

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

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

Case no: 5609/2021

In the matter between:

N[...] F[...] M[...] obo

N[...] M[...]

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT BY:

MOLITSOANE, J

HEARD ON:

29 NOVEMBER 2024

DELIVERED ON:

28 MARCH 2024

- [1] On 9 February 2018 the plaintiff was a pedestrian on a road in Kwakwatsi, Koppies when she was hit by a motor vehicle. She was about 11 years old at the time. She sustained injuries and instituted damages against the defendant. The merits were resolved on the basis that the defendant shall pay 100% of the plaintiff's proven or agreed damages. The damages for future loss of earnings as well as the general damages remained unresolved

- [2] The defendant was, however, ordered to make an interim payment of five hundred and seventy-six thousand and forty-eight rand seventy cents (R576 048.70) for future loss of earnings. This court is only called upon to adjudicate the issue of loss of earnings.
- [3] At the beginning of the trial, the plaintiff brought an application in terms of which leave was sought to lead evidence in respect of the issues of quantum in terms Rule 38(2) of the Uniform rules of this court, read together with Section 3(1)(c) of the Law of Evidence Act, 45 of 1988. Having considered the application and there being, no opposition on the part of the defendant, I granted the application. The essence of the application was to grant leave to admit the affidavits of the applicant's experts pertaining to the issue of quantum as well as the collateral facts and information provided to the plaintiff's experts in so far as it constituted hearsay evidence and as contained in the respective reports.
- [4] Dr Hoffman a plastic surgeon indicated that the plaintiff sustained a left pelvic fracture and had sustained abrasions of both thighs. According to the Dr. the plaintiff presented with a faint pigmented abrasion scar over the lateral aspect of the left thigh.
- [5] Dr Marine, an orthopaedic surgeon also consulted with the plaintiff, Dr Marine confirms the fracture of the pelvis sustained by the plaintiff. According to the doctor, both the plaintiff and the mother informed him that the plaintiff struggled with walking and/or standing for prolonged periods of time. The doctor also opined that due to the nature of the injuries the plaintiff had sustained, he had a high possibility of developing osteoarthritis of the right hip joint. With reference to employability, the doctor opined that the child will ultimately enter the work force. The doctor also opines that the pelvic fracture the plaintiff had sustained, had a profound impact on his productivity, working ability and amenities of life and will continue to do so in future. The doctor further opines that the plaintiff will continue to suffer from sequela emanating

from the injuries. He recommends that the plaintiff should be accommodated and should not do manual labour. He however holds the view that the plaintiff will however be able to work until the retirement age of 65.

- [6] The plaintiff was also assessed by Ms Du Plessis, an educational psychologist. According to Mrs Du Plessis opines that on the pre-morbid level, the plaintiff most probably presented with an average cognitive ability. On the post morbid functioning, she found that the plaintiff had not obtained sufficient knowledge that comes from pre learning and past experiences. She observed that the plaintiff was unable to reason on previously learned verbal information and to respond to formal educational stimulation received within her home, social, academic and occupational environment. When it comes to non-verbal ability attributes of the plaintiff, she noted that the plaintiff showed a significant decrease in ability to reason independently, to analyse and synthesise both concrete and abstract information to solve problems successfully. This attribute becomes increasingly important especially on high school and tertiary levels.
- [7] The plaintiff cannot integrate visual stimuli, reason non-verbally and apply skills to solve problems not typically taught through formal learning and is unable to use her innate potential to solve problems in an abstract manner. Ms Du Plessis concluded that the plaintiff had exceptionally weak, general intellectual profile. She presented with borderline to poor crystallized intelligence. According to her, the plaintiff's below average general intellectual functioning is likely to hamper her learning ability. This would be further compromised by the below average working memory, process in speed and general language ability. She noted that there appeared to be a decline in plaintiff's post morbid cognitive functioning compared to his estimated pre-morbid functioning. According to her, the plaintiff presented with significant delays in reading, spelling and mathematics.

- [8] The plaintiff was also assessed by Ms Frezelna Steyn, an occupational therapist. According to her the plaintiff presented with a decreased right hip rotation, slightly decreased muscle strength in the area surrounding the hips, and leaping gait pattern. She concluded that the plaintiff is unsuited for manual occupations, she also holds the view that the plaintiff is restricted to sedentary and some light duties which require minimal mobility demand. According to her, the plaintiff may be a vulnerable employee and would be unable to compete fairly with his peers within the labour market. She further concludes that if the plaintiff is unable to obtain a grade 12 level of education, he would struggle to secure employment.
- [9] Ms Trudi Burger, an industrial psychologist also assessed the plaintiff. She says the plaintiff informed her that he had frequent pain in the pelvic area when sitting or walking for prolonged periods. He also informed her that at the time of the accident he was a learner in grade R. Mrs Burger had access to the report of the educational psychologist and she opines that the plaintiff's future educational and occupational proficiency had been negatively impacted upon by the accident and this is expected to have a direct negative impact on his future employment prospects and earning potential.
- [10] According to her, his future loss of income would entail calculation of the difference between the earnings with an NQF 4 and NQF 5 level of education. She suggested a higher post morbid contingency deduction to cater for any unknown eventualities, especially for the fact that his career choices will be directly linked to the educational level he obtains. According to her if the plaintiff is unable to complete Grade 12, he will be reliant on unskilled type of occupation which is usually manual in nature. He will be restricted to sedentary and some light work with minimum mobility demands. This would significantly limit his career options. In conclusion she notes that the plaintiff could suffer a partial loss of income

- [11] Southern Insurance Association Ltd B Bailey 1984 1 SA 98 (A) 113G -114 gives guidance on the advantages of applying actuarial calculations. The court in this case said the following:

“Any enquiry into damages for loss of earning capacity is of its nature speculative...All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

It has open to it two possible approaches.

It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award.’

...

In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an ‘informed guess’ it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge’s ‘gut feeling’ (to use the words of appellant’s counsel) as to what is fair and reasonable is nothing more than a blind guess.” (Footnotes omitted)

- [12] It is common cause that the plaintiff was a minor child at the time that he sustained the injuries which are the subject of this litigation. He was in *Grade R* as far as his formal education is concerned. It goes without saying that he was unemployed. The injuries he sustained has resulted in physical incapacity which according to the experts has resulted in him being relegated to only sedentary type of work. If he manages to obtain *Grade 12* level of education, he may be able to cope with sedentary work. However, it is opined that in the event of requiring a revision hip replacement, he will struggle increasingly more with sedentary work where he would constantly seek to sit.

[13] According to the Clinical Psychologist, Ms Magubane, the plaintiff presented with a mild neurocognitive disorder. Ms Magubane opines that the accident appears to have impacted on her neuropsychological functioning.

[14] It is undisputed that the accident has had an impact on the post morbid career prospects of the plaintiff. The pelvic fracture has a significant impact on the productivity, working ability and amenities of his life and will continue to do so in the future.

[15] Ms Burger has suggested that a higher post morbid contingency deduction be applied. According to her, this would cater for unknown eventualities, especially the fact that his career choices will be directly linked to the educational level he obtains. It has to be borne in mind that due to the accident, he might not be able to obtain a *Grade 12* certificate.

[16] Based on information given to him, the actuary, Nilen Kambaran, calculated the future earnings of the plaintiff as follows:

Present value of future earnings	PRE- MORBID	POST-MORBID	LOSS BEFORE CONTINGENCIES
	R6 891 885	R2 305 768	R 4 586 117

[17] Mr Cillie has set out in detail different scenarios wherein the different percentages were applied as contingencies in order to calculate the loss. The court appreciates this gesture. He however submitted, as suggested by the plaintiff's actuaries, that a higher contingency deduction be applied. The defendant did not lead any evidence to controvert the contention by the plaintiff. I agree with the calculation by the plaintiff that on the pre-morbid

income less 27% and culminating in a loss of R5 031 076.05 less the post morbid future income at 45% ultimately translates to the total loss of R3 878 192.05. Much as it is contended that the appropriate percentage to be applied should range between 50% and 60% on the post morbid scenario, I hold that a contingency deduction of 45% would adequately compensate the plaintiff. I accordingly make this order:

ORDER

1. The merits were resolved on the basis that the Defendant shall pay **100%** of the Plaintiff's proven or agreed damages.
2. The Defendant shall pay to the Plaintiff the sum of **R 3 302 143.35(Three million three hundred and two thousand one hundred and forty three rand and thirty five cents)**, being for loss of future/earning capacity within 180 (*one hundred and eighty*) days hereof, in respect of the Plaintiff's claim against the Defendant. This amount is made up as follows:

FUTURE LOSS OF EARNINGS AWARDED:	R 3 878 192.05
LESS INTERIM PAYMENT:	R 576 048.70
TOTAL AWARDED:	R 3 302 143.35

3. In the event of the aforesaid amount not being paid on 180 days from date of this order, the Defendant shall be liable for interest on the amount at the prevailing interest rate, calculated from the 15th calendar day after the date of this Order to date of payment in line with prevailing legislation.

4. The Defendant shall furnish the Plaintiff with an Undertaking in terms of Section 17(4)(a) of Act 56 of 1996 for payment of **100%** of the costs of future accommodation of the patient in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the patient resulting from a motor vehicle accident on **9th February 2018**, to compensate the patient in respect of the said costs after the costs have been incurred and upon proof thereof.
5. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale in respect of both the merits and quantum, up to and including **29th November 2023**, and notwithstanding, and over and above the costs referred to in paragraph 5.2.1 below, subject thereto that:

5.1 In the event that the costs are not agreed:

5.1.1 The Plaintiff shall serve a Notice of Taxation on the Defendant's attorney of record;

5.1.2 The Plaintiff shall allow the Defendant 180 (*one hundred and eighty*) days from date of allocatur to make payment of the taxed costs; and

5.1.3 Should payment not be effected on 180 (*one hundred and eighty*) days from date of allocatur, the Plaintiff will be entitled to recover interest at the prevailing interest rate on the taxed or agreed costs from 15 (*fifteen*) days from date of allocatur to date of final payment.

5.2 Such costs shall include, as allowed by the Taxing Master:

- 5.2.1 The costs incurred in obtaining payment of the amounts mentioned in paragraphs 2 and 5 above;
- 5.2.2 The costs of and consequent to the appointment of counsel, including, but not limited to the following: for trial, including, but not limited to counsel's full fee for **29th November 2023**, and the preparation and reasonable attendance fee of counsel for attending:
- 5.2.2.1. The pre-trial conference held on 2 December 2022;
- 5.2.2.2. the Interlocutory Application heard on 16 November 2023.
- 5.2.3 Pursuant to the court order dated 9th May 2023, the further costs of all medico-legal, actuarial and addendum reports and/or forms obtained, as well as such reports and/or forms furnished to the Defendant and/or its attorneys, as well as all reports and/or forms in their possession and all reports and/or forms contained in the Plaintiff's bundles, including, but not limited to the following:
- 5.2.3.1 Ms N du Plessis, Educational Psychologist (Addendum to previous report);
- 5.2.3.2 Dr L Bezuidenhout, Industrial Psychologist (Addendum to previous report);
- 5.2.3.3 Ms T Burger, Industrial Psychologist;
- 5.2.3.4 Mr N Kambaran, Actuary (New calculation based on addendum and new Industrial psychologist report).
- 5.2.4 The reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by the Taxing Master, of the above experts;

6. The amounts referred to in paragraphs 2 and 5 will be paid to the Plaintiff's attorneys, A Wolmarans Incorporated, by direct transfer into their trust account, details of which are the following:

NAME OF ACCOUNT HOLDER: A WOLMARANS INC

NAME OF BANK & BRANCH: ABSA BANK, NORTHCLIFF

ACCOUNT NUMBER: 4[...]

BRANCH CODE: 632 005

TYPE OF ACCOUNT: CHEQUE (TRUST)

REFERENCE: MS G VAN ROOYEN/MAT7160

P.E. MOLITSOANE, J

For the Plaintiff : Adv. Cillie

Instructed by: Wolmarans Inc.

BLOEMFONTEIN

For the Defendant: Ms Booysen

Instructed by: The State Attorney

BLOEMFONTEIN