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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: 1104/2021

In the matter between:

ADV. MAPULE CONSTANCE BALOYI-MBEMBELE
obo N[...] M[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: MPAMA, AJ

HEARD ON: 22 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 09h00 on 18 May 2023.

FACTUAL BACKGROUND

- [1] The plaintiff, Adv Mapule Constance Baloyi-Mbelembele, is suing the defendant in her representative capacity as *curator ad litem* (appointed on

27 October 2022) of the minor child, N[...] M[....] born on 10 June 2006 to whom I shall refer as the minor.

[2] On 17 December 2014, the minor was involved in an accident when she was hit by a motor vehicle whilst she was a pedestrian. At the time of the accident the minor was 8 years 6 months old. She sustained the following injuries:

- (i) Head injury with loss of consciousness;
- (ii) Left forehead soft tissue injury;
- (iii) Abrasion on the right shoulder;
- (iv) Abrasion on the left knee;
- (v) Dislocated right patella.

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

- (i) Future medical expenses;
- (ii) Future loss of earnings;
- (iii) General damages.

[2] The defendant has accepted liability and tendered an undertaking for future medical treatment in terms of section 17(4) of the Road Accident Fund Act 56 of 1996. The claim for general damages has been rejected by the defendant and is to be referred to the HPSCA for determination. The remaining issue for adjudication by the court is that of future loss of income.

[3] The parties did not present any *viva voce* evidence. It was agreed between the parties that numerous reports compiled by their experts were to be presented by way of affidavits in terms of Rule 38(2) Of the Uniform Rules.

EXPERT REPORTS

[5] Several experts' reports were handed in by both parties in order to assess the seriousness of the minor's injuries. The following reports were handed in by the plaintiff: Dr TL Nhlapo (Education Psychologist), Dr G Fredericks

(Medical Practitioner), Dr A Kelly (Neurosurgeon), Dr M Bongobi (Orthopaedic Surgeon), Drs Verster en Vennote Inc (Diagnostic Radiologist), Ms L. Grootboom (Clinical Psychologist), Ms Rene Walker (Occupational Therapist) and Munro Forensic Actuaries (Actuarial report). The defendant filed the following reports: Dr S. Makhure (Specialist Neurosurgeon), Dr R D. Kgabu (Specialist Orthopaedic Surgeon), Dr GB Bokaba (Clinical Psychologist), MP Seloane (Industrial Psychologist) There were joint minutes filed by Educational Psychologists and Industrial Psychologist and herein under I refer to certain salient features of these reports.

PLAINTIFF'S EXPERTS

- i) Dr TL Nhlapo: She assessed the minor on 7 June 2021 in order to gain a better understanding of the injuries that were caused by the accident and to further determine the impact and extent of these injuries on the minor's intellectual potential/ functioning and academic prospects. For the purpose of her assessment she received reports from the other experts who examined the minor. Dr Nhlapo received the following complaints from the minor: physical -chronic headaches, epistaxis, knee problems, dizziness and fatigue. Cognitive complaints: extreme forgetfulness, academic decline, poor concentration, short memory span and inability to comprehend instructions as expected.

The Dr reported that the minor's birth was not characterised by any complications and it was uneventful. The minor achieved developmental milestones and was a fine child before the accident.

She concluded that the minor had a slow pace performance, a short span of concentration and attention to details. Her thought process was very slow and her responses were delayed. The minor was unable to tolerate the demands of the assessment activities.

The Dr further recorded that at the time of the accident the minor was in Grade 1, she passed Grade 1 but failed and repeated Grade 2. At the time of the assessment she was in Grade 8 and did not achieve in the first term of Grade 8. Her conclusion was that the minor presented with cognitively handicapped IQ, borderline perception, scholastic backlog/gaps/decline,

sunken emotions and psychological complaints. The minor would pre – accident have been able to attain a Grade 12 and a higher certificate.

- ii) Orthopaedic Surgeon: He examined the minor on 28 May 2021. The minor at the time of examination reported that she was experiencing pain in the right knee and the pain is exacerbated by the inclement weather and physical exertion. The minor's knee dislocates when playing and as a result she uses a knee guard. His conclusion was that from an orthopaedic perspective the injuries were not so serious to qualify for general damages.
- iii) Clinical Psychologist: The minor complained of chronic headaches, nose bleeding and pain in the knee. The minor was given a range of neuropsychological tests which covered several cognitive functions including attention and concentration, memory, visuo-spatial and construction ability, reasoning formation as well as executive functioning. He recorded that the tests revealed mild to significant neurocognitive implicating left-hemispheric functions (verbal learning and memory). He concluded that the minor presented with residual post-traumatic stress symptoms and difficulty adjusting to her altered circumstances.
- iv) Specialist Neurosurgeon: He assessed the minor on 28 May 2021. He observed that the minor had memory problems. Her recent and remote memory were impaired and recommended that the minor be assessed by a neuropsychologist. He completed RAF 4 and concluded that the minor did not suffer any serious long term impairment.
- v) Specialist Orthopaedic assessed the minor on 28 May 2021. The minor was complaining of physical pain in the knee. On examination he detected Osgood Schlatter (an inflammation of the area just below the knee) which had no direct relationship with the accident. Further investigations revealed that the minor suffered from pain of the right knee and that full recovery is expected. He concluded that the accident had a minimal impact on the minor's life amenities and enjoyment of life and she has not suffered any serious long term impairment.

- vi) Occupational Therapist: The interview was conducted on 12 August 2021. She concluded the minor presented with mildly compromised agility related to pain in the right knee and compromised load handling due to pain this will preclude the minor from jobs with heavy physical demand where agility and heavy load handling is required. Her employability will be directly related to her educational level.
- vii) Industrial Psychologist: He recorded that prior the accident the minor reported a good health status as a result she was likely to have coped with the requirements of her studies. He reported that in all probability the minor would have completed Grade 12 and pursued a career of her choice at tertiary level, depending on motivation, pre-accident educational potential and support. He noted 3 pre-accident scenarios :
 - (a) The minor obtaining a Higher Certificate (NQF 4) level of education, she would have entered open labour market at a Patterson Level B2, reaching her career ceiling earning at the upper quartiles of Patterson C2 level.
 - (b) With a Diploma (NQF 6) level of education, she would have entered the open labour market at a Patterson level B2/B3, reaching her career ceiling earning at the upper quartile of Paterson C4 level.
 - (c) With a degree (NQF7) level of education, she would have entered the open labour market at a Patterson Level B4/B5/C1, reaching her career ceiling earning at the upper quartiles of Patterson D1+ level and that she would have worked in the open labour market until the normal retirement age of 65 years depending on a variety of factors such as health status, personal circumstances and conditions of employment market.

He concluded that with physical and psychological limitations, the minor has been rendered an unequal competitor and vulnerable job seeker in the open labour market. The minor will be negatively affected due to compromised scholastic abilities and curtailed employment opportunities.

- viii) The Actuary: The reports filed by the actuary are based on the opinion and scenarios contained in the Industrial Psychologist's report.

DEFENDANT'S EXPERTS

[6] Specialist Neurosurgeon: He conducted the assessment on 07 June 2022. He noted that the minor experiences occasional headaches which are well controlled with water and has a poor memory. He concluded that the risk of the minor developing seizures in the future is not higher than that of the general population at 3%.

[7] Orthopaedic Surgeon: The date of examination was 24 April 2022. He recorded that the minor's physical complaints as follows:

- Inability to walk long distances
- Intermittent pains on the right knee
- Intermittent right elbow pain.

He concluded that the minor had soft tissue injuries of both her right knee and elbow, her prognosis is good as she can mobilise without crutches and she can participate in her normal activities.

[8] Neuropsychologist: The report is dated 8 July 2022. It is reported that the minor still suffers from physical pain. She experiences memory problems, is overly forgetful and her concentration span has increasingly diminished. He concluded that the minor presents with signs of mental and behaviour challenges. Her attention and concentration fluctuated and demonstrated working memory challenges.

[9] Industrial Psychologist: The child was seen on 17 June 2022. Having taken into consideration the reports filed by other experts he came to the conclusion that the minor's current cognitive profile would have an increasingly significant impact on her educational progress and subsequently her occupational potential in future.

JOINT MINUTES

- [10] Neurosurgeons: They agree that the minor sustained a minor head injury and her life expectancy has not been affected.

- [11] Orthopaedic Surgeon: They agree that the minor was in good health before the accident and had no physical restrictions and that the minor must be assessed by the occupational therapist and industrial psychologist for further discussion on future work capacity and employability.

- [12] Clinical psychologists: They agree that the current cognitive profile of the minor would have an increasingly significant impact on her educational progress and subsequently her occupational potential in future.

- [13] Industrial Psychologists: They agree that the minor's scholastic abilities have been negatively affected as a result of the injuries she sustained in the accident.

- [14] Educational Psychologists: They agree that the minor would have passed Grade 12 and probable obtain a certificate but disagree as to her obtaining a diploma.

- [15] 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 adduce evidence of her income in order to enable the court to assess her loss of past and future earnings. In addition, the plaintiff must prove the amount of income she will reasonably lose in the future as a result of the injury. The following was stated in **MVUNDLE v RAF** (63500/2009) [2012] ZAGPPHC 57(17 April 2012) an unreported North Gauteng High Court judgment case:

“It is trite that the damages for loss of income can be granted where a person has in fact suffered or will suffer a true patrimonial loss in that his or her employment situation has manifestly changed. The plaintiff's performance can also influence his or her current job and /or be limited in a number and quality of his or her choices should he or she decides to find other employment”.

[16] In order to determine a plaintiff's claim for future loss of income the court must compare what the plaintiff 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 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”.

[17] The court as stated above is called upon to adjudicate only the minor's claim for loss of earnings. The plaintiff must establish on evidence that she would have earned an income but for the injuries sustained. The crisp issue to be decided is the amount of damages that the court should award for future loss of income. The reports of the Educational Psychologists, Industrial Psychologists are instructive in this issue. The Industrial Psychologists agree that the minor's scholastic abilities have been negatively affected by the accident. The plaintiff's Industrial psychologist has noted that the minor's physical and psychological limitations have rendered her an unequal competitor and vulnerable job seeker in the open labour market and there is no evidence to rebut this. The Educational Psychologists also agree regarding the negative effects of the accident on the minor.

Furthermore, both parties have submitted that the minor has suffered loss of income but strongly disagree on the following aspects: Whether the minor would post Grade 12 have progressed to a certificate, diploma or degree, at which Paterson level would the minor have entered the open labour market and at which level would her career peak. The notion that the minor would, but for the accident obtain a Grade 12 and a higher certificate finds support from the plaintiff's and defendant's Educational Psychologist. They have acknowledged that the minor would pre-accident achieve more than Grade

12. It is my view that the minor would, but for the accident obtain her Grade 12 and a diploma. I make this finding having taken into account the minor family's educational background (even though the parents of the minor did not advance in education, the minor's uncle is a professional and working for the municipality), that the minor was an average learner prior the accident and acknowledging that the children achieve more than their parents academically and vocationally.

[18] 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.

[19] 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.

[20] 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.

Having considered the evidence and submissions made by both parties I am satisfied that a fair and reasonable compensation is as follows:

Earnings uninjured	R9 407 300.00
Less 15% contingencies	R1 411 095.00
Subtotal	R7 966 205.00

Earnings injured	R 720 900.00
Less 25% contingencies	R 180 135.00
Subtotal	R 540 765.00

R7 455 530.00 represents the total loss of earnings and is a fair and reasonable amount in the circumstances of the minor.

ORDER

[21] In the result I make the following order:

- 21.1 The defendant is ordered to pay the plaintiff a sum of R 7 455 530.00 in respect of future loss of earnings plus costs.
- 21.2 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 future medical expenses arising out of the injuries sustained by the minor in the motor vehicle accident that occurred on 17 December 2014.
- 21.3. The plaintiff shall prepare a draft order within 4 days from the date of this judgment to be made an order of the court.

L. MPAMA, AJ

On behalf of the plaintiff:
Instructed by:
c/o

Adv. TC Maphalale
Messrs S.B. Seshibe Inc Attorneys
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On behalf of the defendant:
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