

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO.: 5324/2020
REPORTABLE
OF INTEREST TO OTHER JUDGES
REVISED

In the matter between:

T.J.M obo MINOR Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

Link No.: 4821393

JUDGMENT

Kilian AJ

1. This is an application for default judgment where the plaintiff seeks relief in her capacity as the mother and natural guardian of the minor child, T.M.M ("**the minor**") who was born on 22 October 2013. On 10 August 2015, the minor was involved in a motor vehicle collision and because of the injuries sustained, the plaintiff instituted action against the defendant.

2. At the time of the collision, the minor was a pedestrian on a pavement

when the insured vehicle collided with him. The plaintiff and the defendant settled the issue of liability on the basis that the defendant shall be liable for 100% of the minor's proven or agreed damages, resulting from the collision.

3. The matter came before me on a default basis as follows:

3.1. subsequent to the collision, the plaintiff's claim was lodged with the defendant.

3.2. the 120-day prescribed period has since lapsed without the defendant reacting to the lodged claim.

3.3. on 24 January 2020 the summons commencing action was issued and served upon the defendant on 31 January 2020.

3.4. On 28 March 2022 the defendant served a notice of intention to defend

3.5. the defendant, however, failed to file a plea.

3.6. on 9 May 2022 a notice of bar was served upon the defendant and, it having failed to file a plea thereafter, has been *ipso facto* barred from pleading.

3.7. There was due service of the application for default judgment and notice of the date of hearing being given to the defendant.

4. Accordingly, in terms of the provisions of Rule 31(3) of the Uniform Rules of Court, the plaintiff now seeks judgment against the defendant.

5. When the matter was called, in open court, there was no appearance on behalf of the defendant, and it was only Advocate Masina who appeared in the matter on behalf of the plaintiff.

6. Counsel for the plaintiff made application from the bar that I accept the evidence of the various experts on oath in terms of the provisions of Rule 38(2) of the Uniform Rules of Court. The plaintiff relies on various expert reports to support the claim for damages and those reports, together with the expert's affidavits, are filed on record. Accordingly, I granted an order in terms of Rule 38(2) of the Uniform Rules of Court.

7. In a scenario as the present, in an action for damages, it is permissible to place expert evidence of doctors and other experts and witnesses before court by way of affidavits.¹

8. Before addressing the Court on the content of the various medico legal reports, and other documents filed on record, counsel for the plaintiff informed me that the defendant has, to date hereof, not agreed that the minor qualifies for general damages or otherwise made its position known to the plaintiff in respect of the claim for general damages.

9. The assessment of a "*serious injury*" has been made in terms of the RAF Regulations, 2008. The decision whether the injuries of the minor are serious enough to meet the threshold requirement for an award of general damages was conferred on the defendant and not on this court. The assessment of damages as "*serious*" is determined administratively in terms of the manner prescribed by the Regulations made under the Road Accident Fund Act and not by the courts.²

10. Counsel for the plaintiff correctly stated that this court cannot consider the plaintiff's claim for general damages to be awarded in respect of the minor and that the claim for general damages ought to be separated and referred to the Health Professions Council for determination.

11. I intend granting that order as will be set out in what follows.

¹ see: *Hovenga v Parker* 1993 (3) S 724 (T); *Madibeng Local Municipality v PIC* 2018 (6) SA 55 (SCA) and *Baliso v Firststrand Bank Ltd* 2017 (1) SA 292 (CC) at para. 12

² see: *RAF v Leboko* [2012] ZASCA 159; *RAF v Duma & three similar cases* 2013 (6) SA 9 (SCA); *RAF v Faria* 2014 (6) SA 19 (SCA) and *RAF v Botha* 2015 (2) SA 108 (GP).

12. With regards to the quantification of the damages suffered by the minor, because of the collision, I accept the evidence that the minor sustained the following injuries

12.1. various scars to his sculp (which has subsequently healed);

12.2. a mild traumatic brain injury with serious and neuropsychological problems.

13. At the time of the collision the minor was a learned in Grade R and the evidence suggests that he was a healthy individual prior to the collision, reaching all his milestones and not having been involved in any other collision.

14. A neuropsychological assessment evidenced cognitive impairment now presenting itself, all of which has a detrimental impact on the minor's scholastic performance and, so it is postulated, the minor's future earning ability.

15. The consequences, treatment and prognoses of the aforesaid injuries are set out extensively in the medico legal evidence and I need not repeat it here. I do however take note of the opinion that the injuries have now left the minor a vulnerable individual, both currently and so will it be in the future.

16. Absent any other factor which could have caused the current neuropsychological problems experienced by the minor, I am satisfied that on the evidence presented to this court the collision was the sole cause of the injuries and *sequelae* thereof.

17. It is trite that the general principle in evaluating medical evidence and the opinions of expert witnesses is to determine whether and to what extent their opinions advanced are founded on logical reasoning. The court must be satisfied that such opinion has a logical basis and determine whether the judicial standard of proof has been met.

18. Having considered the medico legal reports filed on record, I am satisfied

that the plaintiff has, on a balance or probabilities, demonstrated that the opinions by the various experts are, in the main, founded on logical reasoning and that the plaintiff met the judicial standard of proof regarding the onus that rests on her in respect of the claim for damages.

19. The plaintiff submitted an actuarial calculation, which calculation was informed by the expert opinions.

20. An enquiry into damages for loss of earnings is of its nature speculative as it involved a prediction as to the future without the benefit of crystal balls. This is especially so when one deals with a minor child who is still young and has his/her entire lifespan ahead.

21. Our courts have alluded to the difficulties in arriving at a proper allowance for contingencies and, in the end, it remains a factor in the discretion of the court in assessing what the award of damages ought to be.

22. I have considered the pre- and post-morbid possible career paths as postulated by the industrial psychologist. This court is not convinced, however that the minor would likely have reached the projected levels of earnings and education, was it not for the collision. For instance none of the minor's family members obtained tertiary qualifications, whereas the Industrial Psychologist postulates that the minor will achieve a diploma or degree post matric. The young age of the minor (currently 10) further increases the degree of speculation as to his uninjured future earnings. He was injured while in Grade R and there is no established scholastic track record, pre collision, that would have assisted in postulating the difference in the minor's pre and post collision schooling ability.

23. Having regard to the contingencies to be applied, I refer to the actuarial report prepared by the actuary, Johan Sauer Actuaries and Consultants (dated 4 November 2021). In that calculation, the actuary applied a 15% contingency deduction on the minor's uninjured future earnings and a 45% contingency deduction on the minor's injured future earnings.

24. The minor was born on 22 October 2013. He is currently approximately 10 years of age and, according to the industrial psychologist, would have worked until retirement age 65.

25. On the but for scenario, the minor would have worked to the age of 65. That is a further 55 years to likely retirement. Applying the principle laid down in the matter of *RAF v Guedes 2006 (5) SA 583 (SCA) at [9]* one should deduct 0.5% contingency per year left to retirement on the but for scenario (as a starting point). In this matter, the but for contingency deduction should then be 27.5%.

26. I intend applying a contingency deduction of 40% on the minor's uninjured future earnings for purposes of calculating the loss. This will address the uncertainties regarding potential tertiary studies

27. The minor's future earnings, in an injured state, as calculated, has built into it the negative effects of the injuries and sequelae.

28. In my view, then, there is no compelling reason why this court should apply higher than normal contingencies to the future injured earnings. The "normal" contingency deduction of 27,5%, as suggested in *Guedes* above should be applied to the future injured earnings.

29. Counsel for the plaintiff submitted that the statutory cap is not applicable to the computation of the minor's claim, and this is also evidenced by the content of the actuarial report.

30. In applying the aforesaid contingencies, the minor's likely uninjured future loss would be an amount of R5 534 834,40 and the minor's likely future injured loss an amount of R754 295,08.

31. The difference between those incomes would be a fair estimation of the minor's loss of earnings in future, in the amount of to be R4 780 539,33.

32. Accordingly, I grant an order as per the attached draft order, which is

marked "X".

JM KILIAN
Acting Judge
High Court of South Africa
Gauteng Division, Pretoria

Appearances:

Counsel for plaintiff: :Adv S Masina

Attorney for plaintiff :Magagula Attorneys

Counsel for defendant :No appearance

Attorney for defendant :State Attorney

Date of hearing :22 March 2023

Date of Judgment :22 March 2023