

SOUTH AFRICA / JUDGMENT

Burger (curator ad litem obo Minor) v Road Accident Fund (32688/2018) [2023] ZAGPJHC 679 (9 June 2023)

[2023] ZAGPJHC 679

COURT

South Gauteng High Court, Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

32688/2018

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IN THE HIGH COURT OF

UTH AFRICA

(GAUTENG DIVISION,

JOHANNESBURG)

Case

number: 32688/2018

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

NOT

REVISED

09.06.23

In

the matter between:

ADV

BURGER (curator ad litem obo Minor)

Plaintiff

And

ROAD

ACCIDENT FUND

Respondent

NEATRAL

CITATION: Adv. Burger (curator ad litem abo Minor) vs Road

Accident Fund (Case Number: 32688/2018) [2023] ZAGPJHC 679 09

June 2023.

Delivered: This

judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 9 June 2023.

Summary: Damages

– bodily injuries – determination of quantum- facts

and experts' opinions undisputed – court

ensure that just

and fair compensation awarded even when facts are undisputed.

JUDGMENT

Molahlehi, J

Introduction

- [1] This action is prosecuted by Adv Burger NO (as curator ad litem)[1] on behalf of the minor child (the patient) against the defendant, the Road Accident Fund. The claim arises from a motor vehicle accident involving the patient, who was five years old and a pedestrian at the time. The accident occurred on 7 May 2017.
- [2] The defendant had initially defended the action, but the defence was struck out by Windel J on 4 October 2021.
- [3] The claim was initially pleaded under the following headings; the future loss of earnings, general damages, including an undertaking in terms of section 17 (4) of the Road Accident Fund (the Act). The day before the hearing of the matter, the parties reached a settlement agreement on a number of the heads of damages except for the determination of quantification of general damages.

The issue

- [4] Having agreed on all the other heads of damages claimed by the plaintiff, the only issue before this court for determination is the quantification of damages.

- [5] The parties further agreed that in the circumstances where the defence of the defendant had been struck out, the defendant would be allowed to make a submission on the issue of the quantum of damages based on the plaintiff's papers. The parties also agreed that there was no need to lead oral evidence of the expert witnesses but to rely on their written reports. It is important to note that the defendant did not dispute that the patient qualified for compensation but rather that she was entitled to less than what is claimed in the amended particulars of the claim.

Background

facts

- [6] It is common cause, as indicated earlier, that the minor child was involved in a motor vehicle accident on 7 May 2017 at the intersection of Nugget and Hartfield streets, Berea, Johannesburg. The motor vehicle with the registration number [...] which is insured by the defendant.
- [7] The defendant accepted liability for the injuries sustained by the patient in the accident at 100%. In other words, the defendant accepted liability concerning the alleged negligent driving of the insured driver as pleaded by the plaintiff in the particulars of claim.
- [8] The injuries sustained by the patient are also, in the context of this matter, not in dispute. In this respect, the plaintiff pleaded that the injuries include a severe diffused axonal head injury, multiple facial fractures, or occipital and temporal fractures, multiple facial lacerations and the right scapula fracture.
- [9] In the pre-amendment particulars of claim, the plaintiff claimed R1 500 000.00 for general damages.
- [10] In the amended particulars of claim, the plaintiff claimed R2 500 000.00. The amendment was filed on 20 January 2023. This was after the defence was struck off on 4 October 2021, as indicated to earlier. The defendant's Counsel contended that the plaintiff was entitled to R1 4000 000.00 for general damages.
- [11] In the joint practice note dated 28 February 2023, the defendant accepted the medical-legal reports of the plaintiff's experts.

The case of the plaintiff

- [12] In support of the contention that the patient is entitled to compensation for the injuries suffered and loss of amenities of life, the plaintiff relied on various experts' opinions. Some of the reports concerned the issues upon which the parties had reached settlement, such as the loss of earning capacity. Accordingly, those reports are not discussed in this judgment. The focus is on those reports that deals with issues of pain, suffering, discomfort, disablement, loss of amenities of life and disfigurement resulting from the injuries sustained from the accident. The opinions of those experts are discussed briefly below.

- [13] The opinion of the neurologist Dr Kritzinger regarding the injuries suffered by the patient is that she has totally lost the amenities of life because of the accident. At the time of the accident, the patient was in grade R, and thus, she never had normal schooling and normal sports activities. She also has a personality change as a result of the accident and, accordingly, cannot participate in normal relationships with other people.
- [14] The expert witness further found that the patient has gone through considerable pain and suffering with a head injury and severe permanent, irreversible brain damage.
- [15] The other finding made by the expert is that the patient has developed left-sided hemiparesis, language problems, total abnormality of personality, hyperactivity, severe learning disorder, possible hearing abnormalities and visual abnormalities. She also suffers from being off balance and, accordingly, is intermittently wheelchair-bound.
- [16] The ophthalmologist, Dr Levine, described in his report the nature of the injuries sustained by the patient as involving the following:
- "(a) Diffuse axonal injury of the brain.
- (b) Multiple fractures of the skull, including the base of the skull, bleeding and possible cerebral-spinal fluid leak from the right ear.
- (c) Haemorrhages of the Occipital and Temporal lobes of the brain associated with a severe closed head injury.
- (d) Fracture of right scapula.
- (e) Multiple body abrasions."
- [17] The expert further found that the patient "demonstrated continuous overall involuntary body movements including limbs, face and core." The consequence of this, according to the expert, is that she is unable to visually fixate on whatever she is attempting to concentrate on, resulting in limiting "her concentration span with severe restriction and severe consequential attention deficit."
- [18] According to the expert, the prognosis for the patient is that the ocular and visual functions are likely to be permanent. He did not overrule the possibility of some minor improvement in the condition of the patient. The reality is, however, that the patient is consequently suffering visual disability, which unavoidably will impact her scholastic, occupational and daily requirements.
- [19] It is apparent that whatever improvement may be, the patient is confronted with a lifelong disability and has to endure significant pain and suffering throughout her life.

[20] The clinical psychologist Ms Genis diagnosed the minor child with epilepsy in 2017. She noted that the patient's neurocognitive profile is due to the traumatic injury she sustained. The difficulties confronting the patient since the accident as reported to the expert by her mother, are:

- (a) Epileptic seizures since 2017,
- (b) Experiences regular headaches,
- (c) Has no function on her left arm,
- (d) She cannot dress herself,
- (e) She has, since the accident, become stubborn.
- (f) She fights with other children and her mother,
- (g) She complains of loneliness and stress,
- (h) She lost her front teeth in the accident,
- (i) She walks with a clumsy posture,
- (j) She does not have the full function of her right hand when she writing.
- (k) Her hand trembles and is unable to grip heavy objects,
- (l) Her appetite has decreased, and she has to regularly see a dietician,
- (m) Her speech is slurred,
- (n) She experiences lower back pain which makes her relentless and becomes easily fatigued,
- (o) She becomes aggressive for no reason and tear paper,
- (p) She is forgetful and always absent-minded,
- (q) She experiences unsteady balance when playing,
- (r) She experiences nausea and vomiting once a month,
- (s) She has started bedwetting since the accident, and
- (t) Struggles with climbing the stairs.

[21] The expert has further diagnosed the patient with major depressive disorder consequent the posttraumatic stress disorder. Her cognitive deficit, according to the expert, is due to the severe brain damage she suffered as a result of the accident. Her cognitive deficit is regarded as permanent.

The basic legal principles

[22] It is trite that in claims for general damages, compensation is awarded for pain, suffering, discomfort, disablement, loss of amenities of life and disfigurement resulting from the injuries sustained from the accident. The authorities have cautioned against the courts' tendency to award higher damages as compensation. It is generally accepted that there is no mathematical or scientific formula for the computation of the monetary value of pain and suffering, loss of amenities of life and disabilities.[2]

[23] In assessing the compensatory award, the court must be fair to both sides, i.e. an award must be a just compensation and must not as stated in *De Jongh v Du Pisanie*.^[3] not "pour largesse from the horn of plenty at the defendant's expense." Similarly, the court in *Hully v Cox*,^[4] cautioned the courts against allowing their "sympathy for the claimants" to influence their judgments in considering what compensation to award in cases such as the present..

[24] In *Southern Insurance Association v Bailey N.O.*, ^[5] the court held:

In summary, in determining what would constitute fair compensation in a particular matter, the court has regard, inter alia, to the circumstances of the case, amounts previously awarded in broadly comparable cases and the decrease in the value of money since those previous cases were decided. The court must bear in mind, however, that awards made in previous cases can only afford broad and general guidelines in view of the differences that inevitably arise in each case".

Evaluation and analysis

[25] As appears from the above analysis, there is no material dispute about the severe injuries sustained by the patient. The disagreement is with the quantification of the damages. In this respect, the plaintiff made reference, for comparative purposes, to a number of cases dealing with the quantification of quantum. More importantly, reference was made to *M v Road Accident Fund*,^[6] where the plaintiff a 27 years old plaintiff sustained a severe head injury, loss of consciousness, brain damage, neurocognitive deficits, neurobehavioral deficits, multiple lacerations and abrasion, with the inability to move the right side of the body and speech problem. The court awarded the plaintiff R1 900 000.00, with the current value being R2 378 934.

[26] In *Khokho NO v Road Accident Fund*,^[7] the court awarded the 6 years old minor child who had suffered severe brain injury, right temporal oedema, subarachnoid haemorrhage,

defused cerebral oedema, occipital skull fracture, and the resultant multiple convulsions and an increased risk of seizure on the current value the amount of R2 047 392.00.

[27] In *Van Zyl NO V Road Accident Fund*,^[8] a 19-year-old law student, sustained a severe diffused axonal brain injury, multiple lacerations of the head and face, fracture of the right tibia and fibula and injuries to the right arm. The defendant argued that the cases that the plaintiff relied on in this regard were distinguishable from the circumstances of the present matter.

[28] In arriving at the conclusion that the defendant is liable for the plaintiff's general damages, I have had regard to the cases the

parties relied on in support of their respective cases and also the general principles and guidelines which the courts have applied in matters of this nature. The previous decisions relied on by the plaintiff, in particular, were regarded as guidelines and not

definitive in the determination of the quantum. This matter, like all other cases, has to be evaluated on its facts and own circumstances.[9]

[29] There is no doubt that the negligent conduct of the insured driver in this matter has changed the life of the patient in certain and fundamental respect permanently for the worst. The fair and equitable compensation for the plaintiff is R2 500 000.00. This conclusion is informed by the severe nature of the injuries sustained by the patient, the sequelae thereof, and the physical and mental condition of the patient as described above. It does not appear to me that even if there were be to some improvement in certain conditions of the patient, they would be of any material significance to have a fundamental impact on improving her life.

Order

[30] In the premises the following order is made:

1. By agreement between the parties:

1.1 the defendant shall pay to plaintiff the sum of R3 502 313.15 (three million, five hundred and two thousand, three hundred and thirteen rands and fifteen cents) in respect of loss of earnings in full and final settlement in one interest free instalment within 180 days of 10 March 2023.

2. the defendant shall pay to plaintiff the sum of R2 500 000.00 (two million five hundred thousand, rands.) in respect of general damages in full and final settlement in one interest free instalment within 180 days of 9 June 2023.

3. Payment to be made in the following bank account:

Name of account holder: SONYAMEISTRE

ATTORNEYS INCORPORATED

Bank name: [...]

Branch name and code: [...]

Account number: [...]

Type of account: [...]

3. The attorneys for the plaintiff (Sonya Mestre Attorneys) is ordered:

3.1 to cause a trust ("the Trust") to be established in accordance with the provisions of the Trust Property Control Act, Act 57 of 1998 (as amended) in respect of the minor; and

3.2 to pay all monies held in trust by them for the benefit of the minor to the Trust.

3.3 The objective of the trust is a simple minority trust and is not to operate beyond the minor reaching age of majority.

3.4 for the nomination of LEANE EDWARDS, an employee of Absa Trust Limited, and as such a nominee of Absa Trust, as the first trustee;

3.5 for the nomination of JEAN VOSLOO an executive of Liberty as the second trustee;

3.6 for the nomination of S M, the biological mother of the minor as the third trustee;

3.7 that the ownership of the trust property vest in the trustees of the trust in their capacity as trustees;

3.8 that the powers of the trustees shall specifically include the power to make payment from the capital and income for the reasonable

maintenance of the minor, or for any other purpose which the trustees may decide to be in the minor's interest, and if the income is not sufficient for the aforesaid purpose, the trustees shall have the power, for the purposes of this trust, in their sole and absolute discretion, to:

3.8.1 acquire any shares, unit trusts, debentures, stocks, negotiable instruments, mortgage bonds, notarial bonds, securities, certificates

and any moveable or immovable property or any incorporeal rights and to invest in such assets and to lend funds to any party or make a deposit or investment with any institution, such investment to be of such nature and on such terms and conditions as the trustee may deem fit;

3.9.3 exchange, replace, re-invest, sell, let, insure, manage, modify, develop, improve, convert to cash or deal in any other manner with any asset which from time to time form part of the trust funds;

3.9.4 borrow money;

3.9.5 pledge any trust assets, to encumber such assets with mortgage bonds or notarial bonds to utilize same as security in any manner whatsoever;

3.9.6 institute or defend any legal proceedings or otherwise to take any other steps in any court of law or other tribunal and to subject controversies and disagreements to arbitration;

3.9.7 to call up and/or collect any amounts that may from time to time become due to the trust fund;

3.9.8 settle or waive any claim in favour of the trust;

3.9.9 exercise any option and to accept and exercise any rights;

3.9.10 exercise any rights or to incur any obligation in with any shares, stocks, debentures, mortgage bonds or other securities or investments held by this trust;

3.9.11 open accounts at any bank or other financial institution and to manage such accounts and if necessary to overdraw such account;

3.9.12 draw any cheque or promissory note, to execute or endorse same;

3.9.13 take advice from any attorney or advocate or any other expert for the account of the relevant trust account;

3.9.14 lodge and prove claims against companies in liquidation or under judicial management and against insolvent or deceased estates;

3.9.15 appoint professional or other persons on a temporary or permanent basis to conduct the whole or any portion of the business of the trust under the supervision of the Trustees or to manage the investment of part or the entirety of the funds of the trust and to remunerate such persons for their services out of the funds of the trust;

3.9.16 form any company and to hold any interest in any company and to form any other trusts, to hold an interest in any other trusts or partnership or undertaking for the purposes of this trust or in the interest of any beneficiary;

3.9.17 amalgamate with any other trust with the same or similar aims as this trust;

3.9.18 commence any business or continue such business or to acquire an interest therein and for such purpose to acquire assets or to incur expenses and to partake in the management, supervision and control of any business and to conclude any partnership or joint venture;

3.9.19 accept any disposal in favour of this trust and to comply with any conditions regarding such a disposal; and

3.9.20 in general do all things and to sign all documents required to give effect to the aims of this trust.

3.10 that the trustees shall determine procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Court;

3.11 that in the event of the minor's marriage, her estate be excluded from any community of property;

3.12 the suspension of the minor's contingent rights in the event of cession, attachment or insolvency, prior to the distribution or payment thereof by the trustees to the minor;

3.13 that the amendment of the trust instrument be subject to the leave of this Court;

3.14 In the event of the death of the minor before reaching the age of majority, the trust funds shall devolve upon her estate;

3.15 that the trust property and the administration thereof be subject to an annual audit; and

3.16 that the trust shall terminate when the minor reaches the age of 18, whereupon the trust property shall pass to the minor.

4. The first and second trustees are required to furnish security to the satisfaction of the Master of the High Court. The third trustee is not required to provide security to the Master of the High Court.
5. The Master of the High Court shall in terms of the Trust Property Control Act, Act 57 of 1998 appoint an alternative person as trustee, should the appointed trustee refuse or be unable to fulfil his/her obligations as trustee.
6. The defendant shall pay the costs of the appointment of the trustees as well as the costs of the administration of the estate of the minor by the trustees at each financial year end and subject to section 22 of the Trust Property Control Act, Act 57 of 1998 (as amended).
7. The Defendant is further ordered to furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, wherein the Defendant undertakes to pay the costs of future accommodation of the Plaintiff in a hospital or a nursing home or treatment of or rendering of a service or supplying of goods including the costs of remedial school to the Plaintiff to compensate the Plaintiff in respect of 100% of the said costs after the costs have been incurred and on proof thereof, pursuant to injuries sustained by the Plaintiff in a motor vehicle collision which occurred on 07 May 2017.

8.1 The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale up to the date hereof, including the reasonable costs incurred to obtain payment of same. Such costs to include the costs of 09 March to 10 March 2023 and all reserved costs.

8.2 Plaintiff will serve Notice of Taxation on Defendant's attorneys of record.

8.3 Defendant will be allowed 180 (One hundred and eighty) days after date of taxation for payment of taxed amount.

8.4 If no payment has been made within 180 (One hundred and eighty) days as mentioned above, the agreed amount of costs or allocatur will bear interest at the prescribed rate from the date of agreement or date of allocator as the case may be, up to the date of final payment.

9. The aforementioned costs, as far as experts and counsel are concerned, shall further include and be limited to the following:

9.1 The reasonable taxed or agreed reservation, consultation, medico legal reports and preparation fees, if any, of the following experts:

9.1.1 Dr Kritzinger (Neurologist);

9.1.2 Dr Irsigler (Medical practitioner) and RAF 4 form;

9.1.3 Dr Brian Wolfowitz (ear; nose and throat surgeon);

9.1.4 Dr Jonathan Levin (Ophthalmologist);

9.1.5 Marina Genis (Clinical psychologist);

9.1.6 Rosalind Macnab (Educational therapist)

9.1.7 Maria Georgiou (Occupational Therapist);

9.1.8 Jeannie Van Zyl (Industrial Psychologist);

9.1.9 Gerard Jacobson (Actuary).

9.2 The reasonable taxed or agreed fees and reservation fee of senior-junior counsel.

9.3 The reasonable taxed or agreed fees and reservation fee for the curator ad litem.

9.4 The Trust instrument marked “X” is incorporated into this order.

E Molahlehi

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNNESBURG.

Representation:

Counsel for the plaintiff: Adv Natasha Pather Moodley Adv Willem Burger Curator ad litem

Attorneys for the plaintiff: Sonya Mestre Attorneys Inc State attorney for the defendant:

Muzafhar Khan (RAF State Attorney).

Heard on: 10 March 2023.

Delivered: 9 June 2023.

[1] The curator ad litem was duly appointed by the order made by Moorcroft J on 13 October 2022.

[2] .See A.A. Mutual Insurance Limited v Maqula 1978(1) SA 801 (A) and Southern Insurance Association Limited v Bailey N.O 1984

(1) S.A. 98 (A) at 114.

[3] 2005(5) SA 457 (SCA).

[4] 1923 A.D. 234 at 246.

[5] 1984(1) S.A. 98 (A.D.) at 119 G-H.

[6] 12601/2017 2018 ZAGPJHC 438 18 June 2018.

[7] 804/2019 2019 ZAFSHC 164 12 September 2019.

[8] 2012 6 (6A4) QOD 138 (WCC).

[9] Van Dyk v Road Accident Fund 2003 (SE8) QOD 1 (A.F.), at paragraphs [22] and [23].

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Prepared on 11 October 2026 · Esheria