

SOUTH AFRICA / JUDGMENT

T.D.P obo B.O.P v Road Accident Fund (2453/2018) [2024]

ZAFSHC 254 (21 August 2024)

[2024] ZAFSHC 254

COURT

Free State High Court, Bloemfontein

BEFORE

Loubser

CASE / FILE NUMBER

2453/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Reportable/Not

reportable

Case

number: 2453/2018

In

the matter between

T.D.

P[...] obo B. O. P[...]

PLAINTIFF

And

ROAD

ACCIDENT FUND

DEFENDANT

Coram:

Loubser J

Heard: 21 May 2024

Delivered: 21 August 2024

Summary: Claim against the RAF on behalf of a young child –
RAF failing to provide its legal representative with any instructions
as
far as the hearing of the matter is concerned.
ORDER
The
Draft Order as set out below, is made an order of Court, as amended.

JUDGMENT

LOUBSER J

- [1] It is alleged in this matter that a minor child aged only two years was run over by a motor vehicle along a gravel road in Thaba Nchu on 12 July 2016. The child, B[...] O[...] P[...], was crossing the road at the time of the accident. The Plaintiff, T[...] D[...] P[...], is acting in her capacity as the mother and guardian of the child. The child will be referred to as ‘the patient’. The patient is presently nine years old.
- [2] In the accident, the patient suffered severe injuries in the form of a moderate traumatic head injury as well as a thorax contusion. These injuries resulted, inter alia, in residual symptoms, learning difficulties and behavioral changes.
- [3] On 18 March 2019, Molitsoane J made the following orders in this case by agreement between the parties: ‘The Defendant is liable to pay 100% of the Plaintiff’s proven or agreed damages, and the Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 pertaining to the future medical treatment and services rendered to the patient. With these orders having been made, the only issues which remained unresolved were the future loss of earnings, the general damages suffered by the patient and past medical costs.’
- [4] When these issues came before this Court for adjudication on 21 May 2024, counsel appearing for the Plaintiff and the attorney appearing for the Defendant approached the presiding Judge in chambers before the trial could commence. The attorney appearing for the Defendant, Ms. Megan Booysen, then informed those present that, although this case was allocated to her by the Road Accident Fund (RAF), she was unable to obtain any mandate or any instructions despite all her efforts. She further indicated that the matter has, therefore, become unopposed and that it would serve no purpose for her to attend the proceedings in Court.

[5] I find the failure of the RAF to provide clear instructions to its attorney in this matter, to be lamentable, at best to put it softly. If the Road Accident Fund was not interested in contesting the Plaintiff's claim, it should have settled the claim there and then. Instead, the Defendant chose to show its disinterest by sitting back and causing the Court the inconvenience of an unnecessary hearing for the better part of the day. In the matter of *Baba Max Mbhele v Road Accident Fund*,^[1] this Court had to deal with a similar situation. In its judgement delivered on 16 May 2024, this Court mentioned in no uncertain terms that this attitude displayed by the RAF, deserves to be frowned upon.^[2] Needless to say, the RAF did not heed this warning, and simply repeated their deplorable behavior again in this action. An appropriate order of costs will have to follow.

[6] When the matter proceeded to court, counsel for the Plaintiff made application in terms of Rule 38(2) for the ten expert medico-legal reports, supported by affidavits, to be allowed as evidence for the Plaintiff without calling the respective experts to testify. The Court granted this application in view of the uncontested nature of the proceedings, and to avoid unnecessary costs.

[7] As a result, I do not deem it necessary to deal with all the expert opinions by the Plaintiff in any detail. Suffice it to only highlight some of the findings made regarding the present condition of the patient and the prognosis for the future.

[8] The neuropsychologist opines that the cognitive deficits and the psychological distress suffered by the patient have rendered him less competitive in any employment context in comparison with his peers and pre-accident status. The occupational therapist is of the opinion that it will be difficult for the patient to secure employment in the open labour market. Not every employer is willing

to hire and reasonably accommodate a new employee with functional limitations not sustained in their employment.

[9] The industrial psychologist summarised the reports by the various experts and concluded that, but for the accident and considering the patient's pre-accident functioning, he would have been able to pass grade 12 and would have been able to complete a diploma or a degree. In the post-morbid scenario, the patient will likely leave school with a grade 10 or 11, and enter the open labour

market with a much lower educational level than anticipated but for the accident.

[10] Significantly, the overall view of the experts is not that the patient would be unemployable once he reaches the age of majority. His head injury would probably only cause him to reach a much lower educational level than would have been the case had it not been for the accident. It speaks for itself that this prognosis would have a detrimental effect on his future earning capacity and the amount of damages he will probably suffer in respect of his future loss of earnings. It is here that the Court needs to rely on the calculations of the actuary to come to a fair and balanced conclusion as far as the future loss of earnings is concerned.

- [11] The actuary provided the Court with two sets of calculations based on the expert reports, handed in during the proceedings. The first set is based on the assumption that the patient would have obtained a diploma had the accident not happened. The second is based on the assumption that he would have obtained a degree. In both instances he applied a 20% contingency deduction on the pre-morbid figure and a 40% deduction on the post-morbid figure. In both instances he calculated the future earnings of the patient until retirement now that the accident had happened, as the amount of R1 241 917.
- [12] In the diploma scenario the actuary then indicates the future loss of earnings to be R5 789 813, and in the degree scenario the amount of R9 140 322 after applying the RAF cap. The last-mentioned amount is the amount that is claimed for loss of earnings in the amended particulars of claim.
- [13] Mr. Cross appearing for the Plaintiff, expressed the view that the Court should have regard to both the scenarios. He also suggested that the pre-morbid contingency deduction should be 25% and not 20%. However, I am of the view that the diploma scenario is likely to be the correct assumption, and that the pre-morbid contingency deduction should be one of 30% based on the uncertainties pertaining to his uninjured performance in the future. So calculated, the total loss of future earnings amount to R4 972 943.
- [14] This brings me to the claim for general damages. It is trite that a court has a wide discretion to award what it considers to be a fair and adequate compensation for the injured party. In exercising this discretion, I have taken note of what the courts have awarded in similar cases in the past, and I have kept in mind that the patient is presently only some nine years of age. Although Mr. Cross had suggested an award of R800 000 under this heading, I am of the view that an amount of R600 000 would represent fair compensation for the patient's general damages.
- [15] In view of the tender age of the patient, the total amount awarded by the Court should be entrusted to a trust to be formed for the benefit of the patient. Ms. Jeanne Helen Rabie, an attorney, has already expressed her willingness to be appointed as the trustee of the trust.
- [16] Mr. Cross has provided the Court with a draft order incorporating the envisaged Deed of Trust. This draft order, as amended by the Court, will then be made an order of Court.
- [17] The following order is made:
1. The draft order as set out below, is made an order of Court, as amended.
 - 1.1 The Defendant is liable to pay 100% (One Hundred Percent) of the Plaintiff's proven or agreed damages, as per the Court Order dated 18 March 2019.
 - 1.2 The Defendant is ordered to pay the Plaintiff's attorneys the sum of R5 572 943 (Five million five hundred and seventy-two thousand nine hundred and forty-three Rand) 'capital', set out as follows:

Loss of earning capacity: R 4 972 943 General damages: R 600 000 TOTAL: R 5 572 943 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: 3[...] REFERENCE: MAT110251

1.3 In the event of default on the above payment, interest shall accrue on such outstanding amount at 11.75% (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, as per the Road Accident Fund Act, until the date of payment;

1.4 The issue of past medical costs is separated into Rule 33(4) and postponed to the pre-trial roll of 7 October 2024.

2. The Defendant is ordered to furnish the Trustee appointed in respect of B[...] O[...] P[...] (the Patient/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 Patient in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods (of a medical and non-medical nature) to the Patient arising out of injuries sustained by him in a motor vehicle collision on 12 JULY 2016 (as per the Court Order dated 18 March 2019), in terms of which Undertaking the Defendant will be obliged to compensate the Trustee in respect of the said costs after the costs have been incurred by either the Patient or by the Trustee or by any party on behalf of the Patient and on proof thereof. The Defendant is ordered to pay the reasonable travelling costs and accommodation for the Patient and his caretaker to and from the location where he is to receive treatment covered under the undertaking.

2.1 Without derogating from the generality of the foregoing, the undertaking shall include the reasonable costs of the formation of an inter vivos trust for the benefit of the Patient and the costs of administration of the said trust by the Trustee, including the costs attendant upon the provision of security by the Trustee, and auditing and / or accounting services.

2.2 A case manager is to be appointed, as per the discretion of the Trustee, of which the cost of such appointment (if necessary) is covered under the Section 17(4)(a) Undertaking.

3. The Defendant to pay the Plaintiff's taxed or agreed client and attorney cost, up to and including the trial dates of 21 May 2024 and the date when this order is made an order of court, for the instructing and correspondent attorneys, which cost shall include, but not be limited to the following:

3.1 The fees of Senior Junior Counsel, including but not limited to the preparation for trial; preparation, consideration and completion of the 'submission document', heads of argument accompanying this order; and day fee in respect of the trial date of 21 May 2024;

3.2 The cost of obtaining all expert medico legal- and any other reports of an expert nature which were furnished to the Defendant and/or its experts;

3.3 The cost of obtaining documentation / evidence, scans, considered by the expert(s) to finalise their reports;

3.4 The reasonable taxable reservation, qualifying and preparation fees of all experts whose report(s) were provided to the Defendant and / or its experts,

3.5 The reasonable cost of consultation fees between the Plaintiff's experts and the Plaintiff's the legal teams regarding the matter;

3.6 The reasonable cost of one consultation between the Plaintiff and the Plaintiff's legal team, and to consider the offer to settle;

3.7 The reasonable taxable reservation fees for 21 May 2024 of the following experts:

Dr LF Oelofse Orthopaedic Surgeon Mr J Mbhele Clinical Psychologist Dr D Mutyaba Neurosurgeon Dr Hasrod Ophthalmologist N Janse van Rensburg Audiologist & Speech Therapist Ms L Roos Educational Psychologist Dr Oganowski Ear, Nose & Throat Specialist Ms E Kingsley Rita van Biljon Occupational Therapists Mr Ben Moodie Industrial Psychologist DR. L Grootboom Neuropsychologist Johan Sauer Actuary

3.8 The reasonable taxable accommodation and transportation costs (including toll and e-toll charges) incurred on behalf of or by the Patient (including one person having to accompany him) in attending medico legal consultations with all experts, consultations with the legal representatives and the Court proceedings;

3.9 The reasonable cost for an interpreter's attendance at court and at the medico legal appointments for translation of information;

3.10 The above-mentioned payment with regard to costs shall be subject to the following conditions:

3.10.1 The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorney of record; and

3.10.2 The Plaintiff shall allow the Defendant 14 (fourteen) calendar days to make payment of the taxed costs;

3.10.3 The Defendant is to request and load payment within 14 (fourteen) calendar days from date of settlement / taxation of the bill of cost, with proof of same to be sent to the Plaintiff's attorneys;

3.11 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: 3[...]

3.12 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 Prescribe Rate of Interest Act, 55 of 1975, as amended, per annum, calculated from due date until the date of payment.

4. 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.

5. Until such time as the Trustee, JEANNE HELEN RABIE, 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 attorneys of record:

5.1 Shall be prohibited from dealing with the capital in any other manner unless specifically authorised thereto by the Court, subject to paragraph 6.2 – 6.5 hereunder;

5.2 Are authorised to invest the capital amount in an interest-bearing account with a registered banking institution in terms of Section 86(4) of the Legal Practice Act, Act No: 28 of 2014, to the benefit of the Patient and will only be allowed to pay such monies over to the Trustee of the trust to be created in terms of paragraph 5 of this order, once the Master of the High Court has issued the Trustee with the necessary letters of authority;

5.3 Are further authorized to pay the costs to set security of the funds held in trust, from the capital received, to the relevant insurer by the Trustee of the trust to be created, which costs in turn must be refunded by the Defendant to the Plaintiff in terms of paragraph 3;

5.4 From date of receiving the capital and up and till the Master of the High Court has issued the Trustee with the necessary letters of authority, are authorised and ordered to make payment in the amount of R 10 000.00 per month as, as well as such other amount(s) that may reasonably be indicated and/or required for the wellbeing of the Plaintiff and/or in his/her interest which a diligent Trustee would have paid had such Trustee been appointed;

5.5 Are authorised to make payment of the attorney and client costs, being fees, disbursements and interest on paid disbursements, of the Plaintiff's attorneys.

6 The nominated Trustee is ordered to furnish security to the satisfaction of the Master of the High Court.

7 The nominated Trustee shall attend to the creation of an inter vivos trust in order to protect the awarded funds to the exclusive benefit of the Plaintiff.

8 The trust to be erected for the benefit of the Patient on these papers, with powers which shall include (but not be limited to) the powers as referred to in the Trust Deed attached hereto as Annexure 'A' are regarded as incorporated into this order.

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 2, 3, 4 and 6 of this order, which costs will include the fees of the Trustee.

10 The reasonable remuneration to which the Trustee will be entitled in respect of the execution of the Trustee's official duties is as follows:

10.1 An acceptance/establishment fee of 1% (Excl. VAT) on all capital introduced into the Trust.

10.2 An annual administration fee based on a percentage of the value of the assets under administration, which percentage will be subject to the following sliding scale:

10.2.1 R0.00 – R500 000.00 – 1.5% (Excl. VAT)

10.2.2 R500 000.00 – R1 000 000.00 – 1.25% (Excl. VAT)

10.2.3 R1 000 000.00 – 1% (Excl. VAT)

10.3 The undertaking contemplated by section 17(4)(a) of Act 56 of 1996 will be administered by the Trustee, and the Trustee or his agent/attorney will be entitled to an administration fee of 10% on all successful claims.

10.4 Travel expenses for purposes of attending to Trust related matters.

10.5 A termination fee of 2% (Excl. VAT) on the assets of the Trust at the time of termination/dissolution of the Trust.

10.6 The Trust shall pay to the Trustee the Trustee's usual charges for any work performed by the Trustee beyond the ambit of the Trustee's official duties, in her capacity as attorney acting on behalf of the Trust.

P.J. LOUBSER, J

For the Plaintiffs: Adv. C. G. Cross Instructed by: VZLR Inc, Monument Park c/o Du Plooy Attorneys, Bloemfontein For the Defendant: No appearance

[1] Mbele v Road Accident Fund [2024] ZAFSHC 161.

[2] Ibid para 6.

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