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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 60812/14

DATE DELIVERED: 1 NOVEMEBR 2016

IN THE MATIER BETWEEN

**M. N. P. N. obo L. N. N.**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

JUDGMENT

VAN NIEKERK, AJ

[1] Plaintiff in her representative capacity as the mother and natural guardian of a boy who was born on [...] 2003 (*"the minor"*) instituted an action against the Defendant, a juristic persona in terms of the provisions of Act 56 of 1996 (*"the Act"*) pursuant to a collision between a motor vehicle and the minor on the 9<sup>th</sup> day of December 2007 as a result of which the minor was injured as set out infra. In the particulars of claim it was alleged that the collision was caused due to the sole negligent driving of the insured vehicle as a result of which the minor sustained a severe brain injury, head injury, fracture of the ribs, shock and psychological trauma and a claim was instituted against the Defendant for future medical, hospital and related expenses in the amount of R3 600 000.00, loss of earnings

and/or earning capacity in the amount of R12 000 000.00, general damages in the amount of R3 500 000.00, in total R19 100.00. By agreement between the parties an order was made on the 29th of April 2015 in terms where of it was declared that the Defendant is liable for 100% of the damages suffered in consequence of the injuries sustained by the minor as a result of the motor vehicle collision referred to *supra*, and it was further ordered that the question relating to the quantum of the Plaintiff's claim be determined separately in terms of the provisions of Rule 33(4) and such issue was postponed *sine die*. It was further ordered that the Defendant pay the Plaintiff's costs of suit attributable to the question of liability.

[2] The issue relating to the quantum of damages commenced before this Court on 27 October 2016, and both parties 'counsel confirmed that the issues between the parties' were narrowed as a result of an agreement reached between the parties prior to the commencement of the trial as follows:

[2.1] In respect of future medical, hospital and related expenses it was agreed that the Defendant would furnish the Plaintiff with a suitably worded written undertaking in terms of Section 17(4)(a) of the Act;

[2.2] The Defendant has admitted the correctness of the contents of all the expert reports filed on behalf of the Plaintiff, including the joint minutes filed by various of the experts, as a result of which there would be a no factual dispute relating to the nature and extent of the injuries sustained by the minor, nor the *sequelae* thereof;

[2.3] In respect of the claim for a loss of future earnings it was agreed that such claim should be computed and calculated on the basis as set out in an expert report of an Industrial Psychologist, Mr J J Prinsloo, and Mr G W Whittaker, an Actuary, with the exception of the contingency deduction which has been applied by the Actuary in

an updated report filed by such expert witness and that only the contingency percentage should be decided by the court.

[3] The effect of the aforesaid agreements reached between the parties was namely that the only issues which this Court had to determine, was the appropriate contingency adjustment to be made to the actuarial figures in respect of the minor's future loss of earning capacity, the quantum in respect of the general damages suffered by the minor, and the issue of costs of the action. As a result of the aforesaid, the remaining issues was capable of being disposed of on the basis of argument alone, without the necessity of hearing *viva voce* evidence, and it is commendable that the legal representatives of both parties were able to curtail the proceedings and resultant costs substantially by applying their collective sound logic, sense of reason and experience to the issues in question. The parties further assisted the Court by preparing a draft order which provides for *inter alia* the appointment of a trustee to safeguard any award this Court makes, the provision of a Certificate in terms of Section 17(4)(a) of the Act, and as a result of which all that remains is for this Court to determine the quantum of the general damages as well as the contingency percentage deduction in respect of the loss of future earnings, and that the sum total of these amounts be inserted into the draft order. The remaining issues are dealt with separately hereunder:

**GENERAL DAMAGES:**

[4] In terms of Section 17(1)(b) and 17(1A) of the Act, general damages can only be claimed for serious injury, and it was common cause between the parties that the injuries sustained by the minor constitutes "*serious injuries*" as contemplated in terms of the Act. It is trite law that it is the duty of the Court to award compensation under the heading of so-called "*general damages*" which is fair and reasonable compensation for pain, suffering,

discomfort, loss of amenities, shock and psychological trauma caused by the accident and that the particular circumstances of the case must be considered. It is further established law that comparable cases and the decrease in the value of money since such cases were decided could be considered, but that awards made in previous cases can only afford broad and general guidelines in the view of the differences which inevitably arise in each case.

[5] For purposes of awarding damages under the heading of so-called "*general damages*" the expert reports referred to *supra* provides detailed information about the minor child's injuries, which were:

[5.1] A severe diffuse axonal brain injury;

[5.2] A focal brain injury demonstrated by an intracerebral haematoma;

[5.3] A chest injury consisting of pulmonary contusion;

[5.4] Lacerations of the left forehead and below the left side of the nose and above the lip.

[6] After sustaining the aforesaid injuries in the accident, the minor was taken to a hospital in Nongoma and immediately transferred to a hospital in Empangeni where CT-scans of the brain were done. Thereafter a request was made for a transfer to the Albert Luthuli hospital in Durban due to the severe nature of the injuries. After viewing the scans in Durban the neurosurgeons concluded that the minor's head injury was of such a serious nature that they would not be able to do anything for him and consequently the brain injury was treated non-operatively in Empangeni where the minor child remained in the Intensive Care Unit for seven days and thereafter the child spent another week in the General Ward. The child was thereafter returned to Nongoma where he remained for a further six weeks in hospital before he was discharged. All indications are that, at the time

when the child was discharged, he was severely regressed and presented as new born baby who had to learn to sit, to crawl, to walk and was in nappies as a result of a lack of control. According to the reports, the minor was unconscious for more than two weeks, which is indicative of a severe head and brain injury.

[7] The expert witnesses agreed that the brain injury caused irreversible and significant long term neurocognitive and neuro-physical *sequelae* and that the focal brain injury has resulted in a spastic hemiplegia on the left. A neurosurgeon described the minor's injury as "a very severe brain injury" which implies permanent brain damage with devastating effects in multiple areas.

[8] According to an ear-, nose- and throat specialist the minor suffers from spontaneous nystagmus of both eyes, a condition which causes an involuntary jumping movement of the eyes which is also a consequence of the serious head injury. This condition is irreversible.

An ophthalmologist diagnosed a left homonymous hemianopia of the minor which is incurable, causes a reading problem, and will have a negative effect on the child's employment possibilities and his enjoyment of life's amenities.

[9] The minor presents with a depleted communication profile indicating receptive and expressive language deficits, cognitive linguistic deficits, executive dysfunction and pragmatic difficulty in personal situations, and these problems have a negative impact on the minor's scholastic functioning and will be detrimental to his education, vocational training, employability and ultimately on his dependence.

[10] In terms of a neuropsychological assessment, it was found that the minor is severely impaired in the fields of fine motor speed - dexterity for both hands and especially for the hemiparetic left side, and in general experience problems with co-ordination, concentration, ability to reason, slow comprehension, and an indication of disturbances in the minor's

behavioural functions particularly in the domain of temper control. According to the reports, the child spent five years in Grd. 1 where he was teased by the other scholars, acted towards them aggressively or withdrew and cried. The minor is not able to cope in a normal mainstream school environment and will inevitably receive limited specialised schooling.

[11] The minor suffers from chronic headaches and his left arm and left leg are underdeveloped. He struggles to pick up a pin or a pen with his left hand from a flat surface and his fine co-ordination is poor. He has a poor sense of balance and he walks with a spastic hemiplegic gait on the left. This, in simple terms, means that the minor cannot walk normally, run, play, participate in sport or do many of the things that an uninjured normal person take for granted.

[12] The experts further agree that the minor child runs a 5% to 8% chance of developing epilepsy in future. Presently the child experience periodic seizures.

[13] The effect of the aforesaid injuries and the *sequelae* thereon on the minor's life is devastating. As stated *supra*, he is unemployable in the open market. The minor will need assistance and care for the rest of his life. He is unable to play like a normal child with his peers and neither will he be able to enjoy a normal adult life. The compound effect of all of these disabilities in relation to the issue of loss of amenities, pain and suffering, and emotional trauma is obvious.

[14] This Court was referred to various precedents relating to the issue of the *quantum* of damages. As can be expected, Plaintiff's Counsel referred this Court to precedents where damages in present day terms amounting of R1.8 million was awarded, whereas Counsel acting on behalf of the Defendant referred to various precedents where less than R 1 million was awarded. This Court can only be guided by these precedents, as

none of those precedents are factually on all four to the matter *in casu*. Considering the proverbial low water marks and high water marks of the precedents referred to by Counsel acting on behalf of the respective parties, and considering the facts *in casu*, this Court is of the opinion that a fair and reasonable amount of damages to be awarded under the heading of "*general damages*" amounts to R I 400 000.00.

### **CONTINGENCY ISSUE:**

[15] It is common cause between the parties that the actuarial calculation of the value of the minor's pre-accident income earning amounts to RS 819 748.00. This is the amount as calculated in the actuarial report of Algorithm Consultants and Actuaries dated 12 August 2016. This Court must determine the so-called "*actuarial percentage*" for general contingency deductions for items such as a loss of earnings, savings in relation to travel to and from work, risk of future retrenchment and resultant unemployment, and other factors which may negatively and/or positively influence the earning capability of the minor should he have not been injured. All that the Court can do is to make an estimate.

***Vide: Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A) at p. 113 G - 1***

[16] Again I was referred by Counsel to precedents where as much as 50% was applied for a contingency deduction, and referred to the Quantum Yearbook 2016 at p. 124 where the learned author Koch states: "*It has become customary for the court to apply the so-called sliding scale to contingencies which entails a half percent per year to retirement age that is 25% per child, 20% for a young and 10% in the middle age.*"

[17] It is obvious that there is risk involved in calculation of future earnings, based on life's truth that intervening events may reduce an individual earning capacity whereas at the same token, other events may increase an individual's earning capacity. This is all speculative. In my opinion the effect of this speculation should not be to substantially

reduce a legitimate claim for damages, the purpose of which is to take care of a disabled individual for the rest of that individual's life. I further cannot subscribe to the notion that some form of calculation or formula should apply in terms whereof, the younger the child the greater the percentage contingency should be applied. I am of the view that there is merit in the submissions made on behalf of Counsel for the Plaintiff who argued that it is unfair to provide for the risk of survival of a young child by increasing the percentage contingency where the actuarial calculation of future earnings is already based on an actuarial life expectancy and which therefore results in a proverbial "*double jeopardy*" for a young claimant.

[18] Counsel for Plaintiff invited me to apply a 20% contingency deduction and I cannot fault this suggestion. Counsel for Defendant invited me to deduct a 30% contingency deduction, the effect of which would be to substantially decrease the available funds for the minor which is supposed to provide for his living expenses for the remainder of his life. I am of the view that it would not be fair and reasonable.

[19] In the premises, I find that the contingency deduction in respect of the minor's claim for a loss of future earnings should be 20% and the minor's net loss of income in future will amount to the sum of R4 655 798.00.

**COSTS:**

[20] Defendant failed to make any formal offer and placed all issues in dispute in the pleadings. Defendant's Counsel properly conceded that the Defendant should be liable for all the costs incurred, including costs of the expert employed on behalf of the Plaintiff.

[21] In the result I make an order in terms of the draft order handed in by agreement between the parties which I have marked "x" with the proviso that the amount in paragraph 1 thereof should read R\_6055 798.00.

P A VAN NIEKERK

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

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P. A. Van Niekerk

Acting Judge of the High Court,

Gauteng Division, Pretoria.

Hearing: 28 October 2016

Judgment: 1 NOVEMBER 2016

HEARD ON: 28/10/2016

FOR THE APPELLANT: ADVOCATE G. ALBERTS SC

INSTRUCTED BY: SAVAGE JOOSTE AND ADAMS

FOR THE RESPONDENT: ADVOCATE F. MATIKA

INSTRUCTED BY: TAU PHALANE INC. ATIORNEYS

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

Before the Honourable Mr. Justice

**P.A van NIEKERK,**

**DATE: 27 October 2016**

**CASE NO.: 60812/2014**

In the matter between:

**N.P. N.MBATHA o.b.o L. N. N.**

**PLAINTIFF**

and

**ROAD ACCIDENT FUND**

**DEFENDANT**

**DRAFT ORDER**

By agreement between the parties:

1. The Defendant is ordered to pay the Plaintiff an amount of R6055 79800 for the benefit of the minor, L. N. N., which amount shall be paid within 14 days to the credit of the trust account of the Plaintiffs Attorneys of record, *Savage Jooste & Adams Inc*, Pretoria, whose trust account details are as follows:

Nedbank name                      NEDCOR - ARCADIA

Account type                        TRUST ACCOUNT

Branch code                         16-33-45-07

Account no                          [1...]

Reference no

Mr Makole/KM262

2. In the event that the aforementioned amount in paragraph 1 above is not paid timeously by the Defendant, interest will be payable on the full outstanding amount at the rate of 10.25% calculated from the due date up to and including the date of payment.

3. The award as pertaining to the minor, (L. N. N.) shall be properly shall be protected by means of a Trust ("the trust").

4. It is hereby authorized that Jean Vosloo, of Standard Bank Trust, is to be the Trustee of the trust and is to establish the trust of which **L. N. N.** shall be the sole beneficiary. A copy of the trustee's consent is attached hereto and marked as Annexure "A". The appointment of the Trustee is subject thereto that the Trustee furnishes security to the satisfaction of the Master of the High Court. It is in the Trustee's sole and absolute discretion to:

4.1 Acquired any shares, until trust, debentures, stocks, negotiable instruments, mortgage bonds, notarial bonds, securities, certificates and any moveable 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.

4.2 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 forms part of trust funds:

4.3 Borrow money;

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

- 4.5 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;
- 4.6 To call up and/or collect any amounts that may from time to time become due to the trust fund;
- 4.7 Settle or waive any claim in favour of the trust;
- 4.8 Exercise any option and to accept and exercise any rights;
- 4.9 Exercise any rights or to incur any obligation in connection with any shares, stocks, debentures, mortgage bonds or other securities or investments held by this trust;
- 4.10 Open account at any bank or other financial institution and to manage such accounts and if necessary to overdraw such account;
- 4.11 Draw any cheque or promissory note, to execute or endorse same;
- 4.12 Take advice from any attorney or advocate or any other expert for the account of the relevant trust account;
- 4.13 Lodge and proof claims against companies in liquidation or under judicial management and against insolvent or deceased estates;
- 4.14 Appoint professional or other person on a temporary or permanent basis to conduct the whole or any portion of the business of the trust under supervision of the trustee 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;
- 4.15 Form any company and to hold any interest in any company and to form

any other trust to hold an interest in any other trust or partnership or undertaking for the purposes of this trust or in the interest of any beneficiary;

4.16 Amalgamate with any other trust with the same or similar aims as this trust;

4.17 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;

4.18 Accept any disposal in favour of this trust and to comply with any conditions regarding such disposal;

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

5. The Defendant is ordered to furnish the trustee (to be appointed in terms of paragraph 3 hereto) with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, No 56 of 1996, to compensate the minor for **100%** of the cost of future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the minor resulting from injuries sustained by her as a result of an accident that occurred on the 09 DECEMBER 2007. The aforesaid Costs shall include:

5.1. The reasonable remuneration of and the reasonable costs incurred by the trustee of the Trust to be formed in administering and managing the capital amount referred to in paragraph 1 above, which remuneration and costs shall not exceed the equivalent amount which a *curator bonis* would have been entitled in terms of and as determined by the **Administration of Estates Act, Nr 66 of 1965**, as amended, and the prescribed tariff applicable to *curators* as contained in the

**Government Gazette Notice R1602 of 1st of July 1991**, and, more specifically, paragraphs(a) and (b) of the schedule thereto;.

6. The Defendant is ordered to pay the Plaintiff's taxed or agreed Party &

Party Costs on the High Court Scale, which shall include the following:

6.1 The costs of consultations, preparation and drafting of expert reports, addendum reports (if any), joint minutes, preparation and reservation (if any) and attendance of Court for the following experts:

6.1.1 Dr. J J Du Plessis, Neurosurgeon;

6.1.2 Dr Mazabow, Clinical Neuropsychologist;

6.1.3 Dr J S Enslin, Ear Nose & Throat Surgeon;

6.1.4 Dr Konig, Ophthalmologist;

6.1.5 Archer & Mann, Audiologist;

6.1.6 Mirriam Close, Psychiatrist;

6.1.7 Malusi Mokgata, Speech Therapist;

6.1.8 Elmarie Prinsloo, Educational Therapist;

6.1.9 Anneke Greeff, Occupational Therapist;

6.1.10 Kobus Prinsloo, Industrial Psychologist;

6.1.11 Algorithm, Consultants & Actuaries.

6.2 The travelling and accommodation costs of the Plaintiff and the minor in attending all the medico-legal appointments and attendance of Court;

6.3 The Costs of Senior Counsel;

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BY ORDER

REGISTRAR

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obo Plaintiff: Adv G W Alberts SC

082 499 2000

Brooklyn Chambers

**Standard**

**Trust**

Savage Jooste & Adams Inc P O Box 745

Pretoria

0001

Oocex 58 Pretoria

Trust for N.P. N.M.obo L. N. N..

We confirm that Standard Trust Limited will take up the appointment as Trustee of the Trust

to be created for the benefit of L. N. N..

We place on record that as Trustees, Standard Trust Limited should be entitled to levy our full tariff of fees for the administration of the Trust. We operate within the following tiered structure and charge fees monthly in arrears as indicated below:

- 1% a year on any value up to R1.5 million (subject to a minimum fee of R540.00 per month)
- 0.9% a year on that value more than R1.5 million

I hereby declare Standard Trust limited is prepared to:

- Create a Trust for the benefit of the beneficiary to receive and manage the assets from the  
  
RAF.
- Act as Trustee to manage and invest the assets according to the guidelines of the court order for the benefit of the beneficiary.

Yours faithfully

Jean Vosloo

18/10/2016