a frontal skull fracture;
 - 6.2 Multiple facial and scalp lacerations;
 - 6.3 Soft tissue injury to the knee with abrasions.
3. Furthermore, at paragraph 7 thereof the plaintiff alleges as follows:

"As a result of the aforesaid injuries Plaintiff has suffered damage and is entitled to damages in the sum of R5 967 594, 00 made up as follows:

 - 7.1 Past medical/ Hospital expenses R10 000, 00
 - 7.2 Future medical expenses-Undertaking in terms of Section 17(4) (a) Act 56 of 1996
 - 7.3 Past and future loss of earning capacity R4 757 694, 00
 - 7.4 General Damages R1 200 000, 00"
4. At the commencement of the proceedings and at the request of the parties, the court was requested to record the following:
 - 4.1 That the issue of liability has become settled on the basis that the Defendant shall pay 100% of the Plaintiff's agreed or proven damages;
 - 4.2 That the Plaintiff was abandoning his claim in respect of past medical expenses;
 - 4.3 That the Defendant would provide the Plaintiff with an undertaking in terms of section 17(4)(a) of the Act, in settlement of the Plaintiff's claim in respect of future medical expenses;
 - 4.4 The Defendant admitted the contents and correctness of the Plaintiff's Actuarial report, handed in and marked as exhibit B;
 - 4.5 By agreement between the parties the contents and correctness of the joint minutes prepared by the experts, were handed in and marked as exhibits A
5. The parties were further in agreement that they will merely argue the matter on the pleadings and various expert reports filed of record without

the need call such experts. In this regard they further by agreement handed into the record exhibit C, setting out all facts agreed upon.

DISPUTED ISSUES

6. This court had to determine the extent of the Plaintiff's past and future loss of earning capacity. The court was also called upon to determine the Plaintiff's general damages.

INJURIES

7. As a result of the injuries sustained by the minor, he suffered the following sequelae:¹

Brain injury-regular headaches, memory concentration and slow mental functioning. Behavioural and emotional changes with defiance tendencies and changes in temperament which is directly associated with his frontal lobe impairment. The plaintiff is now emotionally vulnerable with compromised social and recreational interaction. He also now suffers neurocognitive and intellectual impairments.

As per the report of Dr Hoffman,² a plastic, reconstructive and cosmetic surgeon, the minor suffered **disfigurement** in the form of scarring to his face and left knee which is permanent and has affected the minor's self-image.

8. A claim for general damages as stated in the matter Road Accident Fund v Marunga 2003 (5) SA 164 (SCA) at 23, is a claim which comprise of pain and suffering, disfigurement, permanent disability and loss of amenities of life.
9. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain depending on what is considered fair and reasonable by the trial court in all the circumstances of the case. As

¹ Exhibit C p 2

² Exhibit D p 279-299

mentioned *supra*, the Plaintiff claimed general damages in the amount of R1 200 000, 00. In the joint minute prepared by the clinical psychologists the following common factors were noted:

- 9.1 The minor suffered no emotional and physical challenges pre-accident.
- 9.2 Post- accident, he experienced significant difficulties from the start of his scholastic career and failed Grade 1 and 4.
- 9.3 Memory concentration and slow mental functioning were reported.
- 9.4 The experts agree, that the minor sustained a neurocognitive impairment which can be attributed to a brain injury sustained at a vulnerable young age.³
- 9.5 The report of Dr Hoffman as mentioned before further notes that scars from a variety of sources can have long-term emotional effects in addition to physical discomfort and marring of the skin. Furthermore, that scarring on a person's face, such as in the present matter, can lead to negative connotations being made about that person. This may as a result potentially lead them to be ostracized from society or may even prevent them from entering a relationship.⁴ Ms Grootboom, the Clinical Psychologist instructed by the Plaintiff, further opines that the minor's quality of life has been reduced by cognitive, psychological and physical sequelae.⁵

10. In considering an award in respect of general damages, I remain mindful of the opinion expressed by the court in *De Jong v Du Pisanie* N.O. 2005 (5) SA 547 (SCA), wherein the court concluded that the principle remained that an award should be fair to both parties; that it must give just compensation to the Plaintiff, but not pour our largesse from the horn of plenty at the defendant's expense. It has also been said that the court has a wide discretion and that there are no hard and fast rule of general application requiring the court to consider past awards.

³ Exhibit C p 7-11

⁴ Exhibit D P 293-294

11. Having regard to decided cases, Mr Marx appearing on behalf of the Plaintiff submitted to the court, that an award of R1 250 000, 00 should be awarded as general damages as this amount would be fair in the present circumstances. Mr Vermaak appearing on behalf of the defendant adopted a more conservative approach and requested the court to award an amount of R 750 000, 00 having regard to the moderately severe head injury and scarring sustained by the minor and the decided cases referred to in counsel's heads of argument.
12. Considering that an award of general damages is a highly inexact science and given the tender age of the minor, I consider an award R1 000 000, 00 to be an appropriate amount for general damages under the circumstances.

EXPERT EVIDENCE

13. In their joint minute, the Neurosurgeons recorded as follows:
 - 13.1 That the Plaintiff's current complaints consist of headaches having sustained a moderately severe diffuse axonal head injury with a focal brain injury and a frontal skull fracture in the accident.
 - 13.2 As a result of the injury, the minor has struggled academically at school and has an increased risk of developing epilepsy in future (between 3% -10%).
 - 13.3 Furthermore, that the life expectancy of the minor has not been influenced by the accident that he was involved in.⁶
14. The Clinical Psychologists in their joint minute made the following observations:⁷
 - 14.1 The collision in question was the first collision that the minor was involved in and that he had no known emotional nor physical challenges prior thereto.

⁵ Exhibit A p 11

⁶ Exhibit A p 25- 26

⁷ Exhibit A p 7-11

- 14.2 As a result of the collision, the minor displayed memory, concentration and slow mental functioning.
- 14.3 Facial scarring was also noted and behavioural and emotional changes were reported.
- 14.4 They further both agreed that the minor's neurocognitive impairment is attributed to a brain injury sustained at a vulnerable age.
15. The Industrial Psychologists Dr A. Strydom and Mr Oosthuizen also individually filed expert reports. During their joint meeting as experts they recorded that they had at their disposal several other expert reports filed in the present matter. **Pre-accident** they were in agreement that if the court was to accept the opinion of the Plaintiff's educational psychologist then the minor would have been able to complete Grade 12 with an exemption. If, however, the court was to accept the opinion of the defendant's educational psychologist, then it can be accepted that the Plaintiff if not placed in a remedial school, would probably only have progressed during his foundation, intermediate and senior phases. **Post- accident** they agreed that the minor would have continued to work until normal retirement age of 65 years or as long as his health permitted. The experts further reached consensus that post- accident the minor would not be able to reach his pre-morbid potential. Furthermore, that as a result of the collision, the minor would be restricted to unskilled and semi-skilled employment and that he would not be able to perform sedentary, administrative type of work given his neuropsychological sequelae. The experts were further in agreement that as his future prospects are not all guaranteed, a higher post morbid contingency deduction should be considered.
16. The Occupational Therapists met on 6 November 2017. During such meeting they agreed that at the time of the collision the minor was 6 years old. The experts agree that at the time of their report the only complaint reported was that he suffered from headaches post-collision. As for his residual work capacity, they agreed that as a result of the collision he

would find it increasingly more difficult to cope with the demands of his grades. That the minor remains employable within the open labour market, despite the accident. Furthermore, that he would be best suited for sedentary work within the semi-skilled or unskilled domains until retirement age and that his biggest challenge would be to progress beyond the low semi-skilled level. If in future he was to develop epilepsy, he would be unable to be employed as a driver, or work in an environment with machinery.⁸

17. The Educational Psychologists met on 9 November 2018 and recorded the following in their joint minute produced concerning such meeting:

17.1 The minor was a healthy child pre-accident with his birth and development uneventful.

17.2 Post-accident, the Plaintiff is probably a candidate for remedial school and would benefit from remedial intervention and in all probability, he would have managed the demands of Grade 12. Ms Moller on behalf of the Plaintiff opines that the minor pre-accident would have progressed to a NQF5 level with Ms Van den Heever suggesting an NQF4 level together with the completion of a basic skills course at a college.

17.3 Post-accident, the experts agreed that within the remedial school environment with extra concessions, that the minor in all probability would have been able to complete Grade 9 (NQF1) with a slight possibility of a condoned Grade 10 and that his brain injury would result in him struggling to find secure employment.

EVALUATION

18. Now in determining the Plaintiff's post and future loss of earning capacity this court has to determine whether post-accident and as a result of the *sequelae* of the collision, he would have been able to reach his full career potential.
19. Pre-accident the experts agreed that the minor was a healthy child with his

⁸ Exhibit A p 1-6

birth and development uneventful. Post-accident the experts agreed that he minor now would have to go to a remedial school and would only be able to obtain a condoned Grade 10.

20. In *Bridgman NO v Road Accident Fund 2002 (1) ALLSA 1 (CPD)* the court held that "in order to claim compensation for patrimonial loss a Plaintiff must discharge the onus of proving on a balance of probabilities that such loss has indeed occurred. That does not necessarily mean that the Plaintiff is required to prove the loss with mathematical precision however the Plaintiff is required to place before the court all evidence reasonably available to enable the court to qualify the damages and to make an appropriate award in his favour."

21. In *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA 1188 (SCA)* at para [36] and [37] the following is stated relative to expert evidence and opinions of expert witnesses:

"[36] That being so what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of *Bolitho v City and Hackney Health Authority (1997) UKHL 46 [199] AC 232 [HL(E)]*. With the relevant dicta in the speech of Lord Browne Wilkinson we respectively agree. Summarized they are to the following effect.

[37] The court is not bound to absolved a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held is that the treatment or diagnosis in issue accorded with sound medical practice. The court must be satisfied that such opinion has a logical basis in other words that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion.'"

22. In making an assessment on the conclusions opined by the experts and the weight to be attach to their opinions expressed and applying the above

principles *in casu* I have had regard to the undisputed facts in the matter. I list them to be the following:

22.1 That the minor was injured in a motor vehicle collision on 17 September 2012.

22.2 At the time of the collision, that he was only six years old.

22.3 Following the collision, the minor requires remedial schooling and would only be able to achieve condoned Grade 10. In all likelihood that he would be able to obtain employment but that same would be limited to a low semi-skilled level until retirement age 65 years.

23. On behalf of the plaintiff, Mr Sauer, prepared an actuarial report. Same was marked Exhibit 8 page 1 - 12. In terms of the said report the actuary approved contingency deductions of 25 % on his pre-morbid future earnings totalling R 3 390 709, 50. This amount the Defendant was in agreement with. Post- morbid earnings the actuary postulated in his report an amount of R1 211 151, 00 in respect of which this court was called upon to deduct an appropriate contingency. Given the totality of the evidence presented before this court, I am of the opinion that a contingency deduction of 50% would be fair and reasonable under the circumstances as I am satisfied that the plaintiff has discharged his *onus* of presenting reliable evidence in proving his loss of earning capacity.

24. Having regard further to the decision Goodall v President Insurance 1978 (1) SA 389 (W) and the sliding scale method laid down in this decision I am of the opinion that the percentages contingency deductions as alluded to above would be both fair and equitable and will serve to balance the interest of both parties under the circumstances.

ORDER

25. In the result, the following order is made:

25.1 The merits have been settled 100% in favour of the plaintiff;

25.2 The Defendant shall pay the Plaintiff the total amount of R4 996

284, 50 (Four Million Nine Hundred and Ninety-Six Thousand Two Hundred and Eighty-Four Rand and Fifty Cents) in respect of both his loss of income as well as his general damages;

- 25.3 The said amount to be paid into the Plaintiff's attorneys Trust Account No: [...] Absa Business Bank Hillcrest;
- 25.4 Interest on the above amount at a rate of 10,25% per annum from a date 14 days after the date of judgment to date of payment;
- 25.5 The Defendant is ordered to furnish the Plaintiff with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996 in respect of future accommodation in a hospital or nursing home or treatment of and or rendering of a service or supplying of goods to him arising from injuries sustained by him in a collision which occurred on 17 September 2012 only after the costs have been incurred.
- 25.6 The Draft marked X dated and signed and further annexed hereto is hereby made an order of Court.

COLLIS J

**JUDGE OF THE HIGH COURT OF
SOUTH AFRICA**

Appearances:

For the Plaintiff	: Adv. D.J. Marx
Attorney of the Plaintiff	: Van Zyl Le Roux Inc.
For the Defendant	: Adv. H. Vermaak
Attorney for the Defendant	: Maponya Inc.
Date of Hearing	: 30 November 2018
Date of Judgment	: 08 April 2019

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case num: 76476/2015

8 April 2019

Before the Honourable Justice

COLLIS J

(IN COURT 4C)

In the matter between:

N MTSHULANA obo S

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

AFTER HAVING HEARD EVIDENCE AND ARGUMENT BY COUNSEL, IT IS ORDERED THAT:

1.

1.1 The Defendant is to pay the Plaintiff's Attorneys the sum of **R** _____
(_____)

in respect of Loss of Income and General Damages and in full and final payment;

1.2 The Plaintiff's Attorney's trust account details are as follows:

ACCOUNT HOLDER:	VZLR INC
BRANCH:	ABSA BUSINESS BANK HILLCREST
BRANCH CODE:	632005
TYPE OF ACCOUNT:	TRUST ACCOUNT
ACCOUNT NUMBER:	[....]

1.3 In the event of default on the above payment, interest shall accrue on such outstanding amount at 10.25% (at the mora rate of 3.5% above the repo rate on the date on this order, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended) per annum calculated from due date until the date, as per the Road Accident Fund Act, of payment;

2.

The Defendant shall make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale, including the costs of the instructing and correspondent Attorneys, which costs shall include but not be limited to the following:

- 2.1. All reserved cost to be unreserved;
- 2.2. The fees (preparation, and day fee) of D Marx a Senior Attorney with the right of appearance in the High Court, appearing as counsel;
- 2.3. The reasonable taxable costs of obtaining all medico legal/expert, RAF 4 Serious Injury Assessment, actuarial reports and any other report of an expert nature from the Plaintiffs experts, of whom notice had been given, including but not limited to the reports which were furnished to the Defendant and/or its experts;
- 2.4. The reasonable preparation, qualification, reservation and attendance fees, if any, of all the Plaintiffs experts of whose reports had been furnished to the Defendant and / or its experts;
- 2.5. The reasonable taxable accommodation and transportation costs

(including toll and e-toll charges) incurred on behalf of or by the Patient (including his parents, having to accompany him) in attending medico legal consultations with all experts, consultations with the legal representatives and the Court proceedings, subject to the discretion of the Taxing Master;

- 2.6. The reasonable cost for an interpreter's attendance at court on the trial dates and at the medico legal appointments for translation of information;
- 2.7. The reasonable costs of a consultation between counsel, the patient's attorneys, the patient's family and the experts, in preparation of the hearing and discussion of settlement and the terms of this order;
- 2.8. The above-mentioned payment with regard to costs shall be subject to the following conditions:
 - 2.8.1. The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorney of record; and
 - 2.8.2. The Plaintiff shall allow the Defendant 14 (fourteen) calendar days to make payment of the taxed costs;
 - 2.8.3. In the event of default on the above payment, interest shall accrue on such outstanding amount at the mora rate of 3.5% above the repo rate on the date of taxation / settlement of the bill of cost, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended, per annum, calculated from due date until the date of payment;
 - 2.8.4. The above costs will also be paid into the aforementioned trust account.

3.

By agreement between the parties the award to the plaintiff shall be protected by means of it being entrusted to a trust to be formed for the benefit of the patient.

4.

Until such time as the *Trustee* still to be appointed and the trust to be erected, is able to take control of the capital sum and to deal with same in terms of this order, the Plaintiff's attorney of record:

- 4.1 Shall be prohibited from dealing with the capital in any other manner unless specifically authorised thereto by the Court, subject to paragraph 4.2 - 4.6 hereunder;
- 4.2. Are authorised to invest the capital amount in an interest-bearing account with a registered banking institution in terms of Section 78 of the Attorney's Act, 53 of 1979, to the benefit of the patient and will only be allowed to pay such monies over to the *Trustees* of the trust to be created in terms of paragraph 4 of this order, once the Master of the High Court has issued the *Trustees* with the necessary letters of authority;
- 4.3. The Plaintiff's attorneys are further authorized to pay the costs to set security of the funds held in trust to the Master of the High Court by the *Trustees* of the trust to be created, which costs in turn must be refunded by the Defendant to the Plaintiff in terms of paragraph 9;
- 4.4. Are authorised and ordered to make any reasonable payments to satisfy any of the patient's needs that may arise and that are required in order to satisfy any reasonable need for treatment, care, aid or equipment that may arise in the interim;
- 4.5 Are authorised to make payment of the attorney and own client' costs, being fees, disbursements and interest on unpaid disbursements, of the Plaintiff's attorneys;
- 4.6. Are authorised to make payment of such other amount(s) that may reasonably be indicated and/or required for the wellbeing of the patient and/or in his interest which a diligent *Trustee* would have paid had such *Trustee* been appointed.

It is noted that the amount in paragraph 1 above is to be paid into the trust account of the Plaintiff's attorney and that after deduction of the attorney and client fees the balance is to be paid to the *Trustee* to be appointed.

6.

The Plaintiff's attorneys of record shall attend to the creation of an *inter vivos* trust in order to protect the awarded funds to the exclusive benefit of the Plaintiff.

7.

That the trust to be erected for the benefit of the patient on these papers, duly amplified with the powers recommended by the Master of the High Court of South Africa, which powers shall include (but not be limited to) the powers as referred to in the Trust Deed attached hereto as **Annexure "A"** and are regarded as incorporated into this order.

8.

Jeanne Helen Rabie will be the Trustee as per the signed consent attached hereto marked as **Annexure "B"**.

9.

The Defendant is ordered to pay the costs in respect of the creation and future administration of the said trust, to be formed in order to manage and administer the compensation payable to the patient as referred to in paragraph 1 of this order, which costs will include the fees of the trustees, and which costs of administration shall be limited to the amount of costs and fees chargeable by *Curator Bonis* in terms of the Administration of Estates Act, Act 66 of 1965, as amended.

10.

The *Trustee* is ordered to furnish security to the satisfaction of the Master of the

High Court.

11.

There exists a Contingency Fee Agreement between the Plaintiff and Plaintiffs attorneys, which complies with the terms set out in the Contingency Fee Act.

By Order of the Court

REGISTRAR

For the Plaintiff:	VZLR Inc- 012 435 9444, Adv D Marx - 082 828 0629
For the Defendant:	MAPONYA Inc - 012 342 0439, Adv