



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

DATE

SIGNATURE

CASE NUMBER: 2014/00687

In the matter between:

MBEWE, TIMOTEYO KANKHOMBA

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

DOSIO AJ:

INTRODUCTION

- [1] The issue to be decided by this court is whether the Defendant is liable to pay for the costs to register and administer a Trust in respect to the money awarded to the Plaintiff.
- [2] The Plaintiff's Counsel is of the contention the costs to register and administer a trust should be born by the Defendant, whereas the Defendant contends that it should not be liable for these costs.

BACKGROUND

- [3] The issue of merits was settled on a 80% to 20% in favour of the Plaintiff. The Defendant agreed to pay the capital of R150000-00 to the Plaintiff for loss of income. The question of general damages has been postponed *sine die* to the Health Professions Council of South Africa. The Defendant agreed to provide the Plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 ("the Act"), limited to 80% of the cost of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him arising out of injuries sustained in the motor vehicle accident of the 1st of June 2012.

THE PARTIES' CONTENTIONS

- [4] Counsel for the Plaintiff argued that there is no certainty from the clinical psychologists, namely Ms Kok and Dr Gordon as to what role the plaintiff's pre-morbid low intellect played in respect to his current cognitive problems. Counsel argued the experts use terminology such as "*might have contributed to his present level of neurocognitive functioning*". At no stage do the experts say his current problems are due to his pre-existing functioning. Accordingly, the Plaintiff should be given the benefit of the doubt. It was contended further, that the Plaintiff would have continued to receive his income for as long as he would have been able to work. The accident is the cause why this matter is currently in court and why an award for loss of earnings was paid to the Plaintiff. Counsel argued that had it not been for the accident, it would not have been necessary to create a trust. Accordingly, the Defendant should be held liable for the costs of the registration and administration of this trust. Counsel argued that the principle of the "Thin skull rule" applies and that the fact that the Plaintiff had a low

intellect at the time of the accident, cannot jeopardise him for being unable to manage his affairs and accordingly claim the expenses of registering and administering a trust.

- [5] Counsel for the Defendant stated that prior to the accident the Plaintiff was a labourer, doing manual related work. Post-accident, he works as a hawker due to the injuries sustained. It was argued that the Plaintiff's inability to perform his premorbid duties is not due to any neurological mental deficit, it is due to the physical injuries he sustained to his knee and ankle, that prevent him from doing hard labour. Counsel argued that there is no link between the injuries sustained in the accident and the alleged neurological problems. The joint minute of the neurological surgeons, namely Dr Scheltema and Dr Ouma state that the Plaintiff was in good health prior to the accident and that he suffered, at most, a mild concussion during the accident resulting from which they cannot find any neurological sequelae.
- [6] Counsel argued that if one looks at the joint minute of the clinical psychologists, namely Ms Kok and Dr Gordon, Ms Kok states that *"Mr Mbewe reported that he did not loose any consciousness in the accident further corroborating the opinion by Dr Ouma that he sustained a very mild traumatic brain injury. Research indicates that such minor injuries do not typically result in long-lasting deficits...that his performance is likely a reflection of his premorbid functioning."* Counsel argued that the Plaintiff has a low level of education as he passed Standard two (2) in Malawi after many attempts, and that had it not been for his low level of education, he would not have needed a trust. In addition, it was contended that there is no certainty from the reports that the accident is linked to his ability to perform mentally. Accordingly, in the light of this uncertainty, the Defendant should not be liable.
- [7] Defendant's Counsel referred this court to the decision of *Road Accident Fund and Patrick Norman Arendse* [2003] 1 All SA 139 SCA, where it was stated that due to the fact that it was never pleaded in the particulars of claim that the costs of the creation of a trust should be borne by the Road Accident Fund ("RAF"), that such costs were not granted. Counsel argues the same principle should apply in this case.

EVALUATION

- [8] All the experts are in agreement that the Plaintiff has suffered a mild concussive brain

injury and that there was a loss of consciousness. It is also agreed by the experts that should any funds be awarded, they should be protected and that a trust be created.

- [9] It is common cause that from the joint minutes of the clinical psychologists Ms Kok and Dr Gordon that post-accident, (i) the Plaintiff's attention fluctuated leading to erratic performance, (ii) he suffered from inadequate attention and concentration, (iii) delayed simple and complex mental tracking, (iv) below average processing speed, (v) retroactive interference, (vi) delayed working memory, (vii) delayed verbal abstract reasoning ability, (viii) impaired verbal fluency and mental flexibility and (ix) delayed visual abstract reasoning.
- [10] Although Ms Kok states that the pre-existing condition might have contributed to the Plaintiff's level of neurocognitive functioning, this is not expressed in certain terms. This court cannot agree with the Defendant's Counsel that the Plaintiff's current cognitive problems are not accident related. The medico-legal report of Dr B.K Cheyip with specific reference to the neurological sequelae states that *"Mr Mbewe presented with short term memory loss, behavioural changes or mood swings and sleep disturbances, these are all features of post-traumatic stress disorder. I recommend assessment by a neuropsychologist and psychiatrist."* Accordingly, from this report it is clear that there were neuropsychological disturbances caused by this accident. The report of the neurosurgeon Dr Scheltema states that even though he did not find real evidence of neurological impairment and long term neurological sequelae after the accident, he did find *"memory lapse and slow thought process"*. From these two reports, together with the reports of the two clinical psychologists mentioned in paragraph [9] *supra*, it is clear that the accident did have an impact on the thought process of this Plaintiff and accordingly this Court finds that the accident did have a direct link in affecting the Plaintiff's current memory retention capacity.
- [11] Even if this court is wrong in this respect, it cannot be in the interests of justice that a person of low intellect and very little education should be prejudiced. Should the Plaintiff be liable to pay for the registration and management of the trust, there will be nothing left of the capital amount awarded to him. This would defeat the purpose of the RAF which was primarily set up to compensate victims.
- [12] In respect to the particulars of claim not stipulating expressly that a trust should be formed, the court finds that the purpose of the prayer "Further and/or alternative relief"

is there to address the issues of this nature. The summons was drafted in 2014. All the experts reports were compiled post the issuing of the summons. Even if the court is wrong in this respect, section 17(4)(a) of the Act includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her. The registration of a trust and administration thereof falls within the definition of “rendering of a service”.

[13] The decision of *Road Accident Fund and Patrick Norman Arendse supra* is distinguishable from this case. In that matter, a *curator bonis* was appointed for the estate and such curator was entitled to claim reimbursements for accounts paid for which the RAF was liable. Trustees were then appointed to administer the estate and the court held it was not the responsibility of the RAF to pay the trustees any remuneration beyond that of what a curator would have received.

[14] In the result the following order is made:

The Defendant is to bear the costs of the registration and administering of a trust to be created to protect the money awarded to the Plaintiff. These cost will come out of the undertaking. Accordingly the order is granted as per the draft order attached.

D DOSIO
ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Plaintiff	Adv M. Roller
On behalf of the Defendant	Adv N. Alli

Date Heard:	1 June 2016
Handed down order:	2 June 2016