

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2018/4415

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
<u>20/12/2020</u>	
DATE	MOKOSE SNI

In the matter between:

LA TOBO obo LB TOBO

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

MOKOSE J

[1] The plaintiff, in her capacity as the mother and natural guardian of a boy who was born on 13 September 2006 ("the minor child") instituted an action against the defendant, a juristic persona in terms of the provisions of Act 56 of 1996 ("the Act") pursuant to a motor vehicle

accident between a motor vehicle bearing registration number NP176996 and the minor child on 20 March 2017, the result of which the minor child was injured.

[2] It is alleged in the particulars of claim that the accident was caused by the sole negligence of the insured driver, the result of which the minor child sustained a laceration on the back of the head, bruises on the lower back and a blunt chest injury. A claim was instituted against the defendant for past and future medical expenses, general damages and future loss of earnings and earning capacity. The issue of merits was settled 100% in favour of the plaintiff.

[3] The issues relating to the quantum of damages was narrowed as a result of an agreement which was reached between the parties prior to commencement of the trial. In particular, the parties agreed that the defendant would provide the plaintiff with a certificate in terms of Section 17(4)(a) of the Act in respect of future medical expenses.

[4] The issue this court is called upon to determine is that of general damages and future loss of earnings or earning capacity.

[5] The defendant conceded that it has no evidence, information or expert reports to rebut the factual allegations and opinions contained in the expert notices relied upon by the plaintiff. It is also notable from the pre-trial minute that the defendant had undertaken to revert to the plaintiff in that respect. Accordingly, counsel for the plaintiff was of the view that the matter should proceed as a stated case, which was disputed by counsel for the defendant.

[6] The role of a judge is more than to accept a matter as a stated case where no expert reports have been submitted by the defendant. A trial court must have before it, a stated case in which both facts and issues are crisply and clearly set out in order for proceedings to be truly curtailed. Absent a clearly drafted and articulated stated case, the very purpose of Rule 33 would be defeated.¹

[7] No statement as intended by Rule 33 was presented to the court by the plaintiff. Counsel for the plaintiff merely suggested that the matter should proceed as a stated case. Counsel for the defendant was however of the view that the matter could not proceed as a stated case even where the defendant had no evidence to rebut that of the plaintiff.

[8] It is evident from the pre-trial minute dated 30 September 2019 which I note is unsigned by the legal representative of the defendant, that admissions and agreements were concluded by the parties. In view of the absence of expert reports for the defendant and a clearly drafted and articulated case, I come to the conclusion that this matter could not be heard as a stated case.

[9] It is trite that an expert witness is employed to assist the court in deciding issues in which the court does not have the ordinary and requisite expertise. Furthermore, the opinion of an expert witness must be well grounded and reasoned. The determination of the probable value and weight of an expert witness's evidence is not always about credibility; and that judicial officers should be careful not to allow the opinion of an expert witness to take the place of their own finding of fact.

¹ Delisile Mbhele v MEC Health Gauteng Province [2016] ZASCA 166 at para 21

[10] Davis J in the matter of **Schneider NO and Others v AA and Another**³ said:

"In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess."

[11] Theron JA in the matter of **McDonald v Young**⁴ put beyond doubt by saying:

"It is settled that uncontradicted evidence is not necessarily acceptable or sufficient to discharge an onus."

[12] According to the hospital records the injuries sustained by the minor child are a laceration on the posterior central parietal area, right pneumothorax, superficial abrasions on L3 to L5 and mild abrasions on the lower limbs. The hospital records do not state loss of consciousness and also note his GCS was 15/15 on admission to the hospital.

[13] According to the mother's report, post-concussion symptoms experienced by the child are mild light sensitivity, headaches, poor concentration, irritability and fatigue. She also

² Unreported Case No 2013/01470 dated 16 September 2016

³ 2010 (5) SA 203 (WCC) at 211

⁴ 2012 (3) SA 1 (SCA)

reported deteriorating scholastic performance and low endurance asthma which he did not have prior to the accident. This resulted in functional mobility being impaired by chest pains. His personal relationships were also impaired by his irritability and aggression.

[14] According to the report of the orthopaedic surgeon, Dr Oelofse, the injuries sustained by the minor child not result in a 30% Whole Person Impairment (WPI). The injuries were listed as non-serious injuries in the AMA guidelines. He deferred to the neurologist, educational psychologist and clinical psychologist pertaining to whether the minor child would qualify for the narrative test.

[15] Dr Okoli, the neurosurgeon was of the view that the minor child had a WPI of 18%. Dr Okoli reports that the minor child told him that he had no direct recollection of the impact. He merely found himself in an ambulance with his mother. Dr Okoli noted in his report that the minor child had walked to the ambulance. His mother confirmed that the child was confused and failed to recognise her. He came to his senses whilst in the ambulance. The child was admitted to hospital for 6 days where a chest drain was inserted. Dr Okoli also notes that there were no difficulties with the child's memory and that his attention span was normal, having been sustained throughout the interview. Dr Okoli's opinion was that the child had sustained a soft tissue injury with a laceration to the parietal area of the head which had been sutured in hospital. The injuries were consistent with a mild brain injury.

[16] Dr Mureriwa, the clinical psychologist concurred with Dr Okoli's calculation of the WPI however, he was of the view that the minor child qualifies for general damages having considered the persistent pain and discomfort which is a source of serious and long term psychological distress that he will continue to experience. Dr Mureriwa stated in his report that from the mother's narration, the child was unconscious after the accident. Dr Mureriwa's

findings were that the child was alert and co-operative during the assessment but easily distracted, fidgety and restless with mild anxiety. He opined that the child was at risk for conduct problems.

[17] Mr Masindi Nethavhani the educational psychologist, noted that the minor child had been promoted from Grade 5 to Grade 6 in 2017, that being the year he had had the accident. He was also promoted in 2018. In 2019 he failed term 1 and 2, indicating a declining scholastic performance. No reports for Grades R to 4 were available to enable him to determine the child's scholastic progress prior to the motor vehicle accident.

[18] Mr Nethavhani found that the minor child was 3 years behind his peers with reading, 2 years behind his peers in spelling and 4 years behind his chronological age in arithmetic. His cognitive performance was within the low average range and his scholastic performance inadequate suggesting challenges with short term auditory verbal memory. He opined that the minor child was likely to experience difficulties recalling orally presented information in a learning situation.

[19] Mr Ben Moodie, the Industrial psychologist in determining the minor child's pre-accident income took into consideration his age, his family's educational qualifications and occupations and the findings of Mr Nethavhani regarding his pre-accident educational potential. The minor child was the last of three siblings.

[20] His father had completed Grade 11 level of education and owned taxis and worked as a taxi owner/driver. His mother had completed Grade 12 level of education as well as a diploma in nursing. She was currently employed as a registered nurse at Margate Hospital.

His brother Luyanda who was 27 years old had completed Grade 12 level of education and was unemployed. His brother Mthunzi who was 21 years old had completed Grade 11 level of education and was currently employed as a taxi driver and was employed by his father.

[21] Mr Moodie postulated that taking into account the level of education of the minor child's parents and siblings, he would at least have obtained a Grade 12 level of education. However, he concluded further that his mother would have encouraged him to pursue tertiary studies taking into consideration the fact that she herself had completed a nursing diploma. He concludes that based on the findings of the educational psychologist, the minor child would have in all likelihood pursued a diploma (NQF6) studies or a degree (NQF7).

[22] Counsel for the plaintiff was of the view that the minor child would have completed a degree, but for the accident. This view is based upon the opinion of the educational psychologist that it is widely accepted that children achieve better qualifications than their parents. Counsel for the defendant on the other hand, disagreed but had no reports to contradict the evidence of the plaintiff.

[23] The general approach to assessing loss of earnings was stated in the matter of **Southern Insurance Association Ltd v Bailey NO⁵** where the court acknowledged that any enquiry into damages for loss of earning capacity is of its nature speculative because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. The court can only make an estimate which is often a very rough one of the present value of the loss.

⁵ 1984 (1) SA 98 (A) at 113G

[24] Matters which cannot otherwise be provided for or cannot be calculated exactly, but which may impact upon the damages claimed are contingencies and are usually provided for by deducting a stated percentage of the amount or specific claims.⁶ A trial judge, in assessing compensation has a large discretion to award what he considers just and equitable. He may be guided by but not tied down by inexorable actuarial calculations.⁷

[25] A career path was postulated by the industrial psychologist based upon the information furnished, but for the accident. The actuarial report prepared by Munro Forensic Actuaries provided two scenarios, which calculation was based on the industrial psychologist's report dated 7 October 2019. The first scenario is where the minor child obtains a diploma or NQF6 qualification and the second is where the minor child obtains a degree or NQF7 qualification. No contingencies were applied to the figures.

[26] I am inclined to disagree with the counsel for the plaintiff that the minor child would have completed a degree, but for the accident. The reason is that there is no evidence of the child's performance from Grade R to Grade 4, the plaintiff having been unable to obtain duplicate copies of the child's reports. It appears that the industrial psychologist has based his finding on the fact that it is widely accepted from studies that children achieve better than their parents without taking into account the fact that no evidence has been furnished about the child's performance in his early years of school.

[27] Having heard submissions by both counsel for the plaintiff and counsel for the defendant on the issue of contingencies, I am of the view that a pre-morbid contingency of

⁶ De Jongh v Gunter 1975 (4) SA 78 (W) at 80F

⁷ Legal Insurance Company v Botes 1963 (1) SA 608 (A) at 614F-G

35% and a post morbid contingency of 50% are to be applied and are fair and reasonable in the circumstances.

General Damages

[28] The plaintiff claims the sum of R850 000 in respect of general damages. Counsel for the defendant was of the view that the amount claimed was excessive and that an appropriate amount in view of the injuries and the pain and suffering experienced by the plaintiff is the sum of R400 000.

[29] The purpose for the award of general damages is to compensate a claimant for pain, suffering, discomfort and loss of amenities of life to which he has been subjected as a result of the particular injuries that were sustained. Awards in previous cases can only offer a broad and general guideline as there are no scales upon which the court may weigh pain and suffering and loss of amenities of life. The broadest general consideration and the figure arrived at will necessarily be uncertain depending on the judge's view on what is fair in all the circumstances of the case.⁸

[30] A just and fair award must be made by the court. The evidence on hand suggests that the minor child suffered a mild head injury. Dr Oelofse, the orthopaedic surgeon found that no abnormalities could be detected on the thoracic spine and that movements were normal despite the minor child complaining of pain in the thoracic spine, lumbar spine, abdomen, right hip, pelvis and lower legs which pain continued after the accident but dissipated over time. Furthermore, Dr Oelofse suggests that if the discs adjacent to the fracture develop spondylosis as reported by the radiologists as a 'slight anterior wedging of mid dorsal segment probably

⁸ Sandler v Wholesale Suppliers Ltd 1941 AD 194 at 199

T6 and T7', the minor child will develop symptoms and radiological changes of degeneration of the adjacent levels. If he does not respond to conservative treatment, then he will have to undergo surgery for a thoracic fusion.

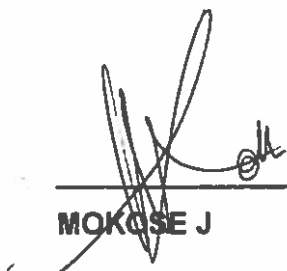
[31] Taking the above into consideration and taking past awards into account, I am of the view that the sum of R550 000 would be a just and reasonable award in the circumstances.

[32] In the premises, the following order is granted:

- (i) the defendant shall pay the sum of R4 458 535,00 in respect of general damages and loss of earning capacity within 30 days of date hereof;
- (ii) interest shall be charges on the amount at the prescribed rate of interest per annum calculated 30 days of judgment to the date of payment;
- (iii) The above amount shall be paid into the attorney's trust account, the details of which are as follows:

Name of Bank	:	Standard Bank of South Africa
Account holder	:	Godi Attorneys
Account Number	:	411076655
Branch Code	:	010145

- (iv) the defendant must furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of the Act in respect of the costs of future accomodation of the minor child



MOKOŠE J

Judge of the High Court
of South Africa, Gauteng
Division, Pretoria

For the Plaintiff:

Adv. P M Leopeng

Instructed by:

N H Zangwa

For the Defendant:

MS B Sibiya

Instructed by:

Lekhu Pilson Attorneys

Date of Hearing: 23 October 2019

Date of Judgment: 20 February 2020