

SOUTH AFRICA / JUDGMENT

H.M obo H.V v Road Accident Fund (2020/3398) [2023] ZAGPJHC 1490 (8 August 2023) [2023] ZAGPJHC 1490

COURT

South Gauteng High Court, Johannesburg

BEFORE

Whittington

CASE / FILE NUMBER

2020/3398

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

No. 2020/3398

1.

Reportable:

2.

Of interest to other
judges:3. Revised: Yes
In

the matter between: H[...] N[...] M[...] obo
H[...]
V[...] Plaintiff
and
ROAD ACCIDENT FUND
Defendant
This judgment was
handed down electronically by circulation to the parties'
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Summary:

Held: Order: Following para 61
of this judgment.

JUDGMENT

WHITINGTON, AJ:

INTRODUCTION

- [1] At issue in this matter are the future prospects of V[...] A[...] H[...] who, at the time of the hearing of this matter, was 14 years of age.
- [2] On the 20th September 2018 V[...], who was 9 years old at the time, was injured in a motor vehicle collision.
- [3] Subsequently V[...]’s mother, N[...] M[...] H[...], instituted a claim on her behalf against the Road Accident Fund (“Fund”).
- [4] The issues of the merits of the matter were settled by the parties at the pre-trial conference of 13th June 2022 with the Fund conceding the merits in favour of the plaintiff.
- [5] It further appears that the dispute relating to the liability of the Fund for the payment of general damages was settled between the parties by agreement on the 18th October 2022. The plaintiff accepted an offer by the Fund for payment in the amount of R 600,000.00 in respect of general damages.
- [6] There being no claim for past medical expenses, the remaining issues for determination relate to the estimated future loss of earnings and future medical expenses.
- [7] I note that, at the hearing of the matter, the representatives for the parties confirmed that, in the event that an order was made in the plaintiff’s favour, the subject of the future medical expenses would be accounted for by means of an undertaking by the Fund in terms of section 17 (4) (a) of the Act.

THE PLAINTIFF'S INJURIES

- [8] The hospital records indicate that on the day of the accident V[...] was initially taken to Chamela Clinic before she was transferred and admitted to the Chris Hani Baragwanath Hospital ("Baragwanath") with a dislocated hip, fractures to the right arm and left hip, a laceration to her liver and a laceration to her head.
- [9] Her score on the Glasgow Coma Scale ("GCS") at the scene was reported as 15/15 however, this dropped to 10/15 when tested at Chamela Clinic. Shortly after her arrival at the clinic, she experienced a seizure and required resuscitation.
- [10] V[...] was stabilised and transferred to Baragwanath later on the same day. On arrival at Baragwanath her GCS score had dropped to 6/15 and on further investigation she was found to have sustained a right frontal brain haemorrhage.
- [11] Thereafter, and later during the day of the collision her GSC score improved to 12/15.
- [12] V[...] received treatment for her multiple injuries and was discharged from hospital on 5 October 2018.
- [13] Following this, on 10 June 2021, V[...]’s injuries were assessed by a specialist neurosurgeon, Dr Mazwi, in accordance with the provisions of regulation 3 read with the provisions of section 17 (1A) of the Road Accident Fund Act 56 of 1996 ("Act").
- [14] I am aware that the regulations referred to above relate to claims for non-pecuniary loss. Nonetheless, the diagnosis which is recorded on the "RAF4" form has not been challenged by the Fund.
- [15] When the Fund’s representative was asked directly whether there could be any challenge to proposition that V[...] had suffered a right frontal brain haemorrhage as a result of the accident or that her subsequent seizure was as a result of this injury it was conceded that there could be no challenge.
- [16] Accordingly, it can be accepted that V[...] sustained the injuries set out in paragraph 8 above, that she suffered a seizure as a result of her injuries and that the injury to her head was severe.

THE EXPERT REPORTS

- [17] At the outset of the proceedings before me the Fund had indicated that the objection to the evidence of the experts related to the reports of the neuro surgeon, Dr Mazwi, and the neuropsychological and educational psychologist, Ms Margaret Anne Gibson.
- [18] After the objections to the reliance on expert affidavits had been withdrawn, the Fund’s representative indicated that he would limit his submissions to the evidence of Dr Mazwi and Ms Gibson.

- [19] Neither party made any submissions regarding the evidence of the remaining experts Dr Kumbirai (orthopaedic surgeon), Dr Strydom (industrial psychologist) and Mr Willem Boshoff (actuary).
- [20] Dr Mazwi's report notes that the hospital records indicate that V[...] presented with a GSC score of 12/15.
- [21] This, according to the Fund, is indicative of the fact that the head injury sustained by V[...] was moderate rather than severe on the reasoning that a score of under 9 is indicative of a severe injury. This was the main thrust of the attack on the report of Dr Mazwi.
- [22] This reasoning cannot be sustained on the information recorded in the hospital records, as set out above – if anything the total picture suggests that the injury sustained by V[...] was rather more pronounced than a finding that she presented with a GCS score of 12/15 might suggest.
- [23] In any event, I note that the conclusions reached by Dr Mazwi were based on a number of factors including a general examination of V[...] and a detailed neurological examination in order to establish the full picture of any impairment resulting from the injuries sustained - the GCS score is but one factor to consider and cannot be regarded in isolation.
- [24] It was further pointed out by the Fund that the conclusion of Dr Mazwi's report states both that V[...] sustained a severe head injury and mild head injury and that these conclusions are incompatible.
- [25] The representative for the plaintiff however made the submission that the one line stating that V[...] had sustained a mild head injury in the conclusion of a report spanning nineteen pages and which is incompatible with everything else in the report was probably an error. I am inclined to agree.
- [26] I note that it is not disputed that V[...] had reached maximal medical improvement by the time she was examined by Dr Mazwi.
- [27] It was contended on behalf of the Fund that, as the report of Dr Mazwi was unsustainable, on the reasoning set out paragraphs 19, 20 and 23 above, the report of Ms Gibson could not be sustained as the latter relied on the findings in the former.
- [28] I have already noted that the reasoning of the Fund, which is based on the submission that a GCS score of 12/15 indicates that the injury sustained by V[...] was moderate at best, is flawed and cannot be sustained. It follows that this line of the attack on Ms Gibson's report must also fail.
- [29] Ms Gibson's report notes that, at the time of the injury, V[...] was in grade 4 and had done well scholastically.
- [30] The Fund makes much of the fact that, on the evidence of her most recent report card, V[...] achieved very well in certain of her subjects.

- [31] This, so the argument goes, is indicative of the fact that any difficulties which V[...] has experienced following her injury must be negligible.
- [32] This argument fails to consider that her average has dropped from 67% at the end of grade 8 to under 60% in grade 9 and that these results are well below those attained in grade 4 in which year her average was 76%.
- [33] It is further apparent that, in certain subjects, V[...] has begun to face challenges. By way of example her mathematics results, which were previously good, dropped significantly on her most recent reports.
- [34] There was no challenge to the findings in Ms Gibson's report that the adverse effects of injuries of the kind sustained by V[...] are likely to become more manifest over the course of her development to adulthood as the divergence between injured and non-injured people would tend to be more obvious over time.
- [35] Additionally, there was no challenge to the findings that, following a battery of tests, V[...] was found to have various educational deficiencies in literacy, numeracy fund of knowledge, difficulty in comprehension of English and ability to extract meaning from print. All of these would eventually have implications in the real world and scholastically. Importantly Ms Gibson notes that educational difficulties are likely to become more evident as V[...] progresses through secondary school where the quantity and nature of the tasks she is expected to perform increases and become more abstract and complex.
- [36] Ms Gibson in her report states that the postmorbidity educational outcome for V[...] is likely to be between National Qualifying Level ("NQF") 4 to 6 which she notes is a substantial deterioration from what could have been expected if not for the injuries sustained. For the sake of clarity, Ms Gibson estimates that prior to her injury V[...] might have expected an educational outcome between NQF 7 and 8.
- [37] I note that the report records that both V[...]’s parents only achieved a grade 11 qualification and that neither are employed. She further has two sisters, one older and one younger, neither of whom have any difficulties however no further information regarding the scholastic achievements of V[...]’s siblings is recorded.
- [38] I am mindful of the fact that the family history as recorded in Ms Gibson's report would probably need to be taken into account as a factor which may operate to lower V[...]’s expected educational outcomes however this must be weighed against her scholastic achievements to date which, even now, suggest that she may be capable of more than what her parents were able to achieve.
- [39] The report of Dr Strydom, an industrial psychologist, builds on that of Ms Gibson. She estimates that prior to her injuries, and assuming an educational outcome between NQF 7 and 8, V[...] would have entered the job market at a B4 or 5 level on the Paterson Scale and progressed to D2 or 3 level.

- [40] Importantly, Dr Strydom notes that pre-morbid contingencies should be applied to accommodate uncertainties regarding specific future educational qualifications.
- [41] Regarding V[...]’s post morbid potential, Dr Strydom bases her estimations on the projection that an NQF 5 certificate would be obtained which would translate potentially to an entry into the job market at a B2 or 3 level (again on the Paterson Scale) with a progression to level C1 or 2.
- [42] Again, regarding V[...]’s post morbid potential Dr Strydom acknowledges the fact that the outcomes predicted in her report would be subject to contingencies.
- [43] The most recent actuarial calculation provided by the plaintiff applies a 20% contingency to the uninjured future earnings and 30% to the injured future earnings and notes that a contingency differential of less than 20% would be normal in the circumstances.
- [44] Based on these reports it would appear that V[...] would have, but for her injuries, been capable of attaining a degree qualification at an NQF 7 or 8 level.
- [45] It would further appear that, after her injuries, she might be expected to attain a certificate qualification at an NQF 4 to 6 level.

CONTINGENCIES

- [46] It has been noted by the court in the matter of *Masemola v Road Accident Fund*[1] that the determination of allowances for contingencies involves, by its very nature, a process of subjective impression or estimation rather than an objective calculation.
- [47] Further, in the *Quantum Yearbook*[2] the learned author points out that there are no fixed rules as regards general contingencies. However, he suggests the following guidelines:

"Sliding scale: 0,5% per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age . . .

Normal contingencies: The RAF usually agrees to deductions of 5% for past loss and 15% for future loss, the so-called normal contingencies."

- [48] In the matter of *Masemola* referred to above the court noted that the resultant consequence of allowing a higher contingency deduction for pre-morbid future loss of earnings is that a plaintiff will get a lower award for damages for loss of earnings.
- [49] The plaintiff in its heads of argument submits that the court ought to accept a 20% contingency in respect of "uninjured income" and 30% in respect of "injured income".
- [50] Given inter alia that V[...] was 9 years old at the time of her injury and her family background I am of the view that the application of a 25% contingency in respect of "injured" income would be justified.

- [51] I note that V[...]’s demonstrated work ethic has enabled her to mitigate, to a degree, the challenges she faces scholastically to this point however she is still only 14 years of age and the full impact of her injuries on her future prospects is difficult to predict. I am accordingly satisfied that the application of a 30% contingency in respect of “uninjured” earnings may be justified.
- [52] I am inclined in the circumstances to make the projected “injured” income subject to a contingency of 25%.
- [53] I am further inclined to make the projected “uninjured” income subject to a contingency of 30%.

CONCLUDING REMARKS

- [54] I note that the plaintiff entered into a contingency fee agreement with her attorneys on 7 August 2023. The matter was heard before me on 16 August 2023.
- [55] Having considered the application of the principles enunciated in the matter of Tjatji v Road Accident Fund and Two Similar Cases[3] I am of the view that the contingency fee agreement is invalid.
- [56] Having revisited the actuarial calculation in the light of the contingencies which I intend to apply as set out above I have made the following adjustments: The “Uninjured Earnings” are reduced at R 10,982,850.00 and the “Injured Earnings” remain at R 6,694,350.00.
- [57] As a result, the quantum of the future loss of earnings is reduced from an amount of R 5,466,980.00 to R 4,288,500.00.
- [58] I note that provision has been made for the establishment of a trust for the benefit of V[...] and that Standard Trust Limited have consented to act as trustees. I note further that the proposed tariff of fees appears to be in line with the customary charges noted in the matter of Master of the High Court (Pretoria Society of Advocates and others as Amici Curiae) and related matters[4].
- [59] The plaintiff’s attorneys have, in its proposed draft order, included several provisions regulating payment of their fees by the plaintiff. Such matters ought properly to be regulated by way of a fee mandate signed and agreed to between the attorney and the client.
- [60] The court is not entitled to make an agreement between the plaintiff’s attorneys and the plaintiff nor would it be proper, in the absence of a dispute between the plaintiff and her attorneys which I have been called upon to adjudicate, for me to make such an order.
- [61] I accordingly decline to act as a collection agent for the plaintiff’s attorneys. In the event that any issues regarding payment of fees arises the plaintiff’s attorneys are at liberty to approach the court for appropriate relief.

Accordingly I make the following order:

1. The defendant is to make payment into the trust account of the attorneys for the plaintiff in the amount of R 4,288,500.00 (four million two hundred and eighty eight thousand five hundred Rand).
2. The amount set out above shall be held for the benefit of V[...] A[...] H[...] pending the establishment of the trust more fully described below. On establishment of the trust, all funds held on her behalf are to be transferred to the bank account of the trust together with any interest.
3. The total amount of R 4,288,500.00 shall be payable on or before one hundred and eighty days from the date of this order.
4. The defendant shall pay interest at the rate of 10.5% per annum after one hundred and eighty days of this order to date of full and final payment.
5. The plaintiff's attorneys shall, cause a trust to be established in accordance with the provisions of the Trust Property Control Act 57 of 1988 in favour of V[...] A[...] H[...].
6. The trust instrument establishing the trust shall make provision for the following:
 - 6.1. the sole beneficiary of the trust shall be V[...] A[...] H[...];
 - 6.2. Standard Trust Limited shall be nominated as trustee and the plaintiff's mother as co-trustee;
 - 6.3. The co-trustee shall act in an advisory capacity only and for this reason shall be excused from providing security to the Master;
 - 6.4. the trustee shall immediately take all requisite steps to secure an appropriate bond of security to the satisfaction of the Master of the High Court for the due fulfilment of their obligations and ensure that the bond of security is submitted to the Master of High Court;
 - 6.5. the trustee shall be required to disclose any personal interest in any transaction involving the trust property;
 - 6.6. the contingent rights of the beneficiary shall be excluded in the event of attachment or insolvency of the minor child, prior to the date of distribution to the beneficiary;
 - 6.7. the trust deed is to be amended only with leave of the court;
 - 6.8. the trustee is to utilise the capital amount and any income of the trust for the maintenance and benefit of the beneficiary exclusively;
 - 6.9. the trustee shall be entitled to remuneration in accordance with the tariff set out in paragraph 3 of the consent signed by the proposed trustee dated 1 August 2023 only;
 - 6.10. the trust may be terminated by order of court;

6.11. the costs and charges relating to the administration of the trust, the costs and charges incidental to the formation thereof (including the costs of furnishing security to the Master and the annual retention of the security) as well as the costs of an annual audit shall be borne by the defendant.

7. The provisions referred to above shall be subject to the approval of the Master.
8. The defendant shall furnish to the plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of the future accommodation of the minor child in a hospital or nursing home, or treatment of or rendering of service or supplying of goods to the beneficiary, arising out of the injuries sustained in a motor vehicle collision on the 20th September 2018, and the sequelae thereof, after such costs have been incurred and upon proof thereof.
9. The defendant shall pay the plaintiff's agreed or taxed party and party High Court costs until to date.
10. The defendant is to make payment of the plaintiff's taxed or agreed costs within one hundred and eighty (180) days of taxation or agreement.
11. This order must be served by the plaintiff's attorneys on the Master of the High Court within thirty (30) days from the date

of the Court order.

WHITTINGTON

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of Hearing: 16

August 2023

Date of Judgment: 2023

APPEARANCES

For the Plaintiff:

Mr Kutama (Attorney with the right of appearance)

Instructed by:

Kutama Attorneys

For the Defendant:

Adv. Dokotela Sondlani

Instructed by:

Road Accident Fund

- [1] [2016] JOL 36003 (SCA) at 13
 - [2] Robert Koch (2017 Edition) at 126
 - [3] 2013 (2) SA 632 (GSJ)
 - [4] [2022] JOL 54227 (GP)
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