



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

CASE NO: 611/2018

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

30 November 2022

Date

K. La M Manamela

In the matter between:

GEELBOOI MAZOMBELANI SKHOSANA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **30 November 2022**.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] Mr Geelbooi Mazombelani Skhosana, the plaintiff, sued the Road Accident Fund, the defendant, in his capacity as parent and natural guardian of his minor daughter born on 28 November 2005. The minor was injured in an accident in the afternoon of 25 February 2015 whilst a pedestrian on the R579 Road in Sehlakwane, Groblersdal, Mpumalanga Province. The minor child was apparently trying to cross the road at the time when she was hit by the motor vehicle ('the insured vehicle'). She sustained injuries which included a mild traumatic brain injury (grade 3 concussion). The plaintiff attributes the cause of the accident to the negligent driving of the driver of the insured vehicle.

[2] On 9 January 2018, the plaintiff caused summons to be issued against the Road Accident Fund in terms of the provisions of the Road Accident Fund Act 56 of 1996 ('the Act') in order to recover compensation for damages suffered by the minor child in respect of future loss of earnings or earning capacity; past and future medical, hospital and related expenses, and general damages, initially in the amount of R3 520 000. The defendant disputed liability, but on 5 August 2022 the defendant's defence was struck out by order of this Court *per* Van der Westhuizen J. The matter, thenceforth, proceeded towards the attainment of default judgment by the plaintiff.

[3] The matter came before the Court for a hearing by video link on 4 October 2022. Ms B Nodada appeared for the plaintiff and, ostensibly, due to the striking out of the defendant's defence, there was no appearance on behalf of the defendant. All issues in the matter were still in dispute, including the issue of merits or liability of the defendant. I reserved this judgment after listening to counsel. Both oral and written submissions of counsel have been considered for purposes of this judgment.

Evidence and submissions on behalf of the plaintiff

General

[4] As already indicated, all issues in this matter are still in dispute in the sense that the plaintiff had to establish both liability on the part of the defendant and the quantum of the minor's proven damages, to put it in rather simple terms. The heads of damages are with regard to future medical expenses; loss of earning capacity and general damages.

[5] The plaintiff caused to be filed medico-legal reports by experts who assessed the minor's injuries and their *sequelae*. Also, the affidavits deposed to by the experts confirming the opinions and other issues contained in their reports were filed, in terms of the prevailing practice directives of this Division. I allowed the evidence in the trial to be adduced or given on the basis of the affidavits by the experts, including the affidavit deposed to by the minor child in respect of the merits of the matter explaining how the accident occurred under Rule 38(2)¹ of the Uniform Rules of this Court.

Merits or liability

[6] As already indicated, the Court allowed that the issues relating to the merits be also deposed to by way of the affidavits available. Apart from that of the plaintiff, the driver of the insured vehicle had also stated his version of the events leading to the accident under oath.

[7] The accident is explained as follows by the minor child:

‘I was crossing Sehlakwane Road from West to East when a motor vehicle with registration numbers approached at high speed and collided with me.’

¹ Uniform Rule 38(2) reads as follows: “The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.”

[8] On the other hand, the driver of the insured vehicle made a statement to the police, recorded in the third person, which also included the following material part:

‘He was travelling from East to West direction. On his way, he suddenly saw a female child coming/running into the road. He tried to avoid the accident, and he failed and collided with her, and she got injured in her whole body.’

[9] It is submitted that the accident occurred in a residential area, which, by itself, required the insured driver to have been vigilant, scanned the road for other road users and proceeded at a lower speed than he did in the circumstances. The submission is further that the nature of the injuries sustained by the minor from the accident and the fact that the insured driver did not avoid the minor while she was attempting to cross are indicative of the fact that the insured vehicle was being driven at a high-speed. Counsel cited caselaw and other authorities to the effect that the insured driver did not conduct himself in a satisfactory way as required by the circumstances and, therefore, was negligent in causing the accident in which the minor was injured.

[10] Considering what is stated above, I find that the sole negligence of the driver of the insured vehicle on the material date caused the accident. The driver of the insured motor vehicle, from his own statement, appears to have been driving at a speed which made it difficult for him to spot the minor child and avoid collision with the minor, despite the fact that the area where he was driving was a residential place. Therefore, the defendant will be held fully (i.e. 100%) liable for the plaintiff’s proven or agreed damages.

Medical opinion, evidence and legal submissions in respect of quantum of the loss or damages

[11] As already mentioned above, a number of medical experts were appointed by the plaintiff. Further, from the medico-legal reports on the assessment of the injuries sustained by the minor and/or *sequelae*, the plaintiff obtained an actuarial report for the calculation of the

relevant figures relating to the minor's claim for loss of earning capacity. For purposes of the default judgment sought I will not burden this judgment with details from these reports, save as they are pertinent to the conclusion to be reached.

[12] The injuries as recorded by the hospital where the minor was admitted after the accident are the following: complete femur midshaft fracture; moderate head injury (GCS 15/15) with laceration on the scalp; complete left clavicle fracture; bleeding from the base of the skull; swollen face with possible fracture of the base of the skull; parietal head laceration with subaponeurotic haematoma and bleeding and/or vomiting from the mouth.

[13] The minor was diagnosed by the neurosurgeon to have suffered a mild traumatic brain injury (grade 3 concussion), as she reportedly lost consciousness for a few minutes. And when examined by the neurosurgeon she complained about post-concussion headaches and memory problems. The diagnosis is supported by the clinical psychologist, who also adds that the minor had not recovered from the condition at the time of her examination. The educational psychologist also shares the same view and adds that relevant assessment indicates that the minor presents with severe deficits consistent with a history of head trauma.

[14] The injuries and their *sequelae* affected the plaintiff's life and her enjoyment of life and amenities of life. She complains of pain over the right thigh; difficulties in lifting heavy objects; and difficulties with walking due to pain. She still struggled to endure prolonged standing still in 2021 when examined. Although the femur is united and healed, x-rays revealed 'slight anterior bowing of the distal femur'. The minor also complained of right shoulder pain and left arm fatigue. She suffers from post-accident headaches in the frontal area twice a week and the headaches are worse during the day. She takes analgesics to relieve the pain. Other complaints included memory problems; short temperedness; being socially withdrawn, and frequent nightmares.

Loss of earning capacity

[15] The minor, post-accident, is reported to have average global IQ and verbal IQ but she has high average performance IQ of mental functioning of her peers, which places her residual ability below the estimated baseline mental functioning. It is further suggested that some of that are indicative of ‘an organic setting left hemisphere or diffuse brain damage’. Also, further clinical examination revealed learning disability, specifically, a language problem.

[16] The occupational therapist, and perhaps a view shared by other experts, stated the following: ‘from an occupational therapy perspective, [the minor] will benefit from therapeutic intervention; however, it is noted that even with remedial and rehabilitative intervention strategies, her impairments will not be entirely resolved, based on the resulting impairments identified, including the time [that] has already lapsed since after the accident’. The educational psychologist opines that the minor’s behavioural problems, cognitive and scholastic deficits as reported ‘are determined to be permanent, and there will be no remedial programme or treatment intervention that will bring effect significant change academically’.

[17] The minor was injured while she was in grade 4. She was then 9 years and 2 months old, as she was born on 28 November 2005. She was 17 years old at the time of the hearing of this matter. The minor is said to have been a competent learner and to have passed all her grades prior to the accident. The educational psychologist stated that the minor had sound intellectual capacity prior to the accident. Following the accident she was away from school and recuperating at home for a period of about three months. Although, post-accident she progressed well through the grades, she is reportedly underperforming when compared to her pre-accident performance. She blames her post-accident memory problems for this. In 2020 she was in grade 9, although she is said to have failed in 2019. But I hasten to respectfully state that, I have noted from the school reports provided that the alleged failure was in respect of the

mid-year examinations and that the minor was promoted to the next grade at the end of the material year.

[18] According to the educational psychologist the minor would have coped in mainstream school system up to grade 12 and would have been able to obtain a tertiary qualification in the form of a degree. This is reiterated by the industrial psychologist who opines that, without the accident, the minor would have obtained a university degree and entered the open labour market at the B3/4 basic salary; at the age of 45 years reached her career ceiling at D2, enjoyed annual inflationary increases and retired at the age of 65.

[19] It is postulated that post-accident the minor would not achieve a grade 12 pass and a university degree. According to the educational psychologist the minor now possesses of an 'average intellect, variable verbal functioning (weak to above average range), and severe cognitive and scholastic deficits [which] suggest that she is more likely to exit the mainstream system after grade 10 in favour of vocational training at a Further Education and Training (FET) College. The educational psychologist further opines that in the event the minor persists in the mainstream system of schooling she may be able to obtain a low mark matric or higher certificated pass and proceed for vocational training as postulated. The minor will not cope with courses requiring great language proficiency or numerical reasoning, the educational psychologist concludes.

[20] The industrial psychologist's opinion regarding the minor's post-accident career prospects, includes the following. The minor's education and future career have been compromised. She has been left with neurocognitive and psychological problems which would affect her education and future career. She will be equipped with low education and she would be unable to achieve a pre-accident academic potential. This would render her less competitive and she is to remain unemployed. Despite all these, the occupational therapist's view is that

the minor's physical impairments would restrict her to sedentary accommodative work as an adult and that with the recommended intervention the minor may ultimately acquire vocational skills for placement within sheltered/protected employment setting, although her employment prospects for both formal and informal work settings would remain compromised. The industrial psychologist's view is that the minor would remain unemployed, due to her deficits.

Actuarial calculation

[21] The actuarial calculation postulated loss of earnings on the part of the minor as follows:

		Uninjured Earnings		Injured Earnings		Loss of Earnings
Future	R	15 483 200	R	-		-
Less contingencies		25%				
	R	11 612 400	R		R	11 612 400
		Total Loss of Earnings			R	11 612 400

[22] According to the actuary, the cap in terms of the RAF Amendment Act has a bearing or impact of the plaintiff's claim. With a reduction of the claim by 19.10% to the amount of R9 394 400.00.

[23] Counsel for the plaintiff submitted that the amount of R9 394 400.00 proposed as an award to the minor for her loss of earnings factors a contingency deduction of 25% accords with Robert Koch's sliding scale.

Revised actuarial calculations and further submissions

[24] On 27 October 2022, I requested through my erstwhile registrar that the plaintiff's legal representatives attend to the following:

[24.1] that, the current actuarial calculation be varied to reflect a scenario in terms of which the plaintiff is employed on the basis of an FET qualification;

[24.2] that, the revised actuarial calculation be furnished reflecting the application of 30% contingency to future uninjured earnings of R15 483 200;

[24.3] that, what is sought in terms of 24.1 and 24.2 above constitute two actuarial calculations to be furnished.

[25] I invited the legal representatives to submit simultaneously with the requested information, their legal submissions for or against the revised actuarial calculations. On 3 November 2022 the plaintiff's legal representatives furnished revised actuarial calculation in terms of the request appearing immediately above. Two calculations were received, one dated 31 October 2022 and another 1 November 2022. The latter appears to accord with the request I caused to be made to the plaintiff's legal representatives and comprises two scenarios.

[26] Scenario 2 is constituted as follows:

[26.1] in the minor's uninjured state she would complete grade 12 in December 2023; obtain a 4-year university degree in December 2027; enter the labour market in January 2028 with her earnings in line with Paterson B3/B4 (basic) at R233 000 per annum in straight line until December 2050 (at the age of 45) with earnings at Paterson D2 (upper) at R1 398 000 per annum, and inflationary earnings until she retires at the age of 65.

[26.2] in the minor's injured state she would complete grade 12 in December 2023; complete 18 months theoretical work in June 2025; she would have earnings for 2 to 3 years from July 2025; in January 2028 she would commence working earning R3 000 per month; in July 2029 there will be no earnings until in January 2032 when she would have an income commensurate with Paterson B1/B2 (basic) at R184 000 per annum in

straight line until December 2050 (at the age of 45) with earnings at Paterson C1/C2 at R490 500 per annum, and inflationary earnings until she retires at the age of 65.

[26.3] The calculations under this part of the scenario are as follows:

		Uninjured Earnings		Injured Earnings		Loss of Earnings
Future	R	15 700 000	R	6 340 100		
Less contingencies		30%		30%		
	R	10 990 000	R	4 438 070	R	6 551 930
Total Loss of Earnings						R 6 551 930

[27] It is stated that the cap in terms of the RAF Amendment Act had no impact on the calculation above. Counsel for the plaintiff, among others, further submits that it is appropriate to accept what appears under scenario 1 in terms of which the minor would receive the amount of R7 455 600 for her future loss of earnings. But she nevertheless urges the Court to consider that ‘the FET qualification will not make [the minor] an exceptional and capable employee with her post-morbid problems [as employers] look for extraordinary, intelligent people with interpersonal skills when recruiting’. Essentially, counsel submits that the minor does not have the attributes necessary to work independently without ‘regular guidance and supervision’.

General damages

[28] Counsel provided comparable case law to the current matter as a guide on the probable compensation for the minor. Counsel submitted that the case that is most similar to that of the minor is that of *JM v Road Accident Fund*² which concerned a 45 year old man who suffered the following injuries: broken left leg (with ability to stand only on right leg); dislocation of

² *JM v Road Accident Fund* (1203/2018) [2019] ZAMP MHC 6 (15 October 2019).

the right hand (from the shoulder with inability to lift it up) and left side facial scarring, as well as scarring on the chin and on top of his head. His injuries changed his life to the extent that, among others, no longer able to exercise; use bathrooms on his own, and being no longer sexually active. Post-accident, this claimant endured constant pain on his right hand from the shoulder to his right side of the ribs. He has been receiving medical treatment at a hospital twice every month. The Court awarded the claimant the amount of R940 000 on 15 October 2019 which, counsel submits, equate to the amount of R1 127 574 in 2022 terms. Counsel pointed out that the two cases differ due to the age of the claimant in *JM v Road Accident Fund* and, consequently, submitted that an award of R1 million be made in respect of the minor's general damages.

Conclusion

[29] The minor was involved in a motor vehicle accident at a very tender age in her life. I agree with the experts that her life both from a personal, social and prospective employment points of view has been significantly altered by the accident.

[30] With regard to the future loss of earning capacity, after consideration of the minor's injuries and *sequelae* on the basis of expert opinion and counsel's able submissions, I award the minor the amount of R6 551 930, stated above. With regard to general damages, I respectfully disagree with counsel that the injuries and *sequelae* in this matter are similar to those in *JM v Road Accident Fund*. Those in the latter matter, comparatively speaking, are of a worser degree to those in the matter under consideration even given the tender age of the minor in this case. Therefore, I will award the amount of R700 000 to the minor as general damages.

[31] Further, the defendant will be held 100% or fully liable for the plaintiff's future medical, hospital and related expenses. To this effect I will order that the defendant furnish the plaintiff or the minor with an undertaking in terms of section 17(4)(a) of the Act in respect of 100% of the plaintiff's future medical, hospital or similar expenses.

[32] Costs will also follow the result in this matter. The details of such costs appear in the order made below, essentially, in terms of the order contained in the draft order submitted by counsel in this matter.

Order

[33] In the premises, I make the order, that:

- 1) the defendant is fully (i.e. 100%) liable for the plaintiff's minor child's proven or agreed damages.
- 2) the defendant is ordered to pay the plaintiff the amount of R7 251 930.00 (seven million two hundred and fifty-one thousand nine hundred and thirty rand), which amount is made up as follows:

general damages	: R 700 000.00, and
future loss of earnings	: R 6 551 930.00.
- 3) the defendant is to pay the amount in 2) hereof into the following trust bank account, on or before the expiry of 180 days from the date of this order:

ACCOUNT HOLDER	: J M MODIBA ATTORNEYS
BANK NAME	: STANDARD BANK
BRANCH CODE	: 010545
ACCOUNT NUMBER	: 012400092
TYPE OF ACCOUNT	: TRUST ACCOUNT
REF	: REF: MR MODIBA/GMS/TPC842

- 4) the defendant is to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the reasonable costs of the future accommodation of the plaintiff's minor child in a hospital or nursing home or treatment of or rendering of a service to her or supplying of goods to her resulting from the injuries sustained by the plaintiff's minor child and of administering and enforcement of this undertaking, as a result of the motor vehicle accident which occurred on 25 February 2015, after such costs have been incurred and upon proof thereof;
- 5) the defendant will not be liable for interest on the amount in 2) hereof provided that the defendant has paid the amount within 180 days from date of this order, failing which interest at the prescribed rate per annum will be payable calculated from the date on which this order was made;
- 6) the defendant shall pay the plaintiff's taxed or agreed costs on a High Court scale. In the event that the costs are not agreed, it is ordered that:
 - 6.1 the plaintiff shall serve the notice of taxation on the defendant's attorneys of record, if any, or the defendant;
 - 6.2 the plaintiff shall allow the defendant 14 (fourteen) court days to make the said payment of the taxed costs, and
 - 6.3 should payment not be effected timeously, the plaintiff will be entitled to recover interest at the prescribed rate per annum on the taxed or agreed costs from the date of allocatur or agreement to the date of final payment.
- 7) the above costs will also be paid into the above trust bank account in 3) hereof , which costs shall include the following:
 - 7.1 counsel's fees, including reasonable preparation and appearance costs, costs of preparation of settlement memorandum of proposal to the defendant and heads of argument, as well as costs relating to the further submissions and other activities at the instance of the Court between 27 October 2022 and 3 November 2022;
 - 7.2 costs of obtaining reports for the following experts:
 - 7.2.1 Prof Lukhele (Orthopaedic Surgeon);
 - 7.2.2 Prof Lekgwara (Neurosurgeon);
 - 7.2.3 Ms Gladys Maluleke (Clinical Psychologist);

- 7.2.4 Ms Zethu Gumede (Educational Psychologist);
- 7.2.5 Ms Yvonne Raganya (Occupational Therapist);
- 7.2.6 Ms Esther Sempene (Industrial Psychologist), and
- 7.2.7 Munro (Actuary).

7.3 the plaintiff's reasonable travelling and accommodation costs for attending consultations with the experts as well for attending Court.



Khashane La M. Manamela
Acting Judge of the High Court

Date of Hearing : 4 October 2022

Date of Further Submissions : 3 November 2022

Date of Judgment : 30 November 2022

Appearances:

For the Plaintiff : Ms B Nodada

Instructed by : JM Modiba Attorneys, Pretoria

For the Defendant : No appearance