

**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION MBOMBELA**

Case No: 4441/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

DATE: 05/09/24

SIGNATURE

In the matter between:

N[...] S[...] OBO

A[...] S[...]

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Msibi AJ

Introduction

[1] In this, is an action for the recovery of damages by the plaintiff on behalf of a minor child following her being run over by an insured motor vehicle. The plaintiff sues for general damages, loss of income and future medical expenses. The merits were settled with the defendant accepting 100% liability of the plaintiff's proven damages. The action is defended by the Road Accident Fund (RAF). At the commencement of the proceedings, the plaintiff brought an application in terms of Rule 38(2) of the Uniform Rules of Court. The application was granted. The defendant did not present any expert evidence.

[2] The minor child, A[...] S[...] N[...], was a pedestrian along Schoemansdal Road in Nkomazi, Mpumalanga Province, when a tractor lost control and went to hit and run over her on 29 June 2021. As a result of the accident, the minor child sustained head injuries, multiple lacerations on the head and face and an injury on the left shoulder. In pursuance of the claim, the plaintiff submitted the following expert reports:

- (a) Orthopaedic surgeon
- (b) Neurosurgeon
- (c) Clinical Psychologist
- (d) Occupational Therapist
- (e) Educational Psychologist
- (f) Industrial Psychologis
- (g) Actuary

Plaintiff's Expert Reports

Orthopaedic Surgeon: Dr Kekeletso Tsolo

[3] The Orthopaedic Surgeon examined the child on 25 April 2023 and noted that she was 8 years of age and doing grade 4 at the time of assessment. She was 6 years old at the time of the accident. The plaintiff reported a pelvic fracture and a vaginal laceration. The following injuries were observed by the expert; back lumbar spine injury, right iliac bone fracture, left ischial fracture displaced; and a perineal tear. She had a short limb gait and a deformity of the hyper lordotic spine. Following the accident, the plaintiff was hospitalised for 3 weeks. She attended follow up appointments as an outpatient for 4 months. As a result of the accident the child suffered from insomnia, frequent headaches as well as chronic pelvic and back pain

which was aggravated by activity and inclement weather. The orthopaedic surgeon qualifies her on a 24% WPI on the narrative test.

Neurosurgeon: Dr M P Seroto

[4] The neurosurgeon examined the child on 25 April 2023. The expert recorded that the child was healthy and fully abled before the accident. She was never involved in a motor vehicle accident before. At the time of her assessment, the child complained of forgetfulness that started after the accident, poor academic performance, short temperedness, signs of post-traumatic stress disorder (anxiety, nightmares, and morbid fear of motor-vehicles), poor concertation, and fatigue. The child suffers from chronic headache and memory impairment. She has reached maximal medical improvement.

[5] The neurosurgeon qualified the child on a 12% WPI based on the AMA guidelines 6th edition.

Clinical Psychologist: M P Mokwala

[6] The expert assessed the child on 25 April 2023. She considered all previous reports pertaining to the child and noted that she could not stand for extended periods of time and tires easily at school as well as when she is playing. Her energy levels have dropped. She is also forgetful of what she learns at school. She has stopped participating in school athletics following the accident due to her inability to run like before. With regard to the pelvic fracture, the child will most probably always have pelvic pain and spasms, even with successful treatment a full recovery is not possible. She experiences occasional sleeping difficulties due to pain in her leg and pelvis.

[7] The expert assessed the child's memory and attention span and noted that both ranged between impaired and below average memory and concentration. This means that she will struggle to perform well on tasks that will require her mental focus. With regard to working with numbers, she demonstrated a below average short term audit memory. She has been rendered cognitively more vulnerable as a result of the accident. These cognitive sequelae are due to a complex combination of brain injury, persistent pain and psychological distress following the accident and its

aftermath. Thus the accident and its aftermath are considered to have had a significant impact on her cognitive, interpersonal relationships, and occupational prospects as well as on her quality and enjoyment of life.

The Educational Psychologist: DR D Mawila

[8] The expert assessed the child and her mother and also considered the child's medical records, school reports and reports by other experts. The child never repeated her grades after the motor vehicle accident. Even though she is currently performing well at school, her educability will probably be reduced as she proceeds to higher grades wherein she will be faced with higher demands on her higher cognitive function. The child's learning abilities have been compromised by the accident. Areas of weakness are her found in her attention, concentration and memory span. The writer opines that despite her mental and educational challenges, the child is likely to pass grade 12 and obtain NQF level 5 at a TVET college.

The Occupational Therapist: Ms Khalipha Yaca

[9] In her assessment of the child, the expert found that the child presented with; impaired concentration, impaired memory, difficulty following instructions, experiences of headaches; and pelvic pain. All the impairments that she has identified will require occupational therapy as well as other therapies to assist her to cope in the classroom setting and in preparation for the next phase of her educational career.

[10] The child's future employability is directly related to the level of education that she will be able to attain. The expert concluded that the injuries sustained in the accident will have a negative impact on the child's career advancement, employment prospects and vocational ability.

The Industrial Psychologist: Ms Christina Badalani

[11] The expert compiled the report based on her interview with the child, her mother and the contents of all relevant reports. The expert assessed the child with the purpose of evaluating her pre-accident and post-accident prospects of employability and earning potential. She noted that the child has difficulty concentrating and recalling information in class. Her impaired cognitive abilities and

her experience of pelvic pain are likely to have a negative impact on her learning abilities, her ability to participate in sporting activities, and her future ability to obtain and sustain employment in the open labour market. She will need a sympathetic employer who will give her work that will not aggravate her injuries. Seeing that such employers are hard to come by, she will therefore be restricted in her employment options.

[12] Had the accident not occurred, the child would probably have completed grade 12 and continued to obtain an honours degree level of education. She was 6 years of age at the time of the accident, as such she did not suffer past loss of earnings. The child will not reach her pre-morbid career potential. She will continue to suffer loss of earning potential until she reaches her career ceiling.

[13] The expert recommended that higher than normal post-morbid contingency deductions should be applied based on her assessment and conclusions.

The Actuary: Namir Waisberg

[14] In both pre-morbid and post-morbid scenarios the expert anticipated that the plaintiff will work until the age of 65 years. At scenario 1, the expert applied a 10% contingency spread and arrived at an amount of R5 836 349 as total loss of earnings.

Submissions

[15] Counsel for the plaintiff submitted that the facts that have to be considered are; the effects of the injuries sustained by the child, that she will best be accommodated by a sympathetic employer, and that she is not an equal competitor in the open labour market. The argument for the plaintiff is that the amount arrived at by the actuary is reasonable and fair.

[16] Counsel for the defendant referred this court to the matter in ***D. B obo N.O.B v Road Accident Fund***,¹ where the court remarked as follows:

¹ [2023] ZAGPJHC 1218 para 36.

“It is practise to consider the intellect of a minor child’s parents and the minor child’s immediate family to attempt to predict the future potential of the minor child. The practise is equally applied to the minor child’s parent’s income in an attempt to quantify the future earning potential of the minor child.”

[17] Counsel further submitted that the child’s father’s highest standard of education is grade 8. He works as a cleaner. Her mother’s highest standard of education is grade 12, but she is currently unemployed. The family survives on social grants received on behalf of the children. The defendant submitted that a total loss of income of R1 477 510.50 is fair and reasonable.

The law

[17] In relation to the assessment of damages for loss of earnings, the following was said in ***Southern Insurance Association v Bailey NO***:²

“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. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of a mathematical calculations, on the basis of the assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award.”

² 1984(1) SA 98(A) at 99A-C.

[18] The object of RAF is to give prejudiced plaintiffs the fullest possible compensation by placing them, in so far as possible, in the same position in which they were before the damage causing event.³

Loss of earnings

[19] Only reports the plaintiff submitted reports in proving its claim. It is clear from the reports that because of the accident, the plaintiff experiences challenges and due to pain and her physical livelihood, school and work performance will be negatively affected. It is not in dispute that she is presently suffering limitations despite her good school performance. She will not be able to achieve her maximum work potential in future as such she should be fairly compensated; applying fair, just and reasonable contingencies. There are considerably more uncertainties in relation to the application of general contingencies to the loss of earning capacity for a minor child. His or her true abilities are not known until later in development, whereas those of a mature adult are more predictable. In my view higher than normal contingencies applied to the first scenario suggested in the actuarial report is appropriate. The contingencies applicable (25% on pre-morbid and 35% on future income) are fair and reasonable. The plaintiff's total loss of earning capacity is therefore adjusted as follows:

But for the accident:	R 9,850 070
Less 25%:	R2, 462 517
Total future value of loss of income:	R7 387 553 00
Having regard of the accident:	R3, 381 614 00
Less 35%:	R1183 565 00
Total future value of loss of income:	R2, 198 049 00

³ *Pretorius v Road Accident Fund* 2013 JDR 1096 (GNP) para 38.

Total value of loss of income: R 5, 189 503 00

General Damages

[20] In *Litseo v Road Accident Fund*,⁴ the court held that:

“In considering the amount to be awarded for general damages it is acceptable to have regard to awards issued in comparative cases, although it is immediately recognised that it is hardly possible to find a case or cases that are on all fours with a particular set of facts. Ultimately, in determining general damages a broad discretion is exercised by the court based on what it considered fair and adequate compensation. The nature, severity and permanency of the injuries sustained, together with pain and suffering, disfigurement, permanent disability and the effects thereof on the person’s lifestyle are aspects to be considered.”

[22] The RAF does not dispute the injuries suffered by the child, the extent thereof and her claim on general damages. The defendant only contends the quantum. The defendant referred this court to the matter in *M obo M v Road Accident Fund*,⁵ wherein the plaintiff, a minor child, had suffered mild concussive brain injury, lacerations and haematoma of the forehead. She suffered from post-traumatic headaches. She also experienced cognitive functional problems and personality changes. She also suffered post-traumatic stress disorder and depressive disorder symptoms. The plaintiff was awarded R400 000.00 for general damages. In the matter at hand the defendant submits that the amount of R400 000.00 is reasonable.

[23] The plaintiff prays for an amount of R1 400 000 00 in damages. It is true that the above mentioned matter by the defendant is relatable to the matter before me. However, the child in this matter sustained a pelvic fracture and leg injury. Her injuries have a potential of improvement through medical treatment, with no permanent recovery. She will have to live with the pain for the rest of her life. An amount of R800 000.00 is a fair and reasonable compensation for general damages suffered by the child.

⁴ [2019] ZAFSHC 52 para 25.

⁵ [2018] ZAGPJHC 451.

Order

[24] Consequently, the following order is made:

1. The defendant is ordered to pay the following amounts:

Loss of earnings: R5 189 503.00

General Damages: R800 000.00

Total amount payable: R5 989 503.00

2. The defendant shall be liable for interest thereon at the applicable rate 14 days after this judgment to the date of payment.

3. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Act, for the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service to him or supplying of goods to him, arising out of the injuries sustained by him in the motor-vehicle collision which occurred on 29 June 2021; after such costs have been incurred and upon proof thereof.

4. The defendant is ordered to pay the plaintiff's costs at a party and party scale.

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ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION MBOMBELA

Appearances

For the plaintiff: Mrs Vicky Mboweni

Instructed by: Mboweni & Partners, Mbombela.

For the defendant: Advocate Cassiem

Instructed by: Office of the State Attorney, Mbombela.