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**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION, MAHIKENG**

**CASE NO: 1321/2018**

Reportable: YES/**NO**

Circulate to Judges: YES/**NO**

Circulate to Magistrates: **YES**/NO

Circulate to Regional Magistrates: YES/**NO**

**In the matter between:**

**B[...] C[...] M[...]**

**PLAINTIFF**

**Obo O.M.M**

**AND**

**MINISTER OF POLICE**

**DEFENDANT**

**Reserved: 26 JUNE 2024**

**Delivered:** This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **20 SEPTEMBER 2024**

**JUDGMENT**

**DJAJE AJP**

[1] This is an action for damages by the plaintiff on behalf of her minor son (O.M.M) who sustained gunshot injuries whilst he was seven (7) years old during community protests. The injuries sustained by the O.M.M were caused by the members of the South African Police Service during their scope of employment with the defendant. The merits were conceded 100% in favour of the plaintiff and the only issue to be determined was the quantum of the damages. The head of damages claimed by the plaintiff are general damages, loss of earning and future medical expenses.

[2] The incident that resulted in this action occurred on 8 January 2018 in Ottoshoop where the community was protesting. The police attended the protest action and live rounds were fired at members of the community. The minor child who was not part of the protest, was shot on his right cheek and sustained serious injuries that resulted in him developing a keloid on his cheek which makes it difficult for him to fully open his mouth and suffers from continuous pain. He was born on **7 October 2010**.

[3] In the determination of quantum the O.M.M was examined by several experts and their recommendations will be dealt with in this judgement. Both the plaintiff and defendant filed expert reports in this matter.

### **Plaintiff's experts**

[4] Dr Blaauw from Oncology in Klerksdorp reported that O.M.M has a keloid on his right cheek which is caused by overgrowth of fibroblasts in the scar tissue caused by a previous injury. The injury which was caused by a rubber bullet on the right cheek. According to the doctor the condition can be rectified by surgically removing the scar tissue and radiating the area immediately on the same day.

[5] The reconstructive surgeon Dr White, concluded that the keloid on the O.M.M's cheek needs to be treated by means of excision and a three day course of radiotherapy.

[6] Nicolene Leonard, the Clinical Psychologist compiled a report as well and noted that the scar on the O.M.M's cheek affects his speech and led to him being bullied at school. He is affected emotionally by the scar as he displayed signs and symptoms of post-traumatic stress disorder and anxiety. He will require counselling.

[7] According to the Educational Psychologist, Dr Petro Erasmus, O.M.M's quality of life has been compromised by the injuries. She noted that he is a vulnerable learner diagnosed with PTSD and fits the criteria for a neuro-developmental disorder. She further noted that there is complex trauma as O.M.M will still have to undergo various surgeries which will impact negatively on his scholastic progress. The Educational Psychologist recommended therapy, assessment annually, placement for O.M.M in a school for learners with barriers which might require him and his mother to relocate.

[8] The report by the Industrial Psychologist, Ruwa Ntuli indicates that the incident impacted negatively on O.M.M, psychologically, physically and emotionally. His work capacity has been limited and thus his earning abilities. He should therefore be compensated adequately. Pre-incident he would have been able to complete his tertiary and enter the open labour market and work until retirement age. Post-incident his earning abilities have been affected.

[9] Based on the expert reports the actuarial calculation for total loss of earning for unskilled work is the amount of six million three hundred and forty eight rand (R6 343 048.00).

### **Defendant's experts**

[10] The Remedial Therapist and Psychologist, Dr Greeta Praag recommended psychotherapy to address emotional impediments and assessment with an Occupational Therapist.

[11] Dr Tabane, the Industrial Psychologist opined that O.M.M would have been able to benefit from mainstream education pre- incident and attain a NQF5/6 and enter the labour market at a skilled level with a normal working lifespan until

retirement age. Having regard to the incident it was opined that O.M.M has above average intelligence and can be expected to achieve educationally and attain NQF5/6 with a productive working lifespan. The Industrial Psychologist based this on the fact that O.M.M was able to continue with his schooling after the incident and reached Grade 5 at the time of assessment.

[12] Professor Ndobe, the Reconstructive Surgeon recommended serial exasions three times in theatre under general anaesthesia.

### **Joint minutes**

[13] The Reconstructive Surgeons agree with the clinical findings and the treatment for O.M.M. They both agree on the costs of the procedure in the amount of R69 600.00 and a course of radiotherapy at a cost of R10 000.00 to R15 000.00. A silastic sheeting and compression bandages at R1 750.00 with a further cost of cortisone injections at R10 500.00.

[14] The Educational Psychologist and the Remedial Psychologist agree that O.M.M will require placement at a remedial school and require intervention to address his learning barriers like lack of concentration and auditory processing challenges.

[15] The Industrial Psychologists point of disagreement is the likelihood of his achievement and prospects of earning capacity.

### **Loss of earning**

[16] The plaintiff submitted that from the actuarial calculations the contingencies to be applied is 15% pre-morbid and that an amount of R4 169 967.00 would be fair and reasonable for loss of earnings. The defendant contended that working on the plaintiff's calculations the contingencies to be applied are 5% pre-morbid and 25% post morbid. Accordingly, the defendant argued that the fair and reasonable amount for loss of earnings should be R1 278 000.00.

[17] In relation to the assessment of damages for loss of earning the following was said in **Southern Insurance Association v Ballie NO 1984 (1) SA 98 (A)**: *“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award...”*

[18] The court in **Phalane v Road Accident Fund (948112/2014) 2017 ZAGPPHC 759 (7 November 2017)** held that *“contingencies are the hazards of life that normally beset the lives and circumstances of ordinary people (AA Mutual Ins Co v van Jaarsveld reported in Corbett & Buchanan, The Quantum of Damages, Vol II 360 at 367) and should therefore, by its very nature, be a process of subjective impression or estimation rather than objective calculation (Shield Ins Co Ltd v Booysen 1979 (3) SA 953 (A) at 956G-H).”*

[19] The plaintiff in this case is acting on behalf of her minor son who was born in **2010** and should now be aged 14 years. His life has been affected by the incident which includes his schooling. He does have learning barriers that will affect his ability to progress in the labour market but for the incident. He should be compensated fairly. Robert Koch in his Quantum Book provides the following guidelines: *“sliding scale half percent per year to retirement age, i.e. 25% for a child, 20% for a youth, and 10% in middle age. Normal contingencies: the RAF usually agrees to deductions of 5% for past laws and 15% for future loss.*

[20] Looking at the actuarial calculations and the circumstances of this case the contingencies to be applied are at 5% pre morbid and 25% post morbid. This will make the total loss of earning one million two hundred and seventy-eight thousand rand (R 1 278 000.00) as argued by the defendant.

### **General Damages**

[21] The court in awarding general damages does not intend to punish the defendant but to compensate the plaintiff as a form of solace for the suffering. In **Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194** it was held that:

*“---it must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must certainly be uncertain, depending upon the judge’s view of what is fair in all the circumstances of the case.”*

[20] In determining an appropriate amount for compensation it is important to look at comparable cases and the awards made in those matters. However, these only serve as a guide as each case should depend on the personal circumstances of the claimant, the severity of the condition and the effect thereof on their life.

[21] In the heads of argument for the plaintiff reference was made to various case law as follows:

*“6.18 In MTA obo MK v Road Accident Fund. The minor child sustained a visible ugly scar on her forehead on the left side which qualifies for non-pecuniary loss due to it being visible and ugly and she therefore qualifies for compensation for the scar sustained under general damages. The court considered the physical injury as well as loss of amenities of life as a result of*

*depression and was satisfied that the amount of R400 000,00 was a reasonable amount for general damages.*

6.19 *In Mashigo v Road Accident Fund. The plaintiff sustained soft tissue injuries to her left wrist, left knee, burn wounds to her arms and breast and was awarded R450 000.00 in respect of general damages.”*

[22] The argument on behalf of the plaintiff was that an amount of six hundred thousand rand (R 600 000.00) is a fair and reasonable amount for general damages.

[23] In contention the defendant argued that the appropriate amount would be Five hundred thousand rand (R 500 000.00). The case law compared to by the defendant is as follows:

**“GUIDING CASE LAW**

16. ***B obo N.O.B v Road Accident Fund (7955/2019) [2023] ZAGP JHC 1218 (26 October 2023)***

*In this case, the mother in her representative capacity instituted action against the Road Accident Fund for injuries sustained by her minor child. At the time of the accident, the minor was 3 years old and suffered injuries to her forehead. She had 5cm laceration on the left side of her forehead. The court in this case awarded general damages in the amount of **R500 000** in 2023 which becomes **R525 000** in 2024.*

17. ***In MB obo Minor v Road Accident Fund (12707) [2021] ZAGPJHC 567; (19 October 2021)***

*In this case, the mother in her representative capacity instituted action against the Road Accident Fund for injuries sustained by her minor child. At the time of the accident, the minor was 10 years old and sustained bilateral femur fractures. The court in this case awarded general damages in the amount of **R500 000** in 2021 which becomes **594 000** in 2024.*

**18. *In Methule obo Minor v Road Accident Fund (37405/20140 [2022] ZAGPPHC 192 (4 April 2022)***

*In this case, the injuries to the minor includes those to his heads, left and right eyebrows, right and left arms, right and left hands and right knee. At the time of the accident, the minor was 8 years old. The court awarded general damages in the amount of **R500 000** in 2022 which becomes **R562 000** in 2024.*

**19. *Mpondo v Road Accident Fund (CA283/2011) ZAECCGHC 24 (9 June 2011)***

*In this case, the appellant was a passenger in the motor vehicle accident. The appellant sustained laceration on her face, a fracture involving the base of the femoral neck and a fracture of the right ankle. The full bench in this case awarded damages in the amount of **R350 000** in 2010 which becomes **R720 000** in 2024.*

[24] It is common cause that O.M.M has an ugly scar on his right cheek which affect his self-esteem and considering the value of damages and inflation, the appropriate amount to be awarded is R550 000.00 for general damages.

### **Future Medical Expenses**

[25] The calculations for future medical expenses are based on the joint minutes by the experts. The experts agree that the minor requires future medical treatment.

### **Costs**

[26] There is no reason why costs should not follow the result.

### **Order:**



[27] Consequently, the following order is made:

1. Defendant pay to the Plaintiff, in her representative capacity on behalf of O.M.M an amount of **R1 278 000.00** (in respect of Total Loss of Earnings.
2. Defendant shall pay to the Plaintiff, in her representative capacity on behalf of O.M.M, an amount of **R 500 000. 00** in respect of Past and Future medical expenses.
3. Defendant shall pay to the Plaintiff, in her representative capacity, an amount of **R 550 000. 00** in respect of general damages.
4. Total amount of damages payable to plaintiff being calculated **R2 328 000. 00.**
5. The capital amount is payable by means of direct fund transfer within 30 days from the date of the court order into the trust bank account of the Plaintiff's attorneys; **NEMANAME ATTORNEYS TRUST ACCOUNT**, ABSA BANK Trust Account, Branch Code: 632005, Account Number: 4[...], Reference: **B[...]** **C[...]** **M[...]** **Obo O.M.M.** Who shall retain same in trust pending the creation of the Trust referred to herein.
6. No interest will be payable except in the event of default payment in which case interest will be payable at the rate of 11,75% calculated from 30 days of the date of Judgment.
7. That the attorney for the Plaintiff is ordered:
  - 7.1 To cause a trust (The Trust) to be established in accordance with the Trust Property Control Act No 57 of 1988 to administer the estate of the minor herein O.M.M:
  - 7.2 To pay all monies held in trust by them for the benefit of the minor, to the Trust.

8. The Trust instrument contemplated in paragraph 4 above shall make provision for the following:

8.1 A Trustee shall be appointed herein;

8.2 Ms. B[...] C[...] M[...] be appointed as a Co-Trustee

8.3 That the minor child is the sole beneficiary of the established Trust;

8.4 That the Trustee(s) are to provide security to the satisfaction of the Master;

8.5 That the ownership of the trust vests in the Trustee(s) of the Trust in their capacity as trustees,

8.6 Procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Honourable Court;

8.7 That the amendment of the trust instrument be subject to the leave of this Honourable Court;

8.8 That the respective trusts shall be terminated upon minor reaching the age of 18 years; and upon the minor's death the trust's assets shall pass to the minors' estate;

8.9 That the trust money and the administration thereof shall be subject to an annual audit.

9. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs up to date hereof on the High Court scale, which attorney and client costs shall include, but not be limited to:

9.1 The taxed or agreed fees of Plaintiff's Counsel, such costs to include travelling, perusal, consultations with the Plaintiff's Attorney, the Plaintiff.

9.2 That such costs of Counsel shall be costs on Scale B of the High Court

10. Qualifying and / or reservation and / or preparation fees, if any, for trial to be proven to the taxing master of the following experts:

10.1 Dr Bogatsu (Orthopaedic Surgeon)

10.2 Dr Blaauw (Oncologist)

10.3 Dr Brian Monaisa (Plastic & Reconstructive surgeon)

10.4 Dr Bruce White (Plastic & Reconstructive surgeon)

10.5 Dr Nicolene Leonard (Clinical psychologist)

10.6 Dr Petro Erasmus (Educational psychologist)

10.7 Prof Gert Saayman (Forensic Pathologist – Chief Specialist)

10.8 Dr Ruwa Ntuli (Industrial psychologist)

10.9 Johan Sauer (Actuarial scientist)

10.10 Subject to the following conditions:

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

10.10.2 The Plaintiff shall allow the Defendant 14 (Fourteen) court days to make payment of the taxed costs.

10.10.3 No interest will be payable, except in the event of default of payment of such costs, in which case interest will be payable at the rate of 11, 75% from date of taxation.

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**J T DJAJE**  
**DEPUTY JUDGE PRESIDENT**  
**NORTH WEST DIVISION, MAHIKENG**

**APPEARANCES**

**DATE OF HEARING : 14 MAY 2024**

**DATE RESERVED : 26 JUNE 2024**

**DATE OF JUDGMENT : 20 SEPTEMBER 2024**

**COUNSEL FOR THE PLAINTIFF : MR LESHILO**

**COUNSEL FOR THE DEFENDANT : ADV TJIANA**