

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

CASE NO: 2073/2022

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

18 MAR 2024

In the matter between:

O[...] M[...] S[...] obo RKS

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MAKHAMBENI AJ:

Introduction

[1] This is a claim for future loss of earning capacity on behalf of a 9-year old minor child (“the minor child”), who sustained injuries on account of being run over

by a motor vehicle whilst she was a pedestrian at the tender age of 6 years, on 12 April 2021 at Wanderous Street, Protea South, Soweto.

[2] In view of the fact that the issue of liability has been settled 100% in favour of the plaintiff, and the issue of general damages has also been settled in the amount of R550 000¹, the only issues that remain before me for determination are those related to the plaintiff's future loss of earning capacity, as well as, the undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 (as amended) ("the RAF Act") with a view to all future medical costs, inclusive of hospitalisation costs, for the plaintiff.

[3] I also need to point out the fact that since the beneficiary on whose behalf this claim has been instituted by the Plaintiff, is in actual fact a minor child, and I had my concerns about the future impact of this accident on her, from a psychological, as well as, an orthopaedic point of view, hence I sought evidence from the three experts that had consulted with the minor child, in order to help address my concerns, and the testimony of the Orthopaedic Surgeon, Prof Chris Frey, the Industrial Psychologist, Ms Michelle Hough and lastly, the Educational Psychologist, Alet Mattheus, which expert testimony I found rather helpful with a view to addressing the concerns I had in this regard. Hence, I now turn to the evidence of the experts.

The evidence of Ms Alet Mattheus and Ms Michelle Hough

[4] Ms Mattheus' evidence can be summed up as following paragraphs.

¹ CaseLines ("CL") 016-1 to 016-4: settlement documents signed by the plaintiff and the defendant.

[5] Ms Mattheus mentioned the fact that she relied on what the Orthopaedic Surgeon had said in respect of all future prognosis of the orthopaedic injury, and in her view, all assessments from her consultation with the minor child, as well as the reports of the Orthopaedic Surgeon, were indicative of the fact that provision would have to be made for the prospect of the minor child falling behind by one to two years in her academic development, given the fact that she was going to require not only one form of surgery but multiple surgeries, as she continues to grow, and each respective kind of surgical procedure that she would require, would result in her missing a term of school, and if all that is taken cumulatively, that would basically amount to a year to two years, given the fact that she would need a minimum of four surgical procedures at different times during the course of her development.

[6] She also testified that it would also be advisable, if possible, to place the minor child in a private school, where the classes were much smaller than the class wherein she currently finds herself, given the fact that in a public school, where the minor child currently attends, classes have on average between 30 and 60 pupils per class, since the minor child would in actual fact benefit from being in a class of around 15 people, so that the teaching staff would be in a much better position to devote attention to her needs.

[7] During cross-examination by Ms Mhlanga, Ms Mattheus conceded that even though the minor child was currently not in a smaller class, where special attention was being paid to her, she had not failed any of her classes, and as a result thereof, the placement in a private school as advocated for by Ms Mattheus would not be

warranted. She did concede that indeed the minor child had not failed any of her classes in this regard.

[8] Ms Mattheus also testified to the effect that counselling would have to be a key component in the life and development of the minor child, given the psychological effects injuries she has suffered, which have resulted in the deformity of her right lower limb, and in her testimony, she emphasised the vital importance thereof when minor child enters adolescence, as a young lady who shall by then be developing further, which under the circumstances, I consider to be a reasonable observation.

[9] She further testified to the effect that with the requisite assistive care referred to, namely, counselling and remedial classes, placement in a private school, and extra classes for catch-up purposes, there were also two scenarios possible that could be reached by the minor child, the first one being her being able to complete Grade 12 and obtaining a post-matric certificate and, the second scenario being one wherein the minor child is able to complete Grade 12 and obtain a diploma qualification, and this would determine the actuarial calculation for future loss of earning capacity in this regard.

[10] Ms Michelle Hough's testimony and evidence pretty much lined up with that of Ms Mattheus, and Ms Mhlanga managed to extract a similar concession out of Ms Hough, that she had extracted out of Ms Mattheus in this regard.

The testimony of Prof C T Frey

[11] Prof Frey testified to the effect that his biggest concern was that the tendons in respect of the minor child's right foot were forever gone and could never ever grow back, and as a result thereof, the toes on the minor child's right foot were pointing downwards. The learned Professor also testified to the effect that a minimum of four surgical procedures would be required, and those by their very nature given their respective lengthy recovery time, would in all probability, put the minor child out of circulation for a better part of three (3) months every time surgery is undertaken, with a view to the ongoing corrective process required in respect of the minor child's right foot.

[12] If regard is had to Prof Frey's report², the injuries are listed as follows:

12.1 Right foot dorsal and right distal tibia large degloving injury with bones and tendons exposed.

12.2 A right ankle joint open and exposed injury;

12.3 The talus and malleolus exposed injury;

12.4 Multiple tendon ruptures of the right foot: extensor hallucis longus (EHL) and extensor digitorum communis (EDC) of the second, third, fourth and fifth right toes;

12.5 The condition of the fingers pointing downwards is referred to as equinus.

[13] Prof Frey highlighted all these injuries in great detail, coupled with the fact that skin grafting from certain parts of the body has had to take place, and that

² CL 003-1

therapeutic treatment would also have to be factored into the equation in respect of the donor areas, where skin had to be removed before it was grafted onto the right foot.

[14] Prof Frey also testified about some of the psychological challenges that patients such as the minor child would experience as they grew, given the nature of the injuries and disability they now would have to live with for the rest of their lives.

[15] Prof Frey also made mention of the fact that the minor child will never ever have a normal gate again, and that in as much as the lengthening procedure that she will undergo, may go some way towards helping to reduce the extent of the limp she has when she walks, walking normally would never ever come back, given the fact that the tendons are gone, and are never going to grow back again, as already stated above. He also stated that in as much as the ankle is a forgiving bone structure amongst children, the potential of osteoarthritis is one that cannot be ignored in as far as the minor child's ankle was concerned.

[16] In as far as the need for counselling is concerned, Prof Frey's testimony lined up with that of the other experts, who had testified in this regard.

[17] I then sought clarity from Prof Frey regarding the rest of the skeletal structure of the minor child, regarding the potential of any form of arthritis developing, or getting an accelerated onset thereof, and he responded by advising that pathologically, that was indeed a possibility, however given what he had seen with this very patient, the pathological possibility of that ever occurring with this minor

child was highly improbable, and that the only area that could probably develop symptoms of any form of degenerative arthritis would be knee and the hip, but even with the pathology of what he had seen in respect of this very patient, this was also a very remote possibility, and not one that was highly probable.

Findings

[18] In view of the fact that the issue of general damages was not before me, and if one has regard to the pleadings, the plaintiff has, in any manner or form, not claimed an amount for assistive devices, such as the placement of the minor child in a private school, with a projected amount that I would have been able to take cognisance of. Hence, I find that these are issues that I cannot pronounce on in any manner or form, since they are not before me.

[19] The foregoing finding is, further, attributable to the fact that at civil law, a plaintiff stands or falls by their pleadings, and if the evidence before me does not line up with the pleadings that provide a basis, as well as, a proper case for the plaintiff's claim, then I cannot award what has not been claimed in the particulars of claim.

[20] In as far as the issue of counselling is concerned, it is my considered view and finding that the requisite counselling suggested by the experts can be provided and compensated for, by means of the undertaking that the defendant is obliged to make in respect of the minor child's future medical costs, which undertaking is also meant to cater for the minor child's costs in respect of her future surgical procedures, as

well as her hospitalisation fees, in terms of Section 17(4)(a) of the RAF Act, and as a result thereof, nothing more needs to be added thereto.

[21] It is furthermore my considered view and finding that the types of ointments and creams recommended by the Orthopaedic Surgeon with a view to caring for the minor child's skin as a result of the skin grafting procedures, are also the type of ointments she might in all probability have to resort to for the rest of her life, and that these ointments would have to be chosen carefully with help from the requisite specialist doctors, and that given the fact that these ointments are not meant for cosmetic purposes, but are rather for therapeutic purposes, the undertaking in terms of Section 17(4)(a) of the RAF Act must also be resorted to in this regard, with a view to covering the costs of these creams and ointments.

[22] In view of my earlier concerns regarding counselling and remedial classes coupled with extra classes, I am not convinced, that given the current academic performance of the minor child, which is reasonable, coupled with the counselling that I have made provision for, as well as, the fact that the minor child is in the care of parents, who are very diligent, and want what is best for her, the minor child will still need any additional help beyond what she currently gets. It is my considered view, that given the help and care the minor child has, thus far, received from her family, coupled with the support she would benefit from with the provision of counselling that would be catered for under the Section 17(4)(a) undertaking (*supra*), to award the plaintiff's future loss of earning capacity on the basis of scenario 2 in the actuarial calculation would be an act of writing the minor child off, as suggested by Ms Mhlanga on behalf of the defendant, who advocated for an award of future

loss of earning capacity in terms of scenario 1, which suggestion is, in my view the correct one. I find that the minor child has sufficient potential, which must just be helped along, and in my view, enough has been put in place, through this judgment, to make provision therefor.

[23] I therefore find that in as far as the issue of future loss of earning capacity is concerned, scenario 1, which is calculated based on the minor child having completed a post-matric certificate level of education, and as such resulting in an amount of R1 265 314.00, (as opposed to scenario 2 which pitches the calculation for future loss of earning capacity at an education level of a diploma post-matric, resulting in an amount of R2 407 029.00), is the preferable scenario.

[24] My reason for the foregoing is attributable to the fact that to try and make provision for the amount advocated for by Mr Jordaan in scenario 2, would effectively amount to inflating the amount to be awarded for future loss of earning capacity, in order to compensate for a low amount in general damages, when the issue of general damages had already been resolved, and was no longer before me.

[25] In respect of the issue of executing on costs post taxation, Mr Jordaan attempted to prevail on me with a view to allowing him to execute thereon within a period of fourteen day after taxation, and he even referred me to the Judgement of my sister Nkutha – Nkontwana J, in the matter of ELLEN VICTORIA JACOBS N.O. v RAF (22121/2022) (unreported), in which subparagraph 9.2 and paragraph 10 of the draft Order made into an Order of Court is legally wrong, and neither persuasive, nor binding binding on me, given the fact that the legal authority for execution against

state organs is thirty days, in terms of the Constitutional Court's decision of Minister for justice and Constitutional Development v Nyathi and Others (CCT23/09) [2009] ZACC 29; 2010 (4) SA 567 (CC)

Order

[26] In light of the foregoing, I make the following order:

1. By agreement, the defendant is held 100% liable for all proven damages suffered by the plaintiff.
2. The defendant is ordered to pay the plaintiff an amount of R550 000.00 in full and final settlement of the plaintiff's general damages.
3. The defendant is ordered to pay the plaintiff an amount of R1 265 314.00 for future loss of earning capacity.
4. The defendant is ordered to provide the plaintiff with an undertaking for all medical expenses, as well as the costs of being accommodated at a hospital in respect of the minor child, RKS, with ID No 140822 1247 087, in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 (as amended) which medical expenses are also to include the following:
 - 4.1. Skin care treatment and ointments for the above-mentioned minor child; and
 - 4.2. All psychological counselling sessions for the minor child with a view to helping her cope with her condition.
5. The costs of this action are to be borne by the defendant on a party and party basis, which costs are to include the costs of all medico-legal reports prepared by the plaintiff's experts, which shall include the medico-legal consultations

with the minor child, the preparations of the expert reports, all qualifying preparation and reservation fees, where applicable with a view to attending the trial.

6. All costs mentioned in 5 above shall be payable upon taxation, and after a period of thirty (30) days after such taxation.

I hand down the order.

P W MAKHAMBENI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

*Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **18 March 2024**, with the matter having been heard on the **29th of February 2024** and the **1st of March 2024**.*

COUNSEL FOR THE PLAINTIFF: Mr Uys Jordaan

INSTRUCTED BY: Uys Jordaan Inc., Roodepoort.

COUNSEL FOR DEFENDANT: Ms Jacqueline Mhlanga

INSTRUCTED BY: State Attorney's Office, Johannesburg

DATE OF THE HEARING: **29 February 2024 / 1 March 2024**

DATE OF JUDGMENT: **18 March 2024**