IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 21179/2018
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED
31.05.23

In the matter between:

S N M obo **PLAINTIFF**
(A S M)

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MOGALE, AJ

INTRODUCTION

1. S N M, in her capacity as a biological mother and the natural guardian, A S M, instituted an action in this court for a claim for loss of earnings in a sum of R6 672 350 respectively, against the defendant.

2. The summons was issued to the defendant on 20 March 2018, wherein the plaintiff claimed payment of R1 870 000 for injuries sustained by the child. On 13 February 2023, the plaintiff amended their pleadings in terms of rule 28 and

claimed payment of the sum of R9 370 000.

3. The issues about the defendant's liability are settled on the basis that the defendant shall pay the plaintiff 100% of her proven or agreed damages, which flow from the injuries sustained. The defendant made an undertaking in terms of section 17(4)(a) of the Road Accident Fund,[1] (The Act). The issues of general damages, loss of income, and past and future medical expenses are to be postponed.

4. Both parties attended the pre-trial conference and filed expert reports. The defendant was properly served with a Notice of set-down, but they failed to appear in court; as a result, the defendant was unrepresented.

5. The plaintiff tendered evidence in terms of rule 38(2) and argued that the interest of justice allowed the court to proceed with the matter. The issue to be determined by the court is the future loss of earnings and the contingencies applicable to it.

Medical history of disability

6. Hospital records from Vryheid Hospital, Kwazulu- Natal, mention that A M was a pedestrian when he was run over by a vehicle on 6 August 2017. A was admitted to Vryheid Hospital on 6 August 2017 and discharged on 16 August 2017. Clinical records indicate the child was placed on neuro observation, and wound dressing commenced. He was taken to theatre for debridement of his scalp wound and secondary suturing, after which wound dressing continued in the ward and antibiotic therapy.

7. A was four years old when he was involved in the accident and started school in 2018 doing Grade R. He failed Grade 1 in 2019, failed Grade 3 in 2022, and he is currently repeating Grade 3. Proving their case for loss of income, plaintiff relied on the discussions of both the expert medico-legal reports.

[1] No. 56 of 1966.

8. Dr. Ntimbana (Neurosurgeon report filed by the plaintiff) examined the child and concluded that A sustained a mild traumatic brain injury, with a degloving wound on the scalp. From the Post-Accident status, A had residual neurocognitive abnormalities and personality changes. Human studies of age effects in mild traumatic brain injury suggest that younger age may place an injured person at greater risk for slow recovery or poor acute outcome following concussion. Dr Ntimbana presents further evaluation by both an educational and a clinical psychologist. The minor child suffers from post-traumatic headache, which becomes permanent in 20% of individuals at one-year post head injury.

9. Dr. Mosadi's (Neurosurgeon report filed by the defendant) opinion is that A sustained a Grade 3 concussion as a subset of mild injury, which was confirmed by a history of loss of consciousness, chronic headache, and memory problems; as a result, the child will suffer prolonged neurocognitive impairments. Dr. Mosadi also records a severe long-term mental or behavioural impairment.

10. Dr. Yvonne Segabutle (Educational psychologist filed by the plaintiff) consulted the child, who was complaining of the following physical, cognitive, and emotional changes: "*He is bed wetting; experiences headaches which get worse in hot weather; his legs get swollen following prolonged walking; he is forgetful; aggressive towards his peers and sometimes laughs uncontrollable.*" Education and employability are recommended that the child has physical limitations, cognitive difficulties, and emotional problems, which have been compromised somehow due to the accident. He now requires alternative school placement. The current results show him as a candidate for a pre-vocational programme found in special schools.

11. Dr. L Kgwate (Educational Psychologist report filed by the defendant) is of the opinion that A's premorbid cognitive function was below average. He opines that even without the accident, A would have developed learning disabilities emanating from his low intellectual functioning. Premorbid, the writer opines that A would have achieved senior certificate level in Grade 12 and proceeded

to achieve an occupational certificate on NQF level 4. Post-morbid, the writer opines that the sequelae of the accident have exacerbated A's learning potential. Post-morbid, the writer opines that A will find it challenging to benefit from mainstream education and that he should be placed in a particular special school. Further postulation on A's career prospects and employability are deferred to an industrial psychologist.

Dr. Sagwati Sebapu (Occupational Therapist report filed by the plaintiff) provided the following remarks on the minor child's life amenities and workability: According to the Educational Psychologist, he struggles to master the foundational basis of school learning and is now a vulnerable learner. This was evident during the academic screening, where his spelling, general knowledge, manipulation of tools, and visual perceptual skills all tested below average for his age. Complaints about his recurrent headaches are expected to influence his cognitive and scholastic abilities if they are not treated according to Dr. J A Ntimbani's recommendations. From an emotional and psychological point of view, Ms. M reported that A has a short temper, is physically aggressive towards other children, and suffers from Enuresis (urinary incontinence), which is poor bladder control in children whose continence is expected. A close link can be made between enuresis/bed wetting and emotional trauma suffered. From a cognitive and emotional point of view, the doctor holds the opinion that A will be able to secure employment in the open labour market; however, he remains compromised in terms of work speed and his competitiveness considering his complaints and limitations.

12. Dr. Miyelani (Occupational Therapist report filed by the defendant), believes that A should be able to continue schooling. However, he will benefit from recommended stimulation intervention. He will also benefit from professional learning support/remedial education in mainstream education for Grades 1 and 2, as Lazarus K. Kgwete (Educational Psychologist) recommends. Regarding future work, S did not present with any physical limitations during the evaluation. As such, future work will mainly depend on his level of education in future. But about physical abilities, no restrictions are anticipated in the future. He will remain competitive in the open labour market.

13. Dr. R T Ntsieni (Industrial psychologist report filed by the plaintiff) conducted an assessment on the child on 22 November 2022 and found that pre-accident, based on the Educational Psychologist's opinion above, it is likely that A had the potential to complete and pass his Grade 12 with a Diploma level, allowing him to proceed with tertiary studies, where he would obtain at least a Diploma qualification of choice from a university of technology at NQF 6, the following scenario is therefore opined:

> "*With an NQF 6 level of education, A would have probably entered the labour market as a semi-skilled worker within the formal sector at a Paterson B4 level. He probably progressed to a Paterson C3/C4 median quartile level, total package, at approximately 45. After that, growth would have mainly emanated from annual inflationary related increases."*
>
> *Post-accident, the doctor concludes that his educability has been curtailed as a direct result of the accident, which has translated into a loss of earnings and will most likely remain as such. Should he secure employment, it will probably be piece jobs or short contracts with his earnings ranging below to within the lower quartile of the unskilled labourers' scale. Given the accident-related challenges, as indicated by the experts, it is the writer's opinion that he may struggle to grow his earnings, and growth would have mainly emanated from annual inflationary-related increases.*
>
> *The injuries sustained from this accident would hinder A's career and future employability. Thus, his progression through his career is considered restricted and compromised due to the impact of the accident-related injuries, resulting in a loss of earnings."*

14. Dr. T Kalanko (Industrial Psychologist report filed by the defendant) examined A and concluded that it is probable that A would have completed his matric qualification and further obtained a certificate. After that, he would have entered employment relevant to his highest qualification skills and abilities. For his future loss of earnings, the writer notes that the accident has hindered his scholastic abilities; he may need to be moved from a mainstream school into a special needs school. Therefore, it is accepted that the sequelae of the injuries sustained have affected the claimant's overall optimal functioning.

Thus, he will experience difficulty competing on par with his healthier uninjured peers in the occupational arena. The difference between the claimant's pre- and post-accident scholastic abilities is used to determine his future loss of earnings. The doctor notes the challenges he currently experiences due to the accident in question and thus recommends that the relevant post-accident contingency percentage be applied. The writer acknowledges that any application of contingencies remains the court's prerogative and a matter of negotiation by the legal parties.

15. Munro Forensic Actuary compiled a report, and the loss of earning calculation was based on information provided by the attorney, including the IP report by Talihina Ntsieni dated 7 February 2023. The claimant is a minor and has not suffered a past loss of earnings due to the accident. The information provided indicates that the claimant's career and earnings will progress as follows now that the accident has occurred (2022 terms, before tax, unless stated otherwise):

    December 2031: leaves school
    January 2032: Unskilled (lower) at R 24 200 per year

    No contingencies have been applied, and the total loss of earnings is calculated at R7 725 400.

16. The traditional principle and rationale guiding for restituting loss of earning capacity were expressed in *Dippenaar* v *Shield Insurance Co Ltd,*[2] where Rumpf JA held that:

    "*… Under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered part of a person's estate, and the loss or impairment of that capacity constitutes a loss if such loss diminishes the estate.*"

17. The approach to determining loss of earnings and applicable contingencies

[2] 1979 (2) SA 904 (A) at 97.

was recently explained by the Supreme Court of Appeal in *Road Accident Fund v Kerridge,*[3] wherein it said:

> "*Any claim for future loss of earning capacity requires comparing what a claimant would have earned had the accident not occurred with what claimant is likely to earn thereafter. The loss is the difference between the monetary value of the earning capacity immediately before the injury and immediately thereafter. This can never be a matter of exact mathematical calculation and is, of its nature, a highly speculative inquiry. All the court can do is make an estimate of the present value of the loss, which is often a very rough estimate.*"

18. The courts usually use actuarial calculations in an attempt to estimate the monetary value of the loss. These calculations depend on the accuracy of the factual information provided by the various witnesses. To address life's unknown future hazards, an actuary usually suggests that a court determine the appropriate contingency deduction. Due to the injury, a claimant often has to engage in less lucrative employment. The nature of the risks associated with the two career paths may differ widely. It is, therefore, appropriate to make different contingency deductions regarding the pre-morbid and the post-morbid scenarios. The future loss will consequently be the shortfall between the two once the appropriate contingencies have been applied.

    Contingencies are arbitrary and also highly subjective; for this reason, the trial court has wide discretion in determining appropriate contingencies.

19. Some general rules have been established regarding contingency deductions, one being a claimant's age. The younger a claimant, the more time they have to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate, but as regards the future loss of earnings, they include, among other things, a downturn in the economy leading to a reduction in salary, retrenchment, unemployment, ill health, death, and the myriad of events that may occur in one's everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting the assumed trajectory of their remaining career. Bearing this in mind, courts

[3] 2019 (2) SA 233 (SCA) par 40-44.

have generally awarded higher contingencies in a pre-morbid scenario the younger the claimant age. This court, in *Guedes*, relying on Koch's Quantum Yearbook 2004, found the appropriate pre- morbid contingency for a young man of 26 years was 20% which would decrease on a sliding scale as the claimant got older. This, of course, depends on the specific circumstances of each case but is a convenient starting point. In quantifying the monetary value of the loss of earning capacity, the court must remember that the case depends on its facts and circumstances and the evidence placed before the court by the plaintiff.[4]

20. In *Goodall v President Insurance*[5], the Court adopted the approach of the so-called sliding scale of ½ % per year to retirement age in the 'but for' scenario - for example, 25% for a child, 20% for youth, and 10% for middle age. In the 'but for' scenarios, the Road Accident Fund usually agrees to deductions of 5% for past losses and 15% for future losses - the so-called "normal contingencies."

21. Ofentse was repeating Grade 1 at the time of the accident. He passed grades two and three despite being home for most of the year due to the global pandemic. After the accident, he repeated Grade 4 in 2022 after displaying various difficulties at school.

22. Having considered all the evidence, it is my view that but for the accident, the plaintiff would have attained a National certificate. Therefore, I find the contingency of 25% is most appropriate when calculating the plaintiff's loss of earnings.

23. In the circumstances, the following order is made:

1. The defendant is liable to pay the plaintiff, S N M, in her representative capacity as a biological mother and natural guardian of A S M, born 22 April 2013, with Link Number: 4247973, the sum of R5 794 050 (five million

[4] Unreported case *P obo LP v Road Accident Fund* (1675/19) (2022) ZAGPJHC 1001 (7 December 2022) by Flatela J.
[5] 1978 (1) SA 389 (W).

seven hundred and ninety-four thousand and fifty Rands) in respect of loss of earnings.

2. The total amount of R 5 794 050 (five million seven hundred and ninety-four thousand and fifty Rands) will not bear interest unless defendant fails to effect payment thereof within 180 days from the date of this order, in which event, the capital amount will bear interest at a rate of 7.75% per annum, calculated from and including the 1 day, up to and including the date of payment thereof.

3. The amount referred to in paragraphs 1 and 2 above shall be paid to the plaintiff's attorneys, Marisana Mashedi Incorporated, by direct transfer into their Trust account details of which are the following:

   Account Holder: Marisana Mashedi Attorneys
   Name of Bank. : […]
   Account Number: […]
   Branch Name.: […]
   Type of Account: Trust Account

4. An amount of R 300 000 (three hundred thousand Rands) shall be paid in advance from the amount stipulated in paragraph 2 to the mother of the minor child (A S M) to cater to the immediate needs of the minor child.

5. The plaintiff's attorneys shall, within 3 (three) months from the date on which the capital referred to in paragraph 2 above is paid by the defendant, establish a Trust in favor of the minor child (A S M).

6. The defendant is ordered to furnish plaintiff with an undertaking, in terms of Section 17 (4) (a) of the Act, for the costs of the administration of the proposed trust, future accommodation in a hospital or a nursing home or treatment of rendering of a service or supplying of goods to the inured after such costs have been incurred and on proof thereof, relating to the injuries sustained by the plaintiff on 6 August 2017.

7. In respect of General Damages, the plaintiff's claim is separated in terms of the provisions of Rule 33(4) and postponed *sine die*.

8. The defendant is ordered to pay the plaintiffs taxed or agreed on party-and-party costs on High Court scale up to date hereof, subject to the discretion of the Taxing Master and subject it to:

8.1. In the event that the costs are not agreed:

8.1.1. The plaintiff shall serve a notice of taxation on defendant;

8.1.2. Plaintiff shall allow defendant 14 (fourteen) court days from the date of the signed allocator of the Taxing Master on the plaintiff's taxed bill of costs to make payment of the taxed costs;

8.1.3 Should payment not be effected timeously, the plaintiff will be entitled to recover interest at the rate of 7.75% on the taxed or agreed costs from the date of the agreement, alternatively, the date of the Taxing Master's allocator, to the date of final payment.

8.2. Such costs shall include the following:

8.2.1. The reasonable costs in obtaining payment of the amount referred to in paragraphs 1 and 2 above; traveling to and spending time traveling to pre-trial conferences; video and telephonic consultations with Counsel, client, and defendant;

8.2.2. Counsels' fees, including preparations; previous court attendances; court attendances on 14 February 2023 and 26 April 2023;

8.2.3 The taxable costs of obtaining the medico-legal reports of all the experts in respect of the quantum of the plaintiff's claim, including consultation and costs of an interpreter, of which the plaintiff gave notice in terms of the provisions of court rule 36(9)(a) and (b);

8.2.4. The taxable qualifying reservation and preparation costs of the expert hereunder, as allowed by the Taxing Master:

a) Dr. Jimmy A. Ntimbani - Neurosurgeon;
b) Dr. N. Ngcoya - Orthopaedic Surgeon;
c) s. Yvonne Segabutle - Educational Psychologist;
d) Ms. Sagwati Sebapu - Occupational Therapist;
e) Ms. Talifhani Ntsieni - Industrial Psychologist; and
f) Dr. Alex Munro - Actuary.

9. Costs of administration of the Trust, which are equivalent to the costs of a curator ad litem/bonis.

10. There is no contingency fee agreement entered between Attorneys and Clients.

K MOGALE,

ACTING JUDGE OF THE HIGH COURT GAUTENG LOCAL DIVISION, PRETORIA

Appearances

Counsel for the Plaintiff: Adv. J Vorster
Instructed by: Marisana Mashedi INC

Counsel for the Defendant:: Unrepresented
Instructed by: the Road Accident Fund

Date of hearing: 26 April 2023

Date of judgment: 31 May 2023