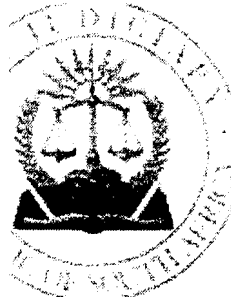


REPUBLIC OF SOUTH AFRICA



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

01/03/2017

CASE NO: 13758/13

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES NO</u>
(3)	<u>REVISED.</u>
	<u>1...MARCH...2010</u>
	DATE
	
	SIGNATURE

In the matter between:

ADVOCATE MOSUPI S MANGOLELE
obo L. N. M.

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

TEFFO, J:

[1] L. N. M. (*"the minor child"*) was knocked down by a motor vehicle, a black Nissan bakkie with registration letters and numbers [W...] there and then driven by one Papi Bosega (*"the insured vehicle"*) on 16

January 2010 at approximately 16h00 while she was a pedestrian at the time. The collision occurred at or near Mamkele Street, Watville, Benoni, Gauteng.

[2] She sustained the following injuries:

Head injury with multiple facial abrasions and lacerations; multiple soft tissue injuries; shock and psychological trauma.

[3] Advocate M S Mangolele instituted a claim against the Road Accident Fund on behalf of the minor child in a representative capacity as a curator *ad litem* for damages suffered as a result of the injuries sustained in the collision based on the negligent driving of the insured vehicle.

[4] The head of damages that is for determination is the future loss of earnings or loss of earning capacity.

[5] The minor child was born on [...] 2005 and at the time of the collision she was only 4 years and 2 months old. She was attending a creche.

[6] The matter was argued on the basis of the medico-legal reports compiled by both parties' experts. The following joint minutes formed part of the parties' arguments and submissions:

6.1 Neurosurgeons (Prof PL Lekgwara and Dr Jaap Earl);

- 6.2 Educational Psychologists (Mr Matome Khumalo, Mr J Singh (JS) and Dr Geeta M Prag (GMP);
- 6.3 Clinical Psychologists (Ms Narropi Sewpershad and Ms Elfriede Tromp);
- 6.4 Industrial Psychologists (Ms Sandra Moses (SM), Ms Fungiwe Dlakavu (FD) and Dr W Pretorius (WP), Mrs A Matthee (AM);
- 6.5 Munro's actuarial calculations; and
- 6.6 Actuarial calculations by Alexander Forbes Financial Services.

[7] In their joint minutes, the neurosurgeons agree that pre-accident the minor child enjoyed good general physical health and that she sustained a mild traumatic brain injury (Grade 3 concussion) as a result of the accident. As regards her post-accident status Prof Lekgwara opined that the minor child has some neuropsychological problems which need to be assessed by a clinical psychologist. Dr Earl's view is that the minor child is not doing well at school but whatever her marks show, it is not the result of this accident.

[8] The clinical psychologists agree that pre-accident the minor child had an uneventful birth and that developmental milestones had been attained within normal limits up to the time of the accident. She was never involved in any prior accidents and no prior injuries were reported. They agree that post-

accident the minor child demonstrated significant neurocognitive difficulties that were not in keeping with her age-related expectations. They consider the deficits to be consistent with a mild traumatic brain injury (or concussion).

[9] The following is noted in their joint minutes:

"5.

- (c) *We agree recovery from a mild head injury can be influenced by a number of factors, including accident-related causes, family background, and the very young age at which she sustained the head injury, with a poor prognosis suggested.*
- (d) *Thus, L.'s difficulties are likely to be compounded by the reported arousal difficulties of the autonomic system, headaches, and poorly integrated psycho-social development.*
- (e) *Psychologically, she presented with premorbid vulnerability as a result of her social circumstances and being abandoned by her biological father and virtually orphaned at a fairly young age following the death of her mother in 2012.*
- (f) *Collateral information from her sister suggests that she is an aggressive child, she prefers to isolate herself, has difficulty in relating to her peers and authority figures and she has a low tolerance for frustration. This would be an indication of changes in emotional and behavioural functioning, post-accident. Such changes are undoubtedly going to affect the quality of her interpersonal relationships, her social functioning and her schooling to a significant degree. Her emotional and behavioural difficulties would need to be appropriately diagnosed and managed by a psychiatrist.*
- (g) *Agreed that the residual difficulties are considered of a permanent nature.*
- (i) *We defer to the Educational Psychologists' assessment for detailed discussion and recommendations with regard to appropriate placement and necessary intervention.*
- (j) *We defer to the opinion of an Industrial Psychologist regarding pre- and post-accident employment potential and potential loss of earnings.*
- (k) *In addition to psychiatric intervention, agreed that L. should receive psychotherapy from a Psychologist experienced in*

working with children with deficits associated with traumatic brain injury."

[10] The educational psychologists given her age at the time of the accident, agreed there is no scholastic history for her pre-accident to compare to her post-accident functioning. Mr Khumalo, who is also a remedial therapist, opined that she would have been able to obtain a Grade 12 level of education and continue to further her studies either at a college or university. JS and GMP's views are that the family schooling history and employment should be taken into account in order to arrive at a reasoned guideline in respect of the minor child's probable pre-accident academic functioning. They took into account that none of her siblings completed a grade 12 level of education and the family's socio-economic circumstances that caused her siblings' learning challenges. In their view, also considering Dr Earl's opinion that she is not doing well at school but whatever her marks show, is not the result of this accident, she would have failed a grade or two (like her siblings) and would have experienced learning challenges in her schooling career. She would have pre-accident benefitted from intervention and (giving her the benefit of the doubt), she would have most probably completed grade 9 or 10 and subsequently have gained entrance to study at a FET College (1st scenario).

[11] They also gave a second scenario that should the relevant experts find that the minor child was significantly affected by the accident in respect of her health and cognitive functioning, then she would have had the opportunity to complete at least a grade 11 level of education (higher than her siblings) and

would have benefitted from attending a FET College and after completing these courses, she would have been able to seek employment.

[12] According to Mr Khumalo the minor child's vocational prospects will depend on her scholastic achievements. She is a candidate for a specialized remedial school and with remedial support she will probably achieve a grade 11 level of education.

[13] The plaintiff's industrial psychologists, SM and FD agree that based on the above experts' joint minutes, the minor child has been compromised by the injuries sustained in the accident. Their view is that pre-accident no reason existed for the minor child not to have been able to complete grade 12 and continuing further studies at a tertiary level. They postulated two scenarios for the minor child's post-school career path with a matric and a further tertiary qualification: According to them should the minor child have achieved a grade 12 qualification and not pursue tertiary education, she would have entered the open labour market at an unskilled level and with training and development progressed to a team leader level at B3 and later to a supervisory at a C1 Paterson level by the age of 45 years. Should she have proceeded to tertiary she would be able to enter the labour market at a higher semi-skilled level of B1 Paterson scale progressing to a more senior supervisory level C4 Paterson level by the age of 45 years. They further state in their joint minute that the rate of progression is difficult to judge as that is dependent on vacancies, personality traits, the economy, etc. A reasonable

yardstick would be between 3-5 per level, thereafter receiving annual inflationary increases until retirement age.

[14] On the other hand the defendant's industrial psychologists who relied on JS and GMP's opinions are of the view that considering the academic performance of her siblings, her mother's death, the fact that her biological father left the family and the general socio-economic circumstances of the family, the chances of her qualifying for formal learning at a tertiary institution (like a university or university of technology) maybe theoretically possible and practically unlikely. This view is also supported by the opinion of N Sewpershad (the clinical psychologist) to the effect that non-accident related factors thus impacted on the minor child's educational and work capacity.

[15] They also postulated two scenarios which they support as follows:

Scenario 1: completed grade 9 or 10 or possibly at least a grade 11 (higher than her siblings) and would have benefitted from attending a FET (Further Education and Training) College:

They agree that she would have probably experienced two or three failures before completing grade 9/10/11 between the age of 18 and 20. She would then struggle to find permanent employment for the first five years and would secure employment in the non-corporate or informal sector on a short contract or piece job basis with long periods of unemployment. They placed her around the Median for Koch's 2016 unskilled worker scale [R19 500 per

annum] although they maintain that her earnings are likely to be less considering that she would probably not have employment 12 months of the year. After five years she would probably secure more permanent type of employment, should she be able to secure an opportunity for vocational directed learning (at FET College or similar). They state that it can be expected that her earnings could grow from R56 000 in a more or less straight line to earn around the Koch 2016 value of R99 500 to R143 000 at age 45 as earnings pinnacle. Inflationary increases to retirement age of between 63 and 65 years.

Scenario 2: Obtains a certificate NQF5 level of education:

If it is accepted that she could have completed grade 12 at age 18 to 19, have been unemployed for one year searching for learning and employment opportunities and then secured a learnership opportunity. Got training as a learner (18 to 24 months) learning equivalent of a NQF5 qualification as well as doing practical training at earnings of between R3 500-R4 000 per month during that period. Assuming that she then secured employment in the corporate sector at a Paterson A2/3 job grade [between R7 772 and R9 004 per month (50th Percentile Basic - PE Corporate 2016)]. Her career would have grown in a straight line to a Paterson B5/C1 job grade earning between R225 474 and R256 864 per annum [50th Percentile Annual Basic Salary- PE Corporate 2016] by the age of 45, earnings growth with annual CPI adjustments until the likely retirement age of between 63 and 65 years.

[16] The defendant's industrial psychologists state that despite the minor child's educational potential one also have to take into account other socio-economic factors such as her home environment and financial ability to afford further tertiary training, as these could limit the extent to which her educational potential is realized. In their view due to the many uncertainties an appropriate pre-accident contingency should be applied. They also noted the difference in opinion between the educational psychologists and suggest that an agreement should be reached regarding the minor child's pre- and post-accident educational potential.

[17] Post-accident WP/AM agree that the minor child has been limited in terms of her educational potential and will most likely not reach her earnings potential. As per the report of GMP she will require remedial support. Their view is that she has been negatively affected from an educational perspective by the accident. Relying on the opinion of Ms A Phasha (the occupational therapist) that from a physical point of **view**, the minor child will be able to engage in her choice of employment but will however struggle with headache during extreme weather conditions (hot/cold), that due to her reported cognitive, learning and psychological limitations, she will most likely only be able to perform work of an unskilled or semi-skilled nature after completing school. It is however expected that she will likely have to work under supervision to ensure she performs adequately, will likely struggle to manage stressful situations and this could ultimately impact her promotional opportunities. The fact that her current communication and speech difficulties would likely affect her school as well as work performance and have direct

effect on her self-esteem. According to them and relying on N Sewpershad's opinion that the minor child's below average cognitive ability is consistent with her severe head injury, she has been negatively affected as her cognitive limitation could increase her risk to make mistakes if she does not work under supervision and her psychological limitations (mental and behavioural disorders 10% WP) could affect her relationships with others as well as her work performance. Her work performance and ability to compete for employment, retain employment as well as the ability to grow her career and earnings have been severely limited.

[18] In their view and also taking into account the conflicting opinions of the educational psychologists, should the minor child enter the labour market with a remedial school education (comparable to a grade 10) she is likely to struggle between 2 to 3 years to find employment. She is likely to start doing *"contract/piece job"* work to gain some work experience and earn an income. As an unskilled worker she is likely to earn between the lower quartile (R7 700 per annum) to the median (R19 500 per annum). They accept that 5 years after school she is likely to remain employed in the non-corporate sector as an unskilled or lowly-semi-skilled worker. They accept that her accident-related learning, neuropsychological and psychological difficulties would limit her ability to grow her earnings.

Scenario 3(a): Accept that from the age of 35 her earnings would likely fluctuate between the 2016 values of R37 750 and R46 875 per annum) during her career.

Scenario 3(b): Taking into account GMP's opinion that she would benefit from completing certificate courses from FET College, she would be able to learn some vocational skills. As a semi-skilled worker she could grow her earnings from the median of the Koch, 2016 scale for semi-skilled workers to somewhere between the median (R56 000 per annum) and upper quartile value (R143 000 per annum). They opined that even in this scenario her earnings growth will be limited considering her reported accident-related learning, psychological and neuropsychological limitations.

[19] SM and FD, the plaintiff's industrial psychologists, are of the opinion that should the minor child leave school with a grade 9 level of education, her occupation choices in the open labour market will become severely limited and she will struggle to secure employment in the open labour market due to the scarcity of the sedentary type jobs for individuals who do not possess relevant qualifications. She will then remain unemployed after leaving school. In their view her occupational choices, employability and earning potential in the open labour market have been adversely compromised as a result of the injuries she sustained in the accident. Without a high level matric and further studies to obtain some form of sedentary type of qualification, she is likely to remain unemployed. Such a possibility exists considering her current challenges.

[20] In their opinion the minor child will not fit into the workplace on a sustainable basis as her emotional and behavioural functioning post-accident will further impact on her employability, even with reasonable accommodation

form of sympathetic employment. She will remain in lower level positions as her future promotional opportunities will also be curtailed due to interpersonal challenges. According to them the minor child suffers a loss of earnings which is the difference between her pre- and post-accident earning capacity.

[21] WP/AM, the defendant's industrial psychologists accept that the minor child has been limited from a psychological and neuropsychological perspective (such as her speech and language difficulties as well as her headaches). They also accept that she has been limited in terms of her work choices as she would probably have to work under supervision and compete for such employment with her neuropsychological and psychological limitations. They note that supervised employment is limited and due to her restrictions she might have difficulty to compete and secure such employment. They accept that should she secure such employment, she would probably have difficulty to retain it due to her limitations, her risk of unemployment and that her ability to grow her earnings has been affected in this regard. They proposed the application of appropriate higher post-accident contingencies for the increased risk that she will not reach her postulated earnings. They recommended that she should be compensated for the loss between the postulated pre- and post-accident career and earnings prospects (compare scenarios 1 and 2 but for the accident) and scenario 3 having regard to the accident and that an appropriate higher post-accident contingency be applied to compensate her for the risk for loss of earnings due to increased risk of unemployment, decrease in earning levels and the rate of earnings growth **as a** result of the accident.

[22] It was argued on behalf of the plaintiff that taking into account the experts' opinions, scenario 1 as per Munru's actuarial calculations with the application of 25% contingency deduction on the award will appropriately be a fair compensation for the minor child's future loss of earnings. It was submitted that according to Mr Khumalo, the plaintiff's educational psychologist, the minor child would have passed matric pre-accident and furthered her studies. Given her age at the time of the accident, there were no school reports to compare her school progress pre-accident with her post-accident progress. The experts had to deal with probabilities. It was submitted that the experts are agreed that the minor child has been failing her grades post-accident, the clinical psychologists agree that the minor child's situation at the time of the accident was vulnerable but it worsened as a result of the accident. Counsel for the plaintiff did not agree with the calculations as proposed and recommended by the defendant's experts. He submitted that it would be unfair to compare the minor child's educational progression to that of her siblings and her career potential to that of her parents in that children differ and the circumstances of the parents were different then. Currently there are support structures available to assist learners to reach their highest educational potential.

[23] Counsel for the defendant submitted that given the conflicting opinions of the parties' experts, neurosurgeons, educational psychologists regarding the pre-accident situation of the minor child, her socio-economic circumstances at the time, her vulnerability as a result of being abandoned by her biological father shortly after the death of her mother and the accident, the

fair compensation in this regard should be the difference between scenarios 3 and 4. They also proposed the application of higher appropriate pre- and post-contingencies because of the uncertainties in the minor child's situation pre-accident and the increased risk post-accident that she will not reach her postulated earnings.

[24] It is correct that as at the date of the collision, the minor child was still at the creche and there were no school reports available to enable the educational psychologists to compare her educational progress pre-accident to that post-accident. It is important to note that the clinical psychologists who are competent to comment on the neurocognitive and neuropsychological effects/*sequelae* of the injuries the minor child sustained as a result of the accident agree that post-accident, she demonstrates significant neurocognitive difficulties not keeping with her age-related expectations and they consider these deficits to be consistent with a mild traumatic brain injury (or concussion). They agree that pre-accident the minor child had a normal birth and no prior injuries or accidents were reported. They also noted that psychologically she presented with vulnerability as a result of her social circumstances and being abandoned by her biological father and orphaned at a young age following her mother's death. The neurosurgeons agree that the minor child sustained a mild brain injury as a result of the accident although Dr Earl who accepts that she is not doing well at school post-accident, is of the view that whatever her marks show, it is not as a result of the accident.

[25] Mr Khumalo, the educational psychologist and remedial therapist for the plaintiff states in his report that the minor child was described as a healthy child pre-accident. No problems were experienced with her at school or at home. He states further that it was reported to him that post-accident she was a different child who developed memory problems, became forgetful, temperamental, short-tempered and irritable, started isolating herself, assaulted other children and experienced headaches at least two episodes a week. Considering the different opinions of the parties' Educational Psychologists, I accept and note that in order to arrive at a reasoned guideline in respect of the minor child's probable pre-accident academic functioning, her family schooling history, employment, and socio-economic circumstances that caused her siblings' learning challenges should also be taken into account. It should be borne in mind that these are not the only factors. It is also commonly accepted that children achieve better than their parents, they are different and are also not gifted the same. Taking into account that there is nothing to compare the minor child's school performance pre-accident to that post-accident and the evidence presented it is more realistic that she could have attained a matric and not proceeded further after matric. In my **view** the postulation by the plaintiffs industrial psychologists, SM and FD, that should she have obtained a matric and not pursue tertiary education, she would have entered the open labour market at an unskilled level and with training and development progressed to a team leader level at 83 and later to a supervisory at C1 Paterson level by the age of 45 years, accords with the evidence. I agree given the above non-related factors pre-accident that the

chances of her qualifying for formal learning at a tertiary institution like a university or university of technology would have been practically unlikely.

[26] As regards her post-accident scenario both parties' industrial psychologists are agreed given the evidence that the minor child has been limited in terms of her educational potential and will most likely not reach her earnings potential. The plaintiff's industrial psychologists' view is that she will not fit into the workplace on a sustainable basis as her emotional and behavioural functioning post-accident will further impact on her employability, even with reasonable accommodation form of sympathetic employment. She will remain in lower level positions as her future promotional opportunities will also be curtailed due to interpersonal challenges. They maintain that she suffers a loss of earnings which is the difference between her pre-and post-accident earning capacity.

[27] The defendant's industrial psychologists accept that supervised employment is limited and that due to her restrictions, discussed above, she will have difficulty to compete and secure such employment and should she secure it, she will have difficulty in retaining it. They proposed a higher post-accident contingency deduction.

[28] Having considered the evidence as presented by the experts in their medico-legal reports and their joint minutes, I am of the view that scenario 1, is a better scenario to compensate the plaintiff for the loss suffered by the minor child. I am persuaded that a higher contingency fee deduction of 35%

should be applied to the award under the circumstances. I find that the amount thereof will fairly and appropriately compensate the plaintiff for the minor child's future loss of earnings/loss of earning capacity in this regard.

[29] The award to be made is calculated as follows:

Future loss of income	R3 870 300
Less 35% contingency	<u>R1354605</u>
Total	<u>R2 515 695</u>

[30] Accordingly I grant judgment in favour of the plaintiff against the defendant as follows:

30.1 Payment of the amount of R2 515 695,00 for the minor child's future loss of earnings/loss of earning capacity.

30.2 Interest on the said amount of R2 515 695,00 at the rate of 15,5% per annum 14 days from date of judgment to date of final payment.

30.3 The defendant is further ordered to pay the plaintiff's costs on the High Court scale either as taxed or agreed, to date hereof such costs to include the costs of counsel and quantifying and reservation fees, if any of the following experts:

30.3.1 Prof Lekgwara;

30.3.2 W MKhumalo;

30.3.3 Narropi Sewpershad;

30.3.4 Adelaide Phasa;

30.3.5 Sandra Moses;

30.3.6 Munro Forensic Actuaries.

M J TEFFO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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INSTRUCTED BY	TSEBANE MOLABA ATTORNEYS
DATE OF JUDGMENT	1 MARCH 2017