

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 54034/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 22 February 2024

In the matter between:

MT obo PM

APPLICANT

and

THE ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT

DE VOS AJ

[1] In October 2014, a mother and her four year old child were in a motor vehicle accident in Kempton Park. As the child, young Mr PM, was a passenger, the merits were settled at 100%. In terms of a court order obtained before Meersingh AJ, the RAF's defence was struck out. The matter therefore proceeded in this Court's default trial roll.

- [2] The determination of general damages has to be postponed *sine die* pending a determination by the HPSCA. The WPI is determined by the experts to be at 13% - but Mr PM may qualify under the narrative test. The only issue for this Court to determine, is the loss of future income.
- [3] I first consider the injuries the young Mr PM has suffered. They were facial lacerations measuring 13 cm, 5 cm, 2 cm x 1 cm and 3cm x 6 cm and a soft injury to his right lower leg. The one scar has a Y-shape and is on the child's right cheek. The other navigates close to his mouth and another is close to his eyelid, resulting in a drooping eye-lid.
- [4] There was no haemorrhage, no facial or skull fractures. The CT scan showed no abnormalities. Mr PM's GCS was one of 15/15 and there is no history of loss of consciousness. No surgery was required. Subsequent medical examinations indicate no tenderness or swelling on the right leg.¹ Whilst Mr PM complained about a sore left leg subsequent to the accident, this is not the leg which was injured and his father explained this injury was as a result of walking home after a game.
- [5] The claim is therefore solely one for the facial disfigurement which affects Mr PM's self-confidence and has resulted in a post-traumatic stress disorder and a depressed mood. The claim does not include one for a brain injury,² but rather the "intense psychological impact due to the accident".
- [6] I identify that the claim is for facial disfigurement and post-traumatic syndrome, not to minimise the extent or impact of the injuries, but to focus on the injury and sequelae. It weighs with the Court that the plastic and reconstructive surgeon, Dr Selahle says that the scars are cosmetically unsightly and disfiguring, conspicuous and difficult to conceal. They are permanent with some prospects of scar improvement by scar revision techniques. Mr PM suffered from considerable physical pain and he is still

¹ Dr Enslin's report

² The Clinical Psychologist, Ms Sepwershad concludes that the child "sustained a mild brain injury", but defers to the neurosurgeon in this regard. In addition, Ms Sepwershad draws the conclusion that based on the laceration on the child's cheek, the history of no loss of consciousness, a GCS of 15/15, it is likely that the child suffered a mild brain injury (concussion). The difficulty is that there is no neurosurgeon's report in this regard. In addition, save for the laceration all the other factors Ms Sepwershad relies on indicate the opposite of a head injury – certainly not a mild brain injury. The Educational Psychologist states categorically that "there was no evidence indicating a brain injury".

suffering from emotional pain due to his cosmetically disfiguring scars. Young Mr PM further is teased at school for these scars and has been given the unkind nickname of Mr Scratch. The identification of the scars and emotional impact on Mr PM is therefore the issues at play in this matter. The impact of these, contends the plaintiff is that it has affected his future earnings. The plaintiff claims just shy of R 9 million in damages for future loss of earnings.

[7] The experts all agree that PM has suffered a post-traumatic stress disorder which can be ascribed to the accident. Further, they all agree that the disorder affects his future ability to earn an income. I accept these findings, the sequelae and that they ground a basis for a damages claim for future loss of income. The issue that I have considered is that of quantum.

[8] The plaintiff seeks for the loss to be calculated as follows:

- a) Future uninjured loss at the level of NQF7 with a 15% contingency
- b) Future injured loss at level NQF5 with a 25% contingency.

[9] The Court provided the plaintiff's counsel an opportunity to call further witnesses, and file additional written submissions and to make a second set of oral submissions. After receipt of these, the Court reserved judgment to consider the claim. After much consideration, the Court requests a recalculation after which it will make a final determination. The reasons for the request for a recalculation appear here.

Uninjured: NQF7 with 15% contingency

[10] Ms Masipa, the EP, postulates that Mr PM would have studied towards a NQF 7 (matric, plus a degree). The EP notes that there is a high degree of uncertainty in this regard as Mr PM -

“attended creche for a few months in 2011 and he was withdrawn because his parents were not satisfied with the care. He was therefore, cared for at home until the time of the accident. Therefore, there is no reliable evidence of his learning ability.”³

[11] The additional difficulty, as acknowledged by the EP, is that so much of a child's life is deeply uncertain. The only other available information that is relied on in these circumstances are the labour market and the immediate circumstances of the child.

³ CL 2-8

In this case, those are that his mother obtained a nursing certificate post matric and that his father completed matric. His sole sibling, an older sister, had not passed matric.

- [12] The uncertainties in relation to young Mr PM's ability to reach the NQF 7 as postulated by the EP would require a higher contingency than the usual contingency to be applied.
- [13] The plaintiff has relied on 15% contingencies for uninjured income. This is incorrect. A sliding scale is used to determine uninjured earnings, and the applicant's contingency based on Koch's sliding scale of 0.5% per year until retirement should be at least 30%. In other words, even before considering the uncertainties abounding in relation to the NQF 7 determination, an appropriate contingency is double what the plaintiff's lawyers have proposed.

INJURED: NQF5

- [14] The EP, Ms Masipa filed two reports. The Court knows this as there is reference to the first report. The court was favoured with only one. In the first one the EP postulated an injured NQF 6 for Mr PM. The addendum to the EP's first report postulates an injured NQF 5. The IP, Ms Mayayise then amended her report in light of Ms Masipa's addendum. Ms Mayayise refers to the new information in Ms Masipa's later report. It is therefore only this which has served before the Court to explain the difference.
- [15] The Court does not know why Ms Masipa changed her view. It does not appear that Masipa did not have a follow-up in person consultation. The two reports are less than two years apart. There is no medical report showing any worsening of the condition.
- [16] The only reference to a change, which is found in Ms Mayayise's report is how well the child is doing in school. Young Mr PM is doing – often above average – well in school. It is not explained how this would decrease his chances of reaching his potential – as one would assume the opposite to be true.
- [17] The Court also notes that the EP notes that according to "his school progress reports of grade R to grade 4, his performance has been ranging between meritorious and outstanding achievement."⁴ In addition according to the child's parents "they have not

⁴ CL 2-77

received any complaint with regard to his learning or behaviour from school”.⁵ His score card shows that of English and Life Skills he achieved 85 and 93% respectively. He also sustains an A+ in maths.⁶ The results of his cognitive and intellectual assessment indicates that he is above average in non-verbal tests and average on a verbal scale. Post -accident he will be able to reach matric “with ease”.⁷

[18] The IP’s report indicates that the child reached his normal developmental milestones. He has subsequent to the accident attended school and has to date not failed or repeated any grade.

[19] If anything, the subsequent events show the absence of a basis to believe that the child’s possibility of reaching his potential has not decreased as a result of the accident. Yet, this is used to contend that his potential has dropped.

[20] The Court, has not been placed in a position to understand this change. Neither the EP nor the IP has explained the change. There is nothing in the written submissions or in oral argument that assisted the Court in understanding the factual basis for this change. In these circumstances, the Court accepts the first report.

[21] This requires a recalculation by the actuary. To be clear, the Court requests a recalculation based on the first report of Ms Masipa projecting an injured NFQ of 6. In fairness to the plaintiff, they have not had a chance to address the court on the appropriate contingency in light of such a recalculation. Out of fairness, such an opportunity is provided for in the further conduct order below.

Order:

[22] The Court orders:

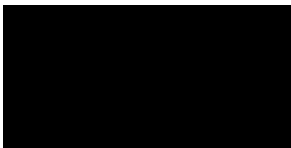
- a) The plaintiff’s actuary is to recalculate the loss on the following premises:
 - i) Uninjured requires a recalculation of the contingencies, on two scenarios (i) 40% and 60%;

⁵ Id

⁶ CL 2-78

⁷ CL 2-86

- ii) Injured an NQF level 6, as identified in the first report of Ms Masipa is to be used to calculate the uninjured earnings and then to provide contingencies calculated at 25%.
- iii) The recalculation is to be uploaded onto caselines within 5 days
- b) The plaintiff is afforded an opportunity to address the court, through written submissions solely on the appropriate contingencies based on the recalculation of the injured projections within 5 days of the filing of the actuary's updated report.
- c) The court will decide the issue within 5 days of the written submissions if any, on the papers, unless the plaintiff requests an oral hearing which will be limited to the issue in paragraph (b) above.



I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the plaintiff:	M MASHAU
Instructed by:	Baloyi Attorneys Inc
Date of the hearing:	17 November 2023
Date of judgment:	22 February 2024