

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NUMBER.: 3755/2018

In the matter between:

ZAMIQHINGA JOSEPH PHAMBANISO obo

L[...] F[...]

Plaintiff

And

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

Beshe J

[1] Plaintiff instituted a claim against the defendant for damages arising out of a motor vehicle accident that occurred on the 27 July 2007.

[2] On 29 April 2022 the defendant was adjudged to being liable for payment of all (100%) of plaintiff's proven or agreed damages.

[3] I am now called upon to determine the appropriate quantum of the damages the plaintiff is entitled to. The damages sought fall under two heads:

(i) General damages in respect of which R1 200 000.00 was initially sought. However, in argument it was submitted that same are to be determined in a sum that is between R600 000 and R800 000.00.

(ii) Future loss of earnings in the sum of R2 147 370.00 as per the actuarial report.

[4] The evidence upon which such determination is to be made appears to be common cause and emanates, to a large extent, from expert reports that were filed by the plaintiff. No expert reports were forthcoming from the defendant.

[5] The plaintiff was four years old and a pedestrian when she was hit by a vehicle as a result of which she sustained, inter alia the following injuries:

Bruises on the sculp.

Swollen upper lip.

Bruises on the left leg and right buttock.

Fracture of the left humerus.

[6] The contents of plaintiff's expert reports were succinctly summarised in plaintiff's brief heads of argument as follows:

Dr. J.J. Schutte RAF4 Serious Injury Assessment Report: According to report plaintiff's whole person impairment amounted to 15%. That however, the plaintiff suffered long-term impairment which could cause loss of bodily function. Has severe long-term behavioural disturbance disorder.

Dr. L.F. Oelofse, an Orthopaedic Surgeon diagnosed plaintiff as having sustained a laceration on her left parietal area and a swollen lip;

a sprained right shoulder;

sprained right knee;

bruised left leg and right buttock;

head/facial injury with chronic headache;

painful eyes;

residual neurological symptoms;

residual psychological symptoms;

slightly visible scarring.

According to Neurosurgeon Dr. Aswegen, plaintiff suffered mild to moderate traumatic brain injury. This was also confirmed by Counselling Psychologist Dr. Rita Du Plessis, who also opined that this injury could contribute to cognitive difficulties in mood and behaviour.

Ms. Prinsloo, an Educational Psychologist concluded that but for the accident and the sequelae thereof plaintiff would have been able to obtain a NQF 5 education, but as a result of the accident will only be able to obtain NQF 3 educational outcome.

Same is confirmed by Dr. E.J. Jacobs. Both explain their findings.

This has also been the basis for the actuarial report which is to the effect that plaintiff's earning capacity would but for the accident, have been R72 100 000.00 per annum from age 21 to R143 440.00 per annum at age 45. In her injured scenario it will be R12 012.00 per annum totalling R2 147 370.00 of loss of earnings.

[7] General damages pertain to non-patrimonial loss which in the case of a delict or delictual liability relates to inter alia: pain, suffering, shock, loss of

amenities of life, disfigurement etc. Based on the injuries plaintiff sustained as a result of the accident and the period she spent in hospital (about one week), there is no doubt that she experienced pain, shock, loss of amenities of life etc.

[8] Ms Futshane who appeared for the defendant submitted that the amount sought in respect of general damages was excessive as plaintiff only suffered: a mild to moderate brain/head injury with no apparent permanent or long-term sequelae and no extant scarring as a result of the accident. She further submitted that in the circumstances an amount of R450 000.00 as and for general damages would be reasonable. As for damages for future loss of earnings, Ms Futshane conceded that without defendant having filed its own actuarial reports, it will be difficult to argue but submitted that based on the reports submitted, there was no evidence that plaintiff's academic performance was altered by the accident in anyway or evidence to show that she would have attained an NQF 5 level of education.

[9] In my view, the fact that plaintiff was only four years old when the accident occurred, and had not started school, entails that there is no point of reference as to how she was performing before the accident. She only started attending creche in 2001 when she was five years and eight months, over a year after the accident. Be that as it may, it is common cause that plaintiff is not performing well academically. In a report prepared by a Neurosurgeon Dr. van Aswegen, in 2018, the plaintiff is reported to have been complaining of headaches at least three to four times per week. The headaches start when she is at school and needed to concentrate. She also complained of poor short-term memory, lack of concentration, excessive sleepiness and tiredness. Dr. van Aswegen opined that these symptoms were indicative of long-term sequelae of a traumatic head injury and that she is not likely to reach her full potential. Based on the fact that as a result of her injuries, plaintiff is not expected to reach

her full potential. She might only be able to find a lower paying job in future as opposed to her career and earnings progressing to those of a semi-skilled worker. As I understand the actuarial calculations, the amount arrived at constitutes the difference between what the plaintiff would have earned had the accident not occurred and what she is likely to earn post injury. I can find no reason why the evidence of plaintiff's experts including that of the actuary as embodied in their reports should not be accepted.

[10] Both parties referred me to a number of comparable cases regarding awards for general damages. Whilst these examples will be used for some guidance, both parties seem to acknowledge that they should not dominate the enquiry or my assessment and consequently the exercise of my discretion in this regard. I have no doubt had regard thereto, in broad sense, whilst taking into account the unique features of the injuries sustained by the plaintiff and the extent thereof. Having considered the circumstances under which the accident occurred, plaintiff's personal circumstances, including her age then and currently as well as the injuries she sustained and the effect thereof on her life, I am of the view that an amount of R500 000.00 will be a fair and adequate compensate in respect of her general damages.

[11] In the result and for the reasons stated above, the following order will issue:

- (a) The defendant is ordered to pay to the plaintiff an amount of R500 000.00 as and for general damages.
- (b) The defendant is ordered to pay the plaintiff an amount of R2 147 370.00 as and for future loss of earnings.

(c) The defendant is ordered to pay costs incurred by plaintiff subsequent to the court's order on 29 April 2022 regarding liability. Such costs to include the qualifying expenses and attendances of the following experts:

Ms. E. Prinsloo.

Dr. A. van Aswegen.

Dr. E.J. Jacobs.

Dr. L.F. Oelofse.

Dr. Schutte.

Dr. R. du Plessis; and

Munro Forensic Actuaries.

Costs of Senior Counsel and plaintiff's attorney's costs of travel and accommodation.

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff	:	Adv: D. H. De La Harpe SC
Instructed by	:	WHITESIDES ATTORNEYS
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For the Defendant	:	Ms V. Futshane
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		Tel.: 066 856 7244

Date Heard	:	9 October 2023
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Date Reserved : 9 October 2023

Date Delivered : 23 January 2024