

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: HCAA05/2023

- (1) REPORTABLE: YES/NO
 (2) OF INTEREST TO THE JUDGES: YES/NO
 (3) REVISED: YES/NO

Naude – Odendaal J

SIGNATURE

DATE

05/05/2024

In the matter between:

ZWIVHUYA SONIA MAHADULULA
 ZWAVHUDI CLEMENT MAHADULULA

FIRST APPELLANT
 SECOND APPELLANT

and

MEC FOR EDUCATION, LIMPOPO PROVINCE

RESPONDENT

 JUDGMENT

NAUDE–ODENDAAL J:

- [1] This is an appeal and cross-appeal against certain portions of the order granted by Semenya DJP on the 19th of August 2022. The appeal is with leave from the court *a quo*, granted on 17 January 2023.
- [2] Before dealing with the appeal, it needs to be stated that at the time of hearing of the appeal, the Appellants failed to file a Power of Attorney. It is however clear that the Appellants were represented throughout the trial in the court *a quo* by S.O. Ravele attorneys. Both the Appellants' legal representative, as well as the Respondent's legal representatives requested this court to condone the failure to file the Power of Attorney and proceed to hear the appeal. Having considered the history of the matter and in light thereof that there was no objection that the appeal proceed and this court condoning the failure to file a power of attorney, this court proceeded to hear the appeal as it deemed it in the interest of justice that this matter be brought to finality considering that the incident took place already in 2015 and summons was already issued in 2016.
- [3] The relevant portions of the order granted in the application for Leave to Appeal is as follows only:-
- "
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- (iii) *The Second and Third Applicants/Plaintiffs' application for leave to appeal is granted;*
- (iv) *The cross-appeal in respect of the award on future medical expenses is granted;*
- (v) *Costs to be costs in the appeal."*

[4] The facts are briefly that Mrs. Azwindini Angelina Mahudulula (the 1st Plaintiff in the court *a quo*) was the mother of the deceased. The deceased tragically passed away by drowning in a swimming pool at her school at Mopani Intermediate School on 25 October 2015. The two Appellants are twins. They were the deceased's siblings and attended the same school and boarding school as the deceased on the date of the incident.

[5] The Respondent (Defendant in the court *a quo*) conceded 100% liability for the First Plaintiff in the court *a quo*, as well as the Appellants' proven or agreed damages. The court *a quo* therefore only had to determine the *quantum* of damages.

[6] The court *a quo* made the following order on 19 August 2022:-

"In the result the following order is made:-

1. *The defendant is ordered to pay the plaintiffs the following amounts in respect of general damages:*

1.1 Angelinah Azwindini Mahadulula: R350 000.00;

1.2 Zwinvhuya Sonia Mahadulula: R400 000.00;

1.3 Zwavhudi Clement Mhadulula: R400 000.00.

2. *The defendant is ordered to pay the first plaintiff an amount of R91200.00 in respect of funeral costs;*

3. *The defendant is ordered to pay the plaintiffs the following amounts in respect of future medical expenses:*

3.1 Angelina Azwindini Mahadulula:

For Ms Sebapu (Occupational Therapist)

R21 158

For Ms Sivhabu (Occupational Therapist) R19 586

3.2 Zwavhudi Clement Mahadulula:

Ms Sebapu:

1. Occupational therapy	R9088
2. Psycho emotional group (initial)	R47 258
3. Psycho emotional (subsequent)	R11 814
4. Family counseling	R9088
TOTAL:	R77 248

Ms. Sivhabu: (Occupational therapist) R19 503

3.3 Zwivhuya Sonia Mahudulula:

Ms Sebapu (Occupational Therapist)

1. Occupational therapy	R19395
2. Vocational guidance	R8816
3. Work visits (allowing for 3 visits)	R2645
4. Occupational Therapist travel cost for work visits (allowing 3 hours)	R1818
TOTAL	R32674

Ms. Sivhabu

1. Occupational Therapy	R19503
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4. *It is ordered that the initial amount paid to the plaintiffs in respect of general damages and funeral costs should be deducted from the amount to be paid in respect of this order;*
5. *The plaintiffs' claim for loss of earning is dismissed.*
6. *The defendant is ordered to pay the plaintiffs' costs."*

- [7] The court *a quo*, in granting the application for leave to appeal conceded that the award was erroneously granted in terms of the recommendations of the two occupational therapists appointed by both parties instead of granting the order on the basis of the opinion of one of the experts. This amounted to a double award. The Appellant also conceded that this was a patent error and that the appeal in this regard should be upheld.
- [8] The Respondent submitted that the future occupational therapy expenses recommended by Ms. Sebatu should be set aside, which are as follows:-
- (i) R21 158.00 in respect of the 1st Plaintiff;
 - (ii) R19 395.00 in respect of the 1st Appellant; and
 - (iii) R9088 in respect of the 2nd Appellant.
- [9] The Appellants legal representative submitted that the 1st Plaintiff and 1st and 2nd Appellants are willing to abandon the amounts of R19586.00 in respect of Ms. Mahadulula, the amount of R19395.00 in respect of the 1st Appellant and the amount of R9088 in respect of the 2nd Appellant.
- [10] I do not agree with the Appellants' nor the Respondent's submission in this regard. It is clear from the amounts chosen by the Appellants' to be abandoned and the amounts chosen by the Respondent to be set aside that each party nit picked the amounts which are more favourable for their respective parties instead of considering the practicality and effect of the services of the respective Occupational Therapists they chose to abandon or apply to be set aside.

[11] In my view all the Occupational therapy expenses for Ms Sivhabu should rather be set aside as certain awards were made for certain treatments which fall under Ms. Sebapu and for which expenses no provision was made under Ms. Sivhabu. Therefore, it would be practical and sensible to rather set aside the Occupational therapy expenses under Ms. Sivhabu as follows:-

(i)	In respect of the 1 st Plaintiff	R19586
(ii)	In respect of the 1 st Appellant	R19503
(iii)	In respect of the 2 nd Appellant	R19503
	TOTAL:	R58 592

[12] This court now turns to deal with the appeal by the Appellants' against order 5 of the judgment and order delivered on 19 August 2022 by the court *a quo*. The Appellants' submitted that the question to be answered by this court is whether the Appellants proved that the reduction in their income earning capacity resulted in actual loss of income. According to the Appellants' the court *a quo* misdirected itself when it found that the Appellants failed to prove a reduction in their capacity to earn income which has the effect of diminishing their estates and further erred in dismissing the Appellants claim for loss of earning capacity.

THE 1st APPELLANT:

[13] The 1st Appellant was 17 years old at the time of the accident. She passed Grade 11, but according to her testimony, she did not perform as well as she would have, had the incident not occurred. She used to end around 20th in her class or year

group at the school, but after the incident she ended around 50th in her grade. She testified that she wanted to become an auditor. She attained her Higher Certificate at the end of her Grade 12, but went back during the year 2017 to improve her results. In 2017 she passed Grade 12 with a Bachelor Certificate after she received treatment to assist her to concentrate.

[14] After passing Grade 12, the 1st Appellant enrolled for a Higher Certificate in music at the University of Venda. She managed to complete her Higher Certificate in music after two years. She was admitted to study a BA degree at the University. According to her she will complete her studies.

[15] The Educational Psychologist's view in respect of the 1st Appellant is that, if she can attend therapy, she will retain her premorbid functionality. The Occupational Therapists' joint view is that the 1st Appellant aspires to follow the same occupations as before the incident and therefore, they are of the opinion that the claimant has suffered only a loss of competitiveness in the open labour market due to the emotional fallouts of the incident should they remain unresolved. Overall, functionally, she should be able to cope with the demands of working as a teacher or any other similar occupation. Her employability or vocational capabilities will be directly related to the level of education that she is able to achieve.

[16] The Industrial Psychologist's view is that the 1st Appellant will probably still be able to complete her Bachelor's degree and qualify as an Educator as was postulated pre-incident.

THE 2nd APPELLANT:

- [17] The 2nd Appellant was 17 years old when the accident occurred. He was in Grade 11 at school. He passed Grade 11 and proceeded to register for Grade 12 in the following year, 2016. He passed Grade 12 and registered at the College for a course in Business Management during 2017. He passed 3 (three) of his 4 (four) subjects that he had registered. He however discontinued his studies because he lost interest in the Business Management Course.
- [18] It should be noted that Mrs. Mahadulula, the 1st Plaintiff in the court *a quo* and the 2nd Appellant's mother, testified that the 2nd Appellant has always performed poorly academically compared to the 1st Appellant. The 1st Appellant excelled according to her in mathematics, whereas the 2nd Appellant performed very poor in mathematics.
- [19] The Educational Psychologist stated that it may be apt to consider that he would have had a similar academic functioning as noted post-incident. Therefore, it may be apt to reason that he would have had a Grade 12 with a Certificate pass pre-incident. He would have been able to continue his studies (with Career Guidance and Psychotherapy) at a FET College with a NQF 5.
- [20] The Occupational Therapist's view is that there are no objective findings that the 2nd Appellant's potential to be gainfully employed has been curtailed. In addition, the Industrial Psychologist's view is that, despite mild symptoms of depression and with

the appropriate interventions, the 2nd Appellant's career will probably progress as per the pre-incident career postulation.

THE LAW:

[21] In **Rudman v Road Accident Fund 2003 (2) SA 234 (SCA)** the court recognized that for the purposes of establishing a claim for loss of earning capacity, *"there must be proof that the reduction in earning capacity indeed gives rise to a pecuniary loss."*

[22] In **Hendricks v President Insurance Co Ltd ZASCA 2014 182 at paragraph 11, Selikowitz J** held that:

"The principle applicable to the assessment of damages has as its ratio the policy that the wrongdoer should not escape liability merely because the damages he caused cannot be quantified readily or accurately. The underlying premise upon which the principle rests is that the victim has, in fact, suffered damages and that the wrongdoer is liable to pay compensation or solatium."

[23] It is trite that the Appellants had to prove the extent of their loss and damages on a balance of probabilities. In **Mvundle v RAF (63500/2009) [2012] ZAGPPHC 57 (17 April 2012)** the following was stated:-

"It is trite that the damages for loss of income can be granted where a person has in fact suffered or will suffer a true patrimonial loss in that his or her employment situation has manifestly changed. The Plaintiff's performance can also influence his or her current job and/or be limited in a number and quality of his or her choices should he or she decide to find other employment."

[24] In order to determine a plaintiff's claim for future loss of income the court must compare what the plaintiff would have earned 'but for' the accident with what he or she would likely have earned after the accident. The future loss represents the difference between the pre-morbid and post-morbid figures after the application of the appropriate contingencies.

[25] In **Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 AD** it was said:-

"Any enquiry into damages for loss of earning capacity is to its nature speculative, because it involves a prediction as to the future without the benefit of crystal balls, soothsayer, augers or oracles. All that the court can do is to make an estimate, which is often a very rough estimate of the present value of a loss."

THE APPLICATION OF THE LAW TO THE FACTS:

[26] There is no evidence to suggest that the 1st and 2nd Appellant's psychological conditions are permanent – any condition present is reversible with therapeutic intervention. There is no evidence that the Appellants' conditions are not reversible with therapeutic intervention.

[27] There is no evidence to suggest that the Appellants' psychological trauma would disadvantage them from competing for employment in the labour market in any capacity. There is further no evidence to suggest that the Appellants are not likely to achieve their objectives of following a career choice in consequence of the traumatic

experience. To the contrary, the evidence shows that the 1st Appellant has overcome her adversities and continued with her studies. There is further no evidence to suggest that the psychological sequelae of the death of their sister, had compromised the 2nd Appellant's career path.

[28] In addition, the Appellants failed to prove a reduced capacity to earn income. The mere fact that they suffered psychological trauma in consequence of the accident does not mean they suffered a reduction in their capacity to earn an income. In fact, the evidence is to the contrary – both the Appellants proceeded to pass their Grade 12, both Appellants enrolled for a higher education and even a degree. It was the 2nd Appellant's choice not to proceed with his studies as he lost interest, despite the fact that he passed 3 of his 4 subjects. The 1st Appellant in all probability has finished her degree by now.

[29] Since the Appellants failed to prove their loss of earning capacity, assessment of damages is not necessary. In this court's view, the court *a quo* was correct in finding that the 1st Appellant continued to pass post-incident. She will be able to achieve her pre-incident qualifications. The court *a quo* further correctly found that the 2nd Appellant passed matric post-incident and went on to pass three subjects at tertiary level. This is proof that he still has his pre-incident capacity to achieve his pre-incident qualification. All he has to do is to go through counseling to deal with his PTSD and his emotions and go back to school if he wishes to do so.

[30] The court *a quo* therefore, in our view, correctly found that the Appellants failed to prove a reduction in their capacity to earn an income which has the effect of diminishing their estates. In the result the Appellants' appeal against order 5 of the Court *a quo*'s judgment and order stands to fail.

[31] The only issue remaining is the costs of appeal. There was no argument made by either party why the general rule that costs should follow the event should not be applicable and in our view, no grounds exist in the present matter to deviate from the general rule.

[32] The Respondent applied for costs of two counsel, where so employed. There is no reason not to grant the cost of two counsel where so employed.

ORDER:

[33] Accordingly, this court therefore makes the following order:-

1. The Appellants' appeal in respect of future loss of earnings (Order 5 of the Court *a quo*'s order) is dismissed.
2. The Respondent's cross-appeal is upheld and the Occupational therapy expenses under Ms. Sivhabu is set aside, as follows:-
 - (i) In respect of the 1st Plaintiff R19586
 - (ii) In respect of the 1st Appellant R19503
 - (iii) In respect of the 2nd Appellant R19503

TOTAL:

R58 592

3. The court *a quo*'s order is substituted with the following order:-*"In the result the following order is made:-*

1. *The defendant is ordered to pay the plaintiffs the following amounts in respect of general damages:*

1.1 Angelinah Azwindini Mahadulula:	R350 000.00;
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1.2 Zwinvhuya Sonia Mahadulula:	R400 000.00;
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2. *The defendant is ordered to pay the first plaintiff an amount of R91200.00 in respect of funeral costs;*

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For Ms Sebapu (Occupational Therapist)	R21 158
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Ms Sebapu:

1. Occupational therapy	R9088
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2. Psycho emotional group (initial)	R47 258
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3. Psycho emotional (subsequent)	R11 814
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4. Family counseling	R9088
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TOTAL:	R77 248
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Ms Sebapu (Occupational Therapist)

1. Occupational therapy	R19395
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TOTAL	R32674

4. *It is ordered that the initial amount paid to the plaintiffs in respect of general damages and funeral costs should be deducted from the amount to be paid in respect of this order;*
 5. *The plaintiffs' claim for loss of earning is dismissed.*
 6. *The defendant is ordered to pay the plaintiffs' costs."*
4. The Appellants are ordered, jointly and severally, the one to pay, the other to be absolved to pay the Respondent's costs of the appeal and cross-appeal on a scale as between party and party, which costs are to be taxed on Scale B of the Cost Scales, and which costs are to include the costs of two counsel where so employed.


M. NAUDÉ-ODENDAAL

JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION,

POLOKWANE

I AGREE:



E.M. MAKGOBA
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE

I AGREE:



G.C. MULLER
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE

APPEARANCES:

HEARD ON : **2 FEBRUARY 2024**

JUDGMENT DELIVERED ON : **3 MAY 2024.**

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be **3 MAY 2024 at 10h00**

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