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**REPUBLIC OF SOUTH AFRICA**



**IN THE SOUTH GAUTENG HIGH COURT  
(JOHANNESBURG)**

**CASE NO: 25846/10**

**DATE:02/09/2011**

In the matter between

**ALFRED KGOMO** on behalf of  
**L M K**

**PLAINTIFF**

and

**ROAD ACCIDENT FUND**

**DEFENDANT**

*Injured person:* 14-year-old boy, learner at school, knocked down by motor vehicle while jogging.

*Damages for bodily injuries arising from accident – quantum of – 14-year-old boy at time of accident - brain injury and soft tissue injuries to shoulder elbow and pelvic area – future loss of employability and earning capacity – assessment of – pre-accident*

*prospects of employment – unemployable post accident – contingency deduction – factors affecting - 20% deduction allowed.*

*General damages – recent awards in similar matters – modern tendency enunciated by SCA in RAC v Marunga 2003 (5) SA 164 (SCA) – awards made prior to 2003 overtaken by modern tendency of awarding higher amounts – in casu award of R800 000 appropriate.*

*Costs – Defendant’s liability for costs of trust to be created and administration thereof confirmed.*

*Issues to be resolved (merits having been settled on basis of defendant accepting liability for 90% of proven damages):*

1. Loss of earning capacity,
2. General damages.

*Summary of compensation awarded:*

Past hospital and medical expenses	R 124 071,30
Loss of earning capacity	R 1 458 956,00
General damages	<u>R 800 000,00</u>
TOTAL	<u>R 2 383 027,30</u>

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## J U D G M E N T

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### **VAN OOSTEN J:**

[1] In this action the plaintiff claims damages in his personal and representative capacity as father and natural guardian of his son (M), arising from bodily injuries M sustained on 12 October 2006, when he was knocked down by the insured vehicle while jogging alongside the road. The issue of negligence was settled between the parties prior to the commencement of the trial on the basis of the defendant accepting liability to pay 90% of the plaintiff’s duly proven damages. The defendant moreover agreed to furnish an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 in regard to future medical treatment. Finally, agreement was reached between the parties concerning the necessity of and formalities relating to the creation of a trust and the appointment of a trustee to administer the award made to M which are all reflected in the order I propose to make at the end of this judgment.

[2] The matter proceeded before me on quantification of the remaining heads of plaintiff’s damages. The plaintiff called three witnesses to testify: firstly, Dr Versveld, an orthopaedic surgeon, secondly, Ms Jamotte, an industrial psychologist, and lastly, the

plaintiff, Mr Alfred Kgomo. The defendant did not call any witnesses. The reports by and calculations of the actuaries were not in dispute. At the conclusion of the evidence the amount of the plaintiff's claim in respect of past hospital expenses (R137 857 less 10%=R124 071,30) was accepted as having been duly proven and was therefore no longer in dispute. The remaining heads of damages I am accordingly required to determine are firstly, M's future loss of earnings and, secondly, general damages.

[3] Before I delve into the monetary issues some background facts are necessary: M was 14 years old at the time of the collision. He grew up in a stable family background. He was a learner at the Bosmont Primary School in Grade 7. He suffered from a learning disability and his progress as a student, was average. He was good at sport. After the accident he remained off school for the remainder of 2006 as well as the whole of 2007. He returned to school in January 2008 and although struggling to cope, passed Grade 8. The next year he failed Grade 9. In 2010 he entered for Electrical Engineering at Whitestone College, but failed. He is presently repeating Grade 9 at the RW Fick Secondary School.

[4] As a result of the accident M primarily sustained a severe head injury with progressive extra-dural haemorrhage resulting in compression of the brain. Treatment consisted of intubation, ventilation and emergency CT scanning. The scan revealed the presence of a haematoma and an emergency craniotomy was performed in an attempt to evacuate the haematoma. Ventilation was initially provided through a endotracheal tube and subsequently by a tracheostomy with complications resulting to the sub-glottic stenosis and eventually damage to the vocal cord. M recently developed breathing problems requiring the insertion of a T-tube to assist with breathing, which is still *in situ* but will probably be removed later this year. The secondary injuries M sustained were abrasions to the left shoulder and soft tissue injuries to the left shoulder, right elbow and left pelvic area. Dr Versveld testified as to the orthopaedic injuries and their *sequelae*, which he said *inter alia* resulted in mild spasticity and distortion of the pelvis causing M to walk with a subtle ataxia or sway of the left leg.

[5] After the accident M was taken by ambulance to the Chris Hani Baragwanath Hospital, where he was admitted and treated. The treatment included physiotherapy

and occupational therapy. He was discharged from hospital on 1 February 2007 and by then he was able to walk for short distances. Repeated admissions of short duration followed thereafter essentially for treatment of the ventilation problems.

[6] The *sequelae* of the injuries sustained include neuro-cognital deficits and neuro-psychological difficulties, manifesting in attention deficits both verbally and visual, an inability to plan and organize and difficulty inhibiting unwanted responses. His memory has deteriorated both visually and verbally. He presently experiences tiredness from walking with a drag, has difficulty in adapting to unnatural inactiveness and gets cramps while writing.

[7] This brings me to the plaintiff's claim in respect of M's future loss of employability and earning capacity. From the joint minutes of the educational psychologists, occupational therapists and industrial psychologists it is common cause that M will not benefit further from mainstream schooling and that practically it is unlikely that he will ever be employed in the open labour market in the future or generate any meaningful earnings during the course of his adult life. He will probably require some level of care and/or supervision. Provision for psychotherapy is advised. The industrial psychologists are in agreement that pre-accident he probably would have obtained at least an N2, if not an N3 qualification at a Technical College and that he would have qualified in a trade. They further agree that in the *but-for* scenario he would have obtained at least a Grade 9 level of education. Ms Jamotte however, was of the view that he would have embarked on technical studies that would have enabled him to progress to an N2 if not an N3 level for technically orientated work. Initially, she testified, he would have worked, at the semi-skilled level in the non-corporate sector where according to the Quantum Year Book, 2011, earnings range from R14 200 – R38 400 – R110 000 per annum. Having worked in that sector for a number of years, she was of the view he could have entered the open labour market at more competitive wages. That would have placed him within the manufacturing and operations category with earnings ranging from the A2, to at best, the B4 level.

[8] The defendant's industrial psychologist has expressed divergent views recorded in the joint minute as to M's pre-accident prospects of employment and earnings. The defendant, however, did not call her to testify. That of course leaves the evidence of Ms Jamotte uncontroverted. Only certain minor aspects, all of doubtful relevancy, were dealt with in cross examination of Ms Jamotte. It is only necessary to refer to one thereof, by way of an example. It concerned Ms Jamotte's view that M's stable family background and the achievements of his immediate family members in their various fields of employment provided relevant considerations in assessing the pre-accident probabilities of M successfully entering the labour market and obtaining employment. I can find no fault with the approach adopted by Ms Jamotte. The general approach she adopted in the evaluation and assessment in any event was on the conservative side, and I accordingly do not hesitate to accept her evidence as a basis for awarding damages under this heading.

[9] The plaintiff's actuary, in a revised report which has been admitted, based his calculations on the conclusions arrived at by Ms Jamotte, to which I have already referred. The pre-accident earnings values he calculated, at four year intervals, from 1 January 2012 being the assumed date of commencement of employment, until 2040, starting at the lower quartile non-corporate income level and increasing to finally the Paterson B4 median package. A contingency deduction of 20% has been factored into the computation. Counsel for the defendant contended for a contingency deduction of 25% which she submitted was justified by making allowance for periods of M's possible future unemployment. Ms Jamotte dealt with this aspect in her evidence and was of the view that the possibility of unemployment could be discarded as M would have had some form of education and qualification upon entering the labour market which would have elevated him above the ordinary high incidence of unemployment in the unskilled labour market. I am satisfied that a contingency allowance of 20% is reasonable and appropriate in the circumstances of this case (see *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (A) at 116G-117A; *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA)) I accordingly accept the calculated net loss in respect of M's future loss of employability in the sum of R1 621 063 and the amount awarded, having allowed for the defendant's 90% liability, accordingly is R1 458 956.

[10] With regard to general damages, counsel for the plaintiff submitted that the facts of this matter are almost identical to those in *Grobler v Road Accident Fund* (GSJ) (case no 2008/9231, dated 29 April 2010) where Tsoka J awarded general damages in the sum of R800 000 (the inflation adjusted current value is R834 400). In that matter a child aged 15 years sustained a head injury with severe traumatic brain injury as well as a fractured pelvis and fractured tibia and fibula. The child suffered from permanent educational disability, permanent employment disability with a permanent loss of amenities of life. The *sequelae* of the injuries suffered by M, in my view, are remarkably similar, although regard must be had in his case, to the pre-existing learning disability he was suffering from. In the light of these considerations a fair and just compensation in respect of general damages in my view, will be R800 000. Counsel for the plaintiff by way of comparison also relied on awards in respect of general damages made in the following cases that dealt with brain injuries: *Webb and Another v Road Accident Fund* (GSJ) (case number 03/13786, dated 14 June 2006): general damages awarded R500 000 (inflation adjusted current value: R698 000); *Torres v Road Accident Fund* 2007 (6A4) 1 (GSJ): general damages awarded (brain damages only) R600 000 (inflation adjusted current value: R800 400) and *Van der Mescht v Road Accident Fund* 2010 (6J2) QOD 42 (GSJ): general damages (moderate brain damage) awarded R400 000 (inflation adjusted value R417 000).

[11] Counsel for the defendant contended for a lesser award of R600 000 in respect of general damages. In support of the contention counsel relied on a number of judgments delivered prior to the SCA judgment in *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA), where the modern tendency to award higher quantum of damages was taken into account in the making of an award for general damages. In my view the awards made in the cases relied upon by counsel for the defendant have been overtaken by the modern tendency of awarding higher amounts, as is reflected in the recent awards I have referred to above.

[13] As to costs, I requested counsel to address further argument on the defendant's proposed liability (set forth in a draft order prepared by counsel for the plaintiff) in

respect of the costs relating to the creation of the trust I have referred to, the administering thereof and the furnishing and renewing of security. Counsel for the plaintiff in supplementary heads of argument, has addressed this aspect fully and referred me to the leading case of *Reyneke NO v Mutual and Federal Insurance Co Ltd* 1992 (2) SA 417 (T) where Van Dijkhorst J held that those costs indeed form part of the total award of damages. Counsel for the defendant very properly conceded the defendant's liability for those costs and referred me to the order made by Msimang AJ in *Arendse NO v Road Accident Fund* [2002] 1 All SA 436 (C), to the effect that the defendant's liability included the payment of the attorney's trust-administration costs.

[12] In the result I make the following order:

1. Defendant is ordered to pay to the first plaintiff the sum of R 124 071,30.
2. The defendant is ordered to pay to the second plaintiff, L M K, ("the patient"), the sum of R 2 178 956.
3. The patient is declared to be incapable of managing his own affairs, and Martha Prinsloo of Absa Trust, 28<sup>th</sup> Floor, Volkskas Centre, 230 Van der Walt Street, Pretoria, is appointed as trustee to the patient, who is to provide security to the satisfaction of the Master of the High Court for the due fulfillment of her obligations in terms of the Trust Property Control Act 57 of 1988, as amended.
  - 3.1 The trustee's remuneration shall be limited to the amount payable to curators as is reflected in Government Gazette Notice R1602 of 1 July 1991, specifically paragraphs 3(a) and 3(b) of the Schedule thereto.
4. Defendant shall furnish the trustee and/or the patient with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996, to pay 90 % of the costs of the future accommodation of the patient in a hospital or nursing home, or treatment of or rendering of a service or supplying of goods to him, arising out of the injuries he sustained in the motor vehicle collision on 12 October 2006, and the *sequelae* thereof, after such costs have been incurred and upon proof thereof.
5. The undertaking referred to in paragraph 4 above shall include the payment of:
  - 5.1 the costs of the creation of a trust and the appointment of the trustee, to *inter alia*, protect, administer and/or manage the capital amount referred to in paragraph 2 above and

5.2 the costs of the trustee in administering the patient's estate and the costs of administering the statutory undertaking furnished in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996, such costs to be limited to the prescribed tariff applicable to Curators as reflected in Government Notice R1602 of 1 July 1991, specifically paragraphs 3(a) and 3(b) of the Schedule thereto; and

5.3 the costs of the trustee furnishing annual security and obtaining an annual security bond to meet the requirements of the Master of the High Court in terms of the Trust Property Control Act 57 of 1988, as amended.

6. The plaintiff's attorneys of record shall cause a trust to be created on behalf of the patient to, *inter alia*, protect, administer and/or manage the capital amount referred to in paragraph 1 above.

7. The defendant is ordered to pay plaintiff's taxed or agreed party and party costs on the High Court scale, such costs to include:

7.1 the costs attendant upon the obtaining of payment of the full capital amount referred to in paragraph 2 above; and

7.2 the costs of the medico-legal reports and qualifying fees of Dr G Marus, Mr BR Mallinson, Dr GA Versfeld, Ms E Bubb; Ms A Lamotte and Mr NJ Morland of Alison Crosbie Inc; and

7.3 the costs of the radiological report of Dr P Wilson; the actuarial report of Algorithm Consultants & Actuaries CC; the expert joint minutes; and

7.4 the costs consequent upon the employment of senior counsel.

8. Plaintiff shall, in the event that the costs are not agreed upon, serve the notice of taxation on defendant's attorneys of record and the defendant is allowed seven days after taxation of the plaintiff's bill of costs to make payment thereof.



***COUNSEL FOR THE PLAINTIFF***

***ADV JN DE VOS SC***

***PLAINTIFF'S ATTORNEYS***

***JOSEPH'S INC***

***COUNSEL FOR THE DEFENDANT***

***ADV (Ms) N MABENA***

***DEFENDANT'S ATTORNEYS***

***SHAI & MNGOMEZULU INC***

***DATE OF HEARING***

***24 & 25 AUGUST 2011***

***DATE OF JUDGMENT***

***2 SEPTEMBER 2011***