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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE

SIGNATURE

CASE NO: 2020/8356

In the matter between:

M[...] J[...] M[...]

PLAINTIFF

OBO N[...] P[...] M[...]

And

ROAD ACCIDENT FUND

DEFENDANT

This Judgment is deemed to have been handed down electronically by circulation to the parties' representatives via email and uploaded onto the caselines system.

Judgment

Thupaatlase AJ

Introduction

[1] The plaintiff is an adult female person who sues in her representative capacity as a mother and legal guardian of a minor child.

[2] The defendant is the Road Accident Fund (RAF) a statutory body established in terms of the Road Accident Fund Act 56 of 1996, as amended (the Act) whose object is “. . . the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles.” See section 2 of the Act. In achieving this object, it is required to, inter alia, engage in “the investigation and settling” of claims submitted to them.’ See the provisions of section 4 of the Act.

[3] The cause of action arose from a motor vehicle collision that occurred between the minor child of the plaintiff and an insured motor vehicle as defined in the RAF Act. The collision occurred on 09 February 2019 at around 18h00 at the intersection of Jongi Khaya street Diepsloot.

[4] The plaintiff was a pedestrian and was 8 years old at the time. As a result of the collision the minor child sustained various injuries including what was referred to as degloving of the foot.

Application in terms of Rule 38(2).

[5] At the commencement of the trial, the plaintiff applied to be granted leave to present expert evidence by way of affidavits. The report were all accompanied by confirmatory affidavits. These also included plaintiff’s hospital and clinical records as well as the minor child’s school reports and the minor child’s scarring.

[6] The basis of the application was that the defendant failed to appoint medico-legal experts to assess the minor child. The plaintiff contended that as result of such failure the experts reports by the plaintiff remained unchallenged.

[7] The argument was based on strength of the cases of *Havenga v Parker* 1993 (3) SA 724 (T) and *Madibeng Local Municipality v PIC* 2018 (6) SA 55 (SCA). Both

decisions were made in the context of an application for default judgment application. It was argued that the position in this case is analogous with the default judgment application. I agreed with the argument and allowed the plaintiff to use experts medical reports accompanied by confirmatory affidavits without the need to lead viva voce evidence.

Common cause issues

[8] The defendant admitted the date and place of the collision but disputed the time of such collision.

[9] The defendant has admitted that the minor child was a pedestrian at the time of the collision. The defendant admitted the identity of the insured driver as well as the details of the insured motor vehicle.

[10] The defendant also admitted that the minor child suffered a foot degloving injury.

Issues for determination

[11] The defendant admitted 80% liability and the issues that the court was called upon to determine was past medical expenses and loss of earning capacity.

Injuries sustained.

[12] The defendant suffered the following injuries:

- A right foot injury.
- A right knee soft tissue injury
- Scaring on the medial aspect of her right foot, the scar measuring 5cm x 3cm. the scar is described as hypopigmented atrophied, irregular, and unstable.

Current complaint.

[13] As at the time of the examination the minor child was complaining of pains emanating from the anterior aspect of her right foot related activity. She also complained of pain over the medial aspect of her right foot related to cold and inclement weather. It was stated that she needed to rest in order to alleviate such pain.

[14] She also had some difficulty standing for long periods of time as a result of right knee and right foot injuries. At the time of the collision the minor child was playing netball which she has since stopped playing following the collision. It was also stated that prolonged walking exacerbates right foot pains.

[15] The minor child still experiences cramps in the right foot with the inclement weather and at times the leg becomes numb. The injuries have resulted in the defendant feeling sub-conscious about her injured right foot. She was severely and considerably disabled for 6 weeks, with 1 week of hospitalisation.

Past hospital and medical expenses

[16] The defendant disputed the entitlement to past hospital and medical expenses. This was based on the internal policy directive which was issued by the RAF regarding such payment.

The directive was to the following effect:

‘Internal Communique’ dated 12 August 2022 distributed by the Acting Chief Claims Officer of the first respondent to all regional managers of the RAF and reads thus:

‘Dear colleagues

All Regional Managers must ensure that their teams implement the attached process to assess claims for past medical expenses. All RAF offices are required to assess claims for past medical expenses and reject the medical expenses claimed if the Medical Aid has already paid for the medical expenses. The regions must use the prepared template rejection letter (see attached) to communicate the rejection. The reason to be provided for the repudiation will be that the claimant has sustained no loss or incurred any expenses relating to the past medical expenses claimed. Therefore, there

is no duty on the RAF to reimburse the claimant. Also attached is a list of Medical Schemes. Required outcome: immediate implementation of the process and 100% compliance to the process’.

[17] This issue need not detain this court for long. This is largely because as it was pointed out to counsel for the defendant the issue had become moot as there was already an extant judgment that set aside the internal memorandum referred to above. The counsel for the defendant, however submitted that it was still her instructions to address this point.

[18] This issue was resolved and decided in the case *Discovery Health (Pty) Limited v Road Accident Fund and Another* (2022/016179) [2022] ZAGPPHC 768 (26 October 2022) where the court quoted with approval previous decisions. At para [27] the court stated as follows; ‘The principle was expressed by the court in the matter of *D’Ambrosini v Bane* 2006 (5) SA 121 (C) in the following words:

“medical aid scheme benefits which the plaintiff has received or will receive are not deductible from in determining his claim for past and future hospital and medical expenses.”

[19] After quoting the *D’Ambrosini* case the court concluded at para [29] that ‘It is apparent from the above statements of the legal position that the first respondent is not entitled to seek to free itself of the obligation to pay full compensation to victims of motor vehicle accidents. Thus, the directive challenged in the present proceed is outside the authority given by the enabling statute. More specifically the directive is inconsistent with the express provisions of section 17 and is, consequently, unlawful’. It follows that the plaintiff is entitled to proven past hospital and medical expenses.

Future Medical Expenses

[20] The Orthopaedic surgeon holds the view that the defendant will require conservative treatment for occasional right knee and foot symptoms. The conservative treatment may consist of analgesics, anti-inflammatories, muscle relaxants and physiotherapy.

[21] According to the Plastic surgeon, the scarring of the medial foot region could be surgically improved, and this require excision. Further that in order to obtain the maximum benefit, this procedure would need to be repeated on 2 separate occasions in the form of serial excision and has to be performed at 6 months intervals. And following each of the operations the defendant will have to apply emollients to her scar for at least 6 months.

[22] The plaintiff submitted that in terms of section 17 (4) (a) of the Act the plaintiff is claiming an undertaking for the payment of any future expenses related to the accommodation in a hospital or nursing home or the rendering of a service of goods arising from the collision of 09/09/2019. The evidence of the Plastic surgeon remained unchallenged as the defendant didn't have any expert witness to give a contrary view. In the premises the court finds that the plaintiff has proved the claim in respect of future medical expenses.

Future loss of earnings

[23] The evidence regarding future loss of earnings was presented through the calculations of Munro Forensics Actuaries. It is accepted that the minor child has not suffered any past loss of earnings due to the accident. It is also true that the plaintiff didn't lead any evidence from an Educational psychologist, to testify about the effect that the minor child may have suffered academically.

[24] The calculations for future loss of earnings are based on no particular academic achievement. The report makes reference to the completion of Grade 12 and a NQF 5 (certification) qualification. The second scenario is based on a three-year diploma qualification. In each scenario there is an allowance for retirement until age 65.

[25] On the basis of medical expert opinion, which I must add was not contradicted, the plaintiff should still be able to achieve her expected pre-collision educational and career prospects. It is accepted that her current complaints of occasional right foot and discomfort is likely to continue into the future.

[26] This may however be a sporadic occurrence. It follows that this may impact his ability to study and may also affect his productivity levels after completion of his career of choice. The direct impact of that would be a delay in his progression at the workplace. The consequence of that will impact salary progression.

Legal context: Loss of earnings

[27] It is trite that in order to claim loss of earnings or earning capacity that a plaintiff must prove the physical disabilities resulting from such loss. This was held in *Rudman v Road Accident Fund* 2003 SA 234 (SCA) at 241G-H held that:

‘I believe that this conclusion is correct. The fallacy in Mr Eksteen’s criticism is that it assumes that Rudman suffers loss once he proves that his physical disabilities bring about a reduction in his earning capacity; thereafter all that remains is to quantify the loss. This assumption cannot be made. A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured... There must be proof that reduction of earning capacity indeed gives rise to pecuniary loss.’

[28] In the case of *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (A) the court had to decide on the quantification of loss of earning capacity of two-year old child. The court emphasised the fact that it is desirable, where possible, to itemise the amounts in respect of pecuniary damage (such as loss of earning capacity) and non-pecuniary damage (such as loss of amenities).

[29] The court went on to discuss the two possible approaches in assessing loss of earning capacity. The court is required to make a round estimate of an amount which seems fair and reasonable or to make use of mathematical calculations on the basis of assumptions resting on evidence.

[30] There are precedents where the courts have awarded loss of future earnings to plaintiffs who were minors. In the case of *Maja v South African Eagle Insurance Co Ltd* 1990 (2) SA 701 (W) the court awarded an amount for loss of earning capacity to a minor child, injured at the age of 32 months, in spite of the fact that the child was so young.

[31] The same approach was followed in *Gallie NO v National Employers General Insurance Co Ltd* 1992 (2) SA 731 (C) where the court awarded damages for loss of earning capacity to a minor on the basis that the minor plaintiff would not be able to earn income for the rest of its life. In the two matters referred to above, it is clear that there was diminished patrimony respective of each of the minors.

[32] On the strength of *Rudman* case above the question remains whether the plaintiff discharged the onus of proving that he has suffered a diminution in the value of her patrimony. There is uncontradicted evidence that the plaintiff's mobility is restricted, and he suffers from minor physical handicaps as well, but this does not necessarily translate into a reduction of earning capacity causing loss.

[33] The above principle was laid down in the case of *Union and National Insurance Co. v Coetzee* 1970 (1) SA 300A to the effect that there must be proof that the disability gives rise to a patrimonial loss. This in turn will depend on the occupation or nature of the work which the plaintiff did pre-accident or would probably have done if no disability occurred.

[34] A further legal basis is that the claim for loss of past and future earnings is assessed under the *Aquilian* action where the defendant must make good on the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. See *Santam Versekeringmaatskappy Beperk v Beyleveld* 1973 (2) SA 146 (A) and also *Dippenaar v Shield Insurance Company Limited* 1979 (2) SA 904 (A).

[35] In the case *Nkgau v Road Accident Fund* (23282/16) [2022] ZAGPJHC 642 (17 August 2022) at para [19] held: It is trite that the plaintiff's capacity to earn an income has to be impaired. It is only once impairment has, as a fact, been established, that the question of quantification arises, and that the question of appropriate contingency provisions fits into the quantification exercise not the first, enquiry. The approach would firstly be whether there is a conceptual difference between the question whether a plaintiff has suffered an impairment of earning capacity. This has to be determined on a balance of probability in that plaintiff has the onus to

discharge. The answer to this question is at least theoretically answered affirmatively if the plaintiff will have established a 51% chance of impairment being present’.

[36] My conclusion is that the plaintiff has failed to discharge the onus of proving that the minor child suffered a diminution in the value of its patrimony. It is therefore unnecessary to consider the evidence and arguments dealing with the quantification of loss.

Order

It is ordered as follows:

1. The defendant shall pay to the plaintiff the sum of R 41 608.91 (Forty-one thousand six hundred and eight rand and ninety-one cent).
2. The amount in paragraph 1 (one) shall be paid directly the plaintiff’s attorneys of record with the following particulars, which amount shall be paid within 180 (one hundred and eighty) days from the order being granted:

Name of Account: W[...] K[...] A[...] T[...] A[...].

Bank:A[...]

Branch Code:6[...]

Account No:4[...]

Reference:T[...]

3. The defendant shall pay the plaintiff’s taxed or agreed party and party costs on the High Court scale up to date, which costs shall include, but not limited to:

3.1 The reasonable costs in respect of the medico legal reports, RAF 4 Serious Injury Assessment reports and actuarial calculations of the following experts:

3.1.1 Dr Read (Orthopaedic Surgeon);

3.1.2 Ms Rice (Occupational Therapist);

3.1.3 Prof Chait (Plastic Surgeon);

3.1.4 Mr De Vlamingh (Industrial Psychologists);

3.1.5 Munro Actuaries (Actuary).

3.2 Costs of counsel to date hearing hereof, including the preparation for trial and attendance on the 14th, 15th, and 16th of November 2023.

3.3 Costs of obtaining confirmatory affidavits for the above-mentioned experts for purposes of trial.

3.4 Any costs attendant upon obtaining of payment of the total capital amount referred in paragraph 1 (one) above, as well as any costs attendant upon of the plaintiff's agreed or taxed costs.

4. No interest will be payable on the costs referred in paragraph 3 (three) above except in the event of default payment of such costs, in which case interest will be payable at the prescribed rate of interest per annum.

5. The cost order in paragraph 3 above is subject to the following conditions:

5.1 The plaintiff shall, in the event that costs are not agreed, serve notice of taxation on the defendant's attorney of record; and

5.2 The plaintiff shall allow the defendant 180 (One hundred and eighty) days to make payment of the taxed costs.

5.3 No interest will be payable, except in the event of default of payment of such costs, in which case interest will be payable at the prescribed rate of interest per annum from date of taxation.

THUPAATLASE AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of the hearing:	16 November 2023
Judgment Delivered on:	18 October 2024
For the Plaintiffs:	Adv. F Saint
Instructed by:	Wim Krynauw Attorneys
For the Defendant:	Adv. Nziyanziya
Instructed by:	State Attorney Johannesburg