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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 641/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO THE JUDGES: NO

(3) REVISED

DATE: 24-07-2024

SIGNATURE

In the matter between:

M[...] O[...] L[...]

PLAINTIFF

obo M[...] S[...] G[...]

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGEMENT

MASHAMBA AJ

Introduction

[1] On 07 August 2015, the minor child M[...] S[...] G[...] (hereinafter referred as "the child") born on the 08th July 2012, was a pedestrian crossing the road along Seleke Road, Limpopo Province, when knocked by a motor vehicle with registration numbers and letters I[...], driven by Mr Maphanga. The child was 4 (four) years old when the accident occurred. The child was going to a tuck-shop with other children. The child is represented by her biological mother Ms M[...] O[...] L[...] (hereinafter referred as "child's mother and /or the plaintiff"). child's mother was not at the scene when the accident took place.

[2] The claim against the defendant was lodged on the 07th September 2018. The summons was issued on the 27th January 2023. The defendant did not enter his notice of intention to defend. The issue of merits was settled between the parties on the 06th November 2023 being 100 % in favour of the plaintiff and the agreement was made an order of court. The issues to be determined before this court are that of future medical expenses and future loss of earnings. The issues of general damages are to be referred to HPCSA.

[3] The matter was before this Court in default hearing on the 01 July 2024. The plaintiff claimed the amount of **R 11 000 000.00** (Eleven Million Rand) calculated as follows;

(a) future medical expenses

R 1 000 000.00 (section 17(4)(a))

(b) loss of earnings R 9 000 000.00

(c) General damages R 1 000 000.00

[4] The child was taken to the clinic in Seleka and transferred to Witpoort Hospital by an ambulance. According to the hospital records the child had a swollen head injury and fully awake. BP=116/68. Pulse rate=55b/min. The child was discharged same day.

The Evidence

[5] In assessing the child loss of future earnings, the Court considered all reports submitted by the plaintiff as follows;

5.1 Orthopaedic Surgeon- Dr Tsolo

5.2 Neurosurgeon- Dr Mosadi

5.3 Clinical Psychologist- Jacqui Van Staden

5.4 Educational Psychologist- Dr Kekana

5.5 Plastic Surgeon- Dr Makgofa

5.6 Occupational Therapist- Sarah Marule

5.7 Industrial Psychology- Zizile Nkosi

5.8 Actuary- Tsebo

[6] On the 28th June 2023, the child was examined by an orthopaedic surgeon, Dr Tsolo. The injuries reported by the plaintiff includes, head injury with loss of consciousness, right arm injury and right leg injury. Clinical and radiological was performed and the child was diagnosed with multiple soft tissue injuries. With recommended treatment the child is expected to recover fully. The child complaints include chronic headaches, itching teary eyes, and occasional right arm pain which is exacerbated by activity. The x-ray was ordered and done by Ors Mkhabele and Indunah radiologist and it shows a normal right knee and right forearm. WPI=4%

[7] On 29 June 2023, the child was examined by the neurosurgeon, Dr Mosadi. Dr Mosadi reported that according to the clinical records, the child pulse was 130b/m, her respiratory rate 20b/m and the child was fully awake and conscious (Glasgow Coma Scale of 15/15). According to the neurosurgeon the child loss consciousness immediately after the accident. The Neurosurgeon opined that as a result of the accident in question the child suffered grade 3 concussion as a subset of mild head injury. It is evidenced by history of loss of consciousness, chronic headache and memory problems¹. The child has some neuropsychological problems which need to be assessed by the clinical psychologist. The child has a same chance of developing a late onset post traumatic epilepsy as the general population. The child prognosis is that she is suffering from post-concussion headaches and the neurological literature documented that 80% of patients suffering from post-concussion headaches recover within 2-3 years, however 20% of patient remain with the chronic symptoms². Neurosurgeon opined that since it is now over 5 years after the accident, spontaneous resolution of these headaches is not expected. The neurosurgeon calculated WPI = 22 %³

[8] On the 29th June 2023, the child was examined by the clinical psychologist, Jacqui Van Staden, who noted that the child was too young to remember events

¹ Bundle D, page 76

² Bundle D, page 77

³ Bundle D, page 88

concerning the accident. The child did not repeat herself and did not report that she generally has problem remembering things. The child was able to recall a series of six numbers on the "memory for digits test" in the straightforward 'repeat as said' section. This indicates an above average memory span. The child physical injury to her head has clearly not had an impact on her motor performance, and she does not experience difficulties in performing activities that are needed in her daily life⁴. Posttraumatic Stress Disorder that has rendered the child more psychologically vulnerable than prior to her injury. The clinical psychologist opined that after the neurocognitive assessment it certainly becomes clear that the child's abilities have not been compromised by the accident in question⁵. In order to address the posttraumatic stress disorder and psycho- social problems 20 session are recommended which cost R 1285.00 according to the present tariffs for psychologist.

[9] On the 28th June 2023, the child was examined by the educational psychologist, Dr Kekana. The educational psychologist noted that after the accident the insured driver took the child to Seleka clinic. The child was stabilised and an ambulance took her accompanied by her mother to Witpoort hospital. According to the plaintiff the child had a brief loss of consciousness. The plaintiff informed the educational psychologist that the child has a short-term memory problem after the accident. Dr Kekana noted the child outstanding performance, the child is performing so well and she got level 7 (outstanding performance) in most of her subjects. The child intellectual (cognitive) functioning was tested using Senior South African Individual Scale- Revised (SSAIS-R) and the child obtain a Global IQ of 98, a verbal IQ of 93 and a Performance IQ OF 104. The conclusion indicates that the child's Intelligence Quotient in general is average. When tasks are complex and needs abstract reasoning, the child could not complete it with speed⁶. The child performance on story memory was low average. The educational psychologist was informed by the plaintiff that the child has short term memory problem after the

⁴ Bundle D, page 100. Para 6.8

⁵ *ibid*, page 103, par 8.

⁶ Supplementary index to bundle D, par 8.2.5

accident⁷. According to the plaintiff, the child cannot concentrate and give attention sufficiently.

[10] Dr Kekana opined that before the accident the child could probably pass grade 12 and obtain an admission to a bachelor's degree study, the child could probably pursue the degree study course of her choice and obtain a NQF Level 7 qualification. The child could also probably pursue the honours degree study course of her choice and obtain a NQF Level 8 qualification. Dr Kekana further opined that after the accident the child school performance is still very satisfactory but she will experience learning challenges due to her problems as she progresses through this phase, the Senior Phase (grade 7 to 9) and through the Further Education and Training (FET) Phase (grade 10 to 12) where higher order learning skills are called into operation⁸. Dr Kekana opined that the child is likely that she will probably pass grade 12 with support and obtain admission to diploma study.

[11] On the 27th June 2023, the child was examined by the plastic surgeon, Dr Makgofa and in brief the Doctor noted the main complaint as visible scars on the right elbow and left knee and that the scars are painful and itching. The scars are amenable to revision. The cost estimated for future treatment at roughly R 80 000.00. The scars rated WPI is 3 %.

[12] On the 07th August 2023, the child was examined by the industrial psychologist, Zizile Nkosi. The industrial psychologist opined that if not due to accident, the child would likely complete matric in 2030 and likely passed grade 12 with a bachelors pass endorsement. The child would likely proceeded with university degree where she would have obtained NQF 7. The child also had the potential to progress within her studies to Honours level with an NQF 8 qualification. The industrial psychologist postulated the pre-accident potential of the child and further considered the contrast with the post-accident scenario as opined by the educational

⁷ *ibid*, page 127, par 4.7.1.

⁸ Supplementary index to bundle D, page 152, par 11.2.2

psychologist who has opined that the child will not reach her pre-accident potential but will only obtain grade 12 and likely be admitted to diploma study and obtain a NQF level 6 qualification.

[13] On the 15th September 2023, the plaintiff appointed Tsebo Actuaries, to calculate the future loss of income suffered by the child as a result of the accident in question. The actuaries calculated the child future loss of earnings based on the 1st and 2nd scenarios. The first scenario, the actuaries considered the uninjured postulations made by the Industrial psychologist, that the child would likely obtain bachelor's degree. The second scenario is that the child would likely obtain honours degree. The actuaries further considered the child pre-accident earning postulated scenario that the child might obtain grade 12 and likely be admitted to diploma study and obtain a NQF level 6 qualification. The actuaries applied the following contingencies, 20% uninjured and 50% injured.

[14] **Scenario 2: Honour's Degree**

Uninjured income (R)	Injured income (R)	Loss (R)	
Future loss			
	17 618 939	8 281 534	
Future contingencies	(3 523 788) 20%	(4 140 767) 50%	
Net	14 095 151	4 140 767	9 954 384
Impact of a cap			(989 378)
Net Total			8 965 006

[15] The plaintiff submitted that considering the conclusion of all medical experts discussed above the child has been adversely affected by the accident. The plaintiff further indicated that considering the seriousness of the head injury and neurological challenges experienced by the child, the amount of R **8 965 006.00** in respect of the

child future loss of earnings after the contingency's deductions of 20 % uninjured and 50 % injured, will be reasonable. The plaintiff relied their submissions to the heads of argument which was handed over to this Court.

The Law

[16] Regarding the evaluation of credibility and reliability of expert evidence, Wallis JA (Fourie and Koen AJJA concurring) in *Pricewaterhouse Coopers Incorporated and Others v National Potatoe Co-operative Ltd and Another* [2015] 2 All SA 403 (SCA)⁹ referred to *Wightman v Widdington (Succession de)* 2013 QCCA 1187 CanLII) where it was remarked thus:

"Legal principles and tools to assess credibility and reliability"

[326] *"Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist"*

[327] *"As long as there is some admissible evidence on which the expert's testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish".*

[328] *An opinion based on facts not in evidence has no value for the Court.*

[329] *With respect to its probative value, the testimony of an expert is considered in the same manner as the testimony of an ordinary witness. The Court is not bound by the expert witness's opinion.*

[330] *An expert witness's objectivity and the credibility of his opinions may be called into question, namely, where he or she:*

⁹ At page 441 para [98]

- *accepts to perform his or her mandate in a restricted manner;*
- *presents a product influenced as to form or content by the exigencies of litigation;*
- *shows a lack of independence or a bias;*
- *has an interest in the outcome of the litigation, either because of a relationship with the party that retained his or her services or otherwise;*
- *advocates the position of the party that retained his or her services;*
or
- *selectively examines only the evidence that supports his or her conclusions or accepts to examine only the evidence provided by the party that retained his or her services."*

[17] *In Ruto Flour Mills v Adelson (T)*¹⁰ Boshoff J stated that a party seeking to introduce expert evidence must satisfy the court that the witness not only has specialist knowledge, training, skill or experience but that he/she can, on account of these attributes or qualities, assist the court in deciding the issue, that he/she is an expert for the purpose for which he/she has been called upon to express an opinion,¹¹ the witness does not or will not express an opinion on hypothetical facts that have no bearing on the case or which cannot be reconciled with all the other evidence in the case.¹²

Court Findings

¹⁰ 1958 (4) SA 235 At 237C-D.

¹¹ *Goliath v Fedgen Insurance Company Ltd* 1994 (2) PH F 31 E at 83.

¹² *S v Mkhle* 1990 (1) SACR 95 (A) at 100d.

[18] The Court has raised issues which are of great concern, the first issue was the fact that when the accident occurred, the child was crossing the road with other children. The plaintiff was not present when the accident took place and only heard about the accident. The plaintiff has reported to different experts that the child had lost consciousness on the scene. The driver of the insured vehicle is the one who immediately after the accident took the child to Seleka clinic and no loss of consciousness was reported by the driver. No evidence of the eye witness before this Court who has witnessed the child loss of consciousness. Medical records submitted before this court indicated that the GCS was 15/15, the child was awake and discharged same day. The Court on the balance of probabilities finds that the child did not lose consciousness during the accident, therefore, the diagnosis and opinion of all medical experts who noted loss of consciousness were based on the wrong information and such information has influenced their opinion in their respective reports.

[19] The Court further raised concern about the head injury *sequelae* as opined by neurosurgeon, and educational psychologist. The plaintiff reported challenges such as headache twice a week and itching teary eyes that has disturbed the child at school. The educational psychologist did not investigate the reported post-accident challenges with the child's teachers which would have assisted in verify the child's current challenges as reported. The educational psychologist opined that although the child is still performing very well, the child will in future have difficulties when doing higher grades¹³. So, according to the educational psychologist, although no challenges that affect the child's school performance now, the challenges will manifest in the future. The plaintiff did not provide medical expert evidence regarding the causes of the child itching teary eyes at school and how it is related to the accident in question. The Court on the balance of probabilities finds that, whatever, challenges noted by the educational psychologist which are currently not affecting

¹³ Supplementary index to Bundle D, page 153, para 14.2.2

the child school performance, would likely not have any adverse impact on the child school performance even in the future.

[20] The Court had informed the plaintiff legal team that it would be prudent to wait until the highest grades as opined by the educational psychologist in order to assess how the child's performance drops but the legal team submitted that the court should decide the issues of the future loss of earnings not later than now because the accident occurred in 2016 which makes it approximately 7 years after the accident. The Court requested the counsel to confirm the instructions and he indicated that he holds such instructions, therefore, the Court will proceed to evaluate the balance of probabilities of all evidence before this Court, in order to decide the child's future loss of earnings as a result of the accident in question.

[21] The court noted that several medical experts referred in supra, made their findings based on the information reported by the child's mother who has an interest in the matter. The child was 4 (four) years old when the accident happened, the clinical psychologist indicated that the child did not generally has problems remembering things¹⁴. The plaintiff reported to the neurosurgeon and educational psychologist that the child has memory problem. The clinical psychologist indicated that after the neurocognitive assessment it certainly becomes clear that the child's abilities have not been compromised by the accident in question. According to the clinical psychologist the child has an above average memory span. The Court on the balance of probabilities finds that the child has no memory problem nor forgetful. This Court finds that the accident did not affect the child's performance at school.

[22] The Court had no pre accident school report to compare with the post-accident school performance since the accident happened before the child commenced with school. The Court is in possession of the child's school reports, the child performs exceptional well. The Court noted that the child has a post-traumatic

¹⁴ Bundle D, page 99, para 6.6

stress disorder as diagnosed by the clinical psychologist. The court is of the view that the child post-traumatic stress disorder may not entirely associated with the accident in question, specially, when taking cognisance of the period of approximately 7 (seven) years before the child was assessed by the clinical psychologist.

[23] The clinical psychologist opinion contradicts the neurosurgeon and educational psychologists' opinion regarding memory problem, forgetfulness and the future impact of the head injury. The clinical psychologist opined that after the neurocognitive assessment it certainly becomes clear that the child's abilities have not been compromised by the accident in question¹⁵. There is no factual basis which was submitted before this court to support the educational psychologist opinion that although the child's school performance is currently satisfactory, would likely struggle in the high grades in future. The Court on the balance of probabilities finds that the child's injuries as a result of the accident in question will not likely have any adverse impact on the child school performance nor future loss of earnings.

[24] The Court is of the view that although there is no apparent loss of future income foreseen, the child should be compensated by applying a spread of 5% of the different between the pre and post morbid which are regarded equal. In doing so, the Court considered the conclusion of the clinical psychologist who opined that the child has a post traumatic disorder and psycho-social problems and such may probably have a slight effect in the child's future income.

[25] In consideration of an actuarial calculations in para 14 *supra*, the court accepted that the child has a potential to obtain an honours degree, so scenario 2 has been considered. The future loss of earnings is made out as follows;

Scenario 2

¹⁵ Bundle D, page 103

Uninjured income (R) Injured income (R) Loss (R)

Future loss			
	17 618 939	17 618 939	
Future contingencies	(3 523 787,80) 20%	(4 404 734,75) 25%	
Net	14 095 151,20	13 214 204.20	880 947
Impact of a cap			
Net Total			880 947.00

[26] In the circumstances, the Court find that the appropriate amount to be awarded to the plaintiff in respect of the future loss of earnings capacity should be in the sum of **R 880 947.00** (Eight hundred and Eighty Thousand, Nine Hundred and Forty-Seven Rands).

[27] The plaintiff has made out its case, and the cost should follow the suit.

Order

[28] In the circumstances, the following is the Order of this Court:

1. The defendant shall pay the plaintiff the sum of **R 880 947.00** (Eight hundred and Eighty Thousand, Nine Hundred and Forty-Seven Rand) in respect of future loss of earnings.
2. The defendant shall furnish the plaintiff with an undertaking in terms of Section 17 (4) (a) of Act 56 of 1996 within 30 days from the date of delivery of the Court Order.
3. The amount in paragraph 1 above shall be paid into the plaintiff's

attorneys trust account.

4. The defendant shall be liable to pay interest on the aforesaid amounts' *tempore morae* at the rate of 11,75% per annum from 180 days after the date of this order to date of the payment.

5. The defendant shall pay the plaintiff 's taxed or agreed party and party costs until the date of this order including costs of a counsel scale B.

6. The costs consequently in the preparation of and obtaining the medico legal and actuary reports that were served on or provided to the defendant.

7. The reasonable taxable preparation, qualifying and reservation fees, if any of the plaintiff's experts for trial of whom notice was given to the defendant.

8. The reasonable taxable costs of necessary consultations with the said experts and the reasonable taxable traveling, subsistence and accommodation costs of the Plaintiff for attending the medico legal examination, subject to the discretion of the taxing master.

9. The reasonable taxable costs of traveling, subsistence,accommodation costs of the plaintiff for attending court.

10. The defendant shall be liable to pay interest on the amount of the plaintiff's costs of suit, as taxed or agreed, at 7 % per annum from 14 (fourteen days) of the allocatur of the taxing master or the date of the agreement, whichever applies, to date of payment.

11. The issues of general damages are refer

E. MASHAMBA
ACTING JUDGE OF THE HIGH COURT, LIMPOPO DIVISION
POLOKWANE

APPEARANCES

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FOR THE DEFENDANT: NO APPEARANCE

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