

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 144/2017

In the matter between:

NM M[...] obo R

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: MPAMA AJ

HEARD ON: 23 NOVEMBER 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be **15:00** on **19 APRIL 2023**.

Factual Background

- [1] The plaintiff, Ms M[...] is suing the defendant in her representative capacity as the biological mother of R[...] born on 4 February 2010.

[2] On 20 May 2016, R[...] was involved in an accident when she was hit by a motor vehicle whilst she was a pedestrian. She sustained the following injuries:

(a) A degloving injury on the scalp.

(b) Abrasions on the back.

(c) Abrasions on the right foot.

[3] As a result of the accident, the plaintiff instituted this claim under the following heads:

(i) Future medical treatment.

(ii) Future loss of earnings.

(iii) General damages.

[4] The parties have settled the merits, general damages at an amount of R650 000.00 (Six Hundred and Fifty Thousand) and the defendant further agreed to furnish the plaintiff with an undertaking for future medical expenses in terms of section 17(4) of the Road Accident Fund Act 56 of 1996. The defendant conceded liability for 100% of plaintiff's proven damages. The issue which remained unresolved between the parties is that of future loss of income.

[5] The plaintiff did not present any *viva voce* evidence. By agreement between the parties, the plaintiff's affidavit and numerous reports compiled by experts were presented by way of affidavits in terms of Rule 38(2) of the Uniform Rules.

[6] In terms of the plaintiff's affidavit Ms N[...] M[...] M[...] is the mother of the minor child. She deposed to an affidavit on 23 November 2022 stating the

condition of the minor since the accident. She stated that the minor was hit by the car on 20 May 2016, next to K[...] P[...] S[...], Dewetsdorp. She was taken to hospital where she was detained for a week. The minor sustained some injuries on the head, back and foot. She further stated that the minor still complains of headaches and for pain management she gives her aspirin. In addition, the minor complains of pain in her feet and back when she is standing or walking for extended periods.

EXPERT REPORTS

[7] There were a number of medico-legal experts who assessed the minor and prepared some reports. The following reports were handed in on behalf of the plaintiff and they form part of evidence before this court. I will now refer to certain salient features of these reports.

i) Dr Danie Hoffman: Plastic, Reconstructive and Cosmetic surgeon

He examined the minor on 11 October 2016, and completed the RAF 4. His diagnosis was disfigurement due to scarring of the scalp. The minor sustained a degloving injury on the scalp, abrasion on the back and right foot. He recorded that the minor remains with a large alopecic scar over the left temporo-parietal scalp which may improve over time with treatment. He further stated that the scar can be excised and re-sutured in one setting to improve the appearance of the scar in future. He determined that the minor qualified for general damages under the narrative test on the basis of permanent serious disfigurement.

ii) Dr LF Oelofetse: Orthopaedic Surgeon

He examined the plaintiff on 22 May 2018. The plaintiff at the time of examination reported that she was experiencing chronic headaches, pain over the area of her skull and inside her head. She was experiencing these headaches on a daily basis with radiating pain into her neck. His conclusion was that the injuries sustained from an

orthopaedic perspective have no impact on the minor's future productivity, working ability, amenities of life and expected age of retirement.

He examined the minor again on 19 October 2022, and filed an addendum report. He opined that the minor had a thoracolumbar spine injury with secondary mechanical back pain and a left foot with residual pain. This resulted in a difficulty with sitting, walking, stooping, squatting, handling heavy objects, climbing and getting in and out of a vehicle. His conclusion was that the minor must be placed in a permanent light duty and back friendly environment. He noted that the injury on the head has a profound impact on her school activities and other amenities of life, however it will not have a detrimental effect on the minor's life expectancy. However, he deferred to the opinion of a neurologist regarding the minor's head injury and the possible effect this injury might have on her life expectancy.

iii) Ms Lida Roos: Educational Psychologist

Ms Roos examined the minor on 23 August 2018. In her report she referred to the reports of Dr Oelofense, Hoffman, and Mr Nhlapo. Ms Roos recorded that the minor had an uneventful birth, her development was normal and there were no concerns raised. She further stated that no one in the minor's family has been diagnosed with any learning problems, however her family has very low levels of education. At the time of accident, the minor was doing Grade one (2016) and at the time of the assessment she was in Grade three (2018). She noted that though the minor has an average range of intellectual potential she probably would have completed her school career with a matric qualification. She recorded that she would have been able to find some employment in the open market with her matric qualification. She noted that her verbal skills measured below average, with comprehension and memory indicated as below par. She opined that the minor is able to access her working memory, her processing

and work speed is adequate. However, the minor's regular headaches could affect her optimal functioning in the classroom and needs to be medically addressed.

Ms Roos assessed the minor again on 29 September 2022, to determine if there was an improvement or deterioration in the minor's functioning or circumstances. She recorded that the minor's intellectual ability falls in the average range post-accident. Her verbal skills measured below par. She concluded that with a severe head injury and diffuse brain it is highly probable that the minor will struggle at later grades as she progresses in school and that if she develops serious learning problems she might have to move to a remedial school and obtain a remedial Grade 12.

iv) Mr AS Nhlapo: Neuropsychologist

He examined the minor on 28 June 2019. He found that the minor's neurocognitive functions have not been negatively affected by the head injury. According to him at the time of examination the minor's intellectual functioning fell within the average and she performed above average in some tasks. He concluded that it was expected for the minor to progress well throughout her school career and tertiary level.

v) Ms A Booyse: Occupational therapist

She assessed the minor on 14 April 2019. On consultation with the minor it was reported that the minor still suffers from chronic headaches. She recorded that the minor tested below the norm in all the subtests presented to her and was unable to maintain focus on the task at hand. These low scores indicated difficulty in almost all areas of visual perception and they will affect her reading and writing abilities in the classroom. She added that if these issues are not addressed she may fall behind as workloads and difficulty of work increase in higher

grades. Her conclusion was that this could impact on her concentration and attention within the classroom as well as in tests and exams.

vi) Dr AC Strydom: Industrial psychologist

He conducted his assessment on 19 January 2022. At the time of the assessment the minor was 11 years and 11 months old. In his assessment he referred to the reports of Ms Roos, Dr Hoffman, Dr Oelofse and Mr Booyse. He noted that considering the minor's premorbid potential, the earnings should be calculated at the median of an unskilled worker. He recorded that the minor seems to have experienced good health prior to the accident and probably had the capacity to have continued working until the usual retirement age of 65 years or for as long as her health allows. He concluded that the minor has been rendered a vulnerable scholar and future candidate in the open labour market and needs to be compensated for that.

vii) Dr DK Mutyaba: Specialist Neurosurgeon

He examined the minor on 20 May 2016. His diagnosis was that the minor suffered a mild traumatic brain injury (TBI) with post-concussion headaches. He recorded that TBI rarely result in significant neurocognitive and/or psychological deficits and that there were no expected complications from a neurosurgical perspective.

viii) Mr AS Nhlapo: Clinical Psychologist

He assessed the minor on 28 February 2019. In order to establish the impact of the accident on the minor's emotional well-being as well as general behaviour. The minor was subjected to neuropsychological screening tests. The results suggested that the neurocognitive functions have not been negatively affected by the head injury, that her intellectual functioning fell within the average and she performed above average on some tasks.

ix) Johan Sauer Actuaries & Consultants:

Mr Sauer compiled a report on the future loss of earnings to be suffered by the minor. He based his calculations on the educational psychologist and industrial psychologists' reports. He noted that due to the minor's age at the time of the accident she would not earn an income until 1 April 2030, and would have to earn an income equivalent to the median income of unskilled workers as suggested by the industrial psychologist. According to his calculations if a contingency in the pre-morbid scenario of 20% and a contingency in the post-morbid scenario of 60% is applied the future loss of earnings is an amount of R1 110 271-00. If the loss earnings are calculated by using a 60% contingency differential and more particularly 20% premorbid and 80% post morbid, the calculated loss of earnings is an amount of R 1 665 406 00.

- [8] The undisputed evidence of the plaintiff is that the minor sustained injuries as a result of the accident. What remains to be considered is how these injuries have affected the minor or whether the injuries resulted in the *sequelae* as contended by the plaintiff. Both parties are in agreement that the minor did suffer some future loss of income. The plaintiff in her heads of argument referred the court to several authorities and submitted that a fair and reasonable award for the plaintiff's damages for future loss of income is an amount R1 110 271-00. The defendant made no contradictory submission. However, the defendant contended that the plaintiff bears an onus to prove her case and the court should exercise its discretion in the application of contingencies.

Legal Framework

- [9] It is trite that the plaintiff must prove the extent of her loss and damages on a balance of probabilities. With regard to loss of income the plaintiff must prove

the amount of income she will reasonably lose in the future as a result of the injury.

- [10] In order to determine a plaintiff's claim for future loss of income the court must compare what the minor would have earned if it was not for the accident with what she would likely have earned after the accident. In **SOUTHERN INSURANCE ASSOCIATION LTD V BAILEY NO 1984(1) SA 98 AD at 113F -G** it was said:

"Any enquiry into damages for loss of earning capacity is to its nature speculative, because it involves a prediction as to the future without the benefit of crystal balls, soothsayers, augers 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 a loss."

- [11] In determining what the effects of the injuries are likely to be in the minor's education and career I have had regard of the expert reports. It is so that according to the neurosurgeon and clinical psychologist the minor's neurocognitive functions have not been affected by the accident. However, the occupational therapist, industrial psychologist and educational psychologist agree that there is a high probability that the minor's scholastic performance and career prospects will be negatively affected. The orthopaedic surgeon has also concluded that due to the nature of the injuries sustained, the minor must be placed in a permanent light duty and back friendly environment. All this indicates without an inch of doubt that the minor's future income has been negatively affected by the accident. Moreover, no evidence to the contrary was received from the defendant.

- [12] When making an order for future losses, it is expected from the court to make use of contingency deductions to provide for any future circumstances which may occur, but cannot be predicted with precision.

- [13] Our courts have accepted that the extent of the period over which a plaintiff's income has to be established has a direct influence on the extent to which

contingencies have to be accounted for. The longer the period over which unforeseen contingencies can have an influence over the accuracy of the amount deemed to be the probable income of the plaintiff, the higher the contingencies have to be applied.

[14] The actuarial calculations are not binding to this court as the court has a wide discretion to award what it considers to be fair and reasonable compensation. The court is not to be 'tied down by inexorable actuarial calculations.

[15] Having regard to the evidence presently before me I am of the view that an amount of R1 110 271.00 will be adequate and fair compensation for future loss of income.

Order

[16] I accordingly make the following order:

1. The defendant shall pay to the plaintiff the amount of R650 000.00 in respect of general damages.
2. The defendant shall pay to the plaintiff the amount of R1 110 271.00 in relation to the plaintiff's future loss of earnings.
3. The payments shall be made by the defendant to the plaintiff within 180 days from the date of this order into the trust account of the plaintiff's attorneys failing which the defendant shall become liable to pay interest a tempore morae on the capital amount aforesaid at a rate of 7% per annum from the date of this order to date of final payment.
4. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4) of the Road Accident Fund Act 56 of 1996, for payment of 100% for the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supply of goods to her,

arising from the injuries sustained by her in the motor vehicle collision on 20 May 2016.

5. The defendant shall pay the plaintiff's taxed or agreed party and party costs until the date of this order including costs of one counsel. Such costs shall include the following:

- 5.1 the reasonable qualifying fees of the following experts:

- 5.1.1 Dr DK Mutyaba

- 5.1.2 Dr LF Oelofse

- 5.1.3 L Roos

- 5.1.4 Dr D Hoffman

- 5.1.5 Dr AC Strydom

- 5.1.6 AS Nhlapo

- 5.1.7 Anel Booyse

- 5.1.8 Mr Johan Sauer

6. The payments are to be made into the following account:

VZLR INC – TRUST ACCOUNT

ABSA BUSINESS BANK HILLCREST

ACCOUNT NUMBER: 3[...]

BRANCH CODE: 6[...]

REFERENCE: M[...]

MPAMA AJ

On behalf of the plaintiff:

Instructed by:

Adv. MDJ Steenkamp

Messrs VZLR Inc

c/o Du Plooy Attorneys

Bloemfontein

On behalf of the defendant:

Instructed by:

Ms P. Mkhwanazi

Office of the State Attorneys

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