

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

CASE NUMBER: 2017/1179

RAF Link no: 3859607

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 14/11/24

In the matter between: -

ADV JM KILIAN N.O

N[...]: P[...] M[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

**REASONS FOR JUDGEMENT BY HONOURABLE ACTING MADAM
JUSTICE MAMABOLO**

INTRODUCTION

1. An order was granted on the 04th of October 2024, subsequently written full reasons for the same judgment are requested in terms of Rule 49 (1)(b) by the plaintiff's attorneys.

2. This is an action for recovery of damages in terms of the Road Accident Act arising out of personal injuries sustained by the injured minor (P[...] M[...] N[...] born on the 0[...]th of O[...] 2005) as a result of the two (2) separate accidents which the details as mentioned below:

2.1.1 On the 22nd of June 2012, at approximately 22h10 and on the Piet Retief Road near Ermelo, P[...] M[...] N[...] R76, minor female born on the [...] th of O[...] 2005(“the minor”) was a passenger in a motor vehicle WMN [...], when it was there and then involved in an accident when it collided with stray cattle and rolled (“first the accident”).

2.1.2 On 28 March 2013 at approximately 20h30 on the R33 Road between Paulpietersburg and Piet Retief, the minor was a passenger in a motor vehicle FRM [...] when they were involved in a collision with motor vehicle PTK [...], which motor vehicle collided at the back of the vehicle the minor was in while stationary changing a wheel (“the second accident”).

3. The minor is herein represented by Adv JM Kilian who was appointed as curator ad litem to the minor on the 6th of February 2020.

(CaseLines 22-11 to 22-12)

4. The Defendant's defence was struck out on the 26th of August 2022 and the Plaintiff was granted leave to proceed to trial by default. The trial date of 4 October 2024 was allocated and the notice of set down was served on the defendant on the 9th of September 2024.

(CaseLines 22-9 to 22-10; 17-1 to 17-4)

5. **MERITS:**

The Defendant offered to settle the issue of negligence regarding the first and second accidents, which the plaintiff accepted.

(CaseLines 18-1 to 18-8)

Therefore, the matter proceeded in the default court only on the quantum, specifically the General damages, future medical expenses, and the issue of loss of income.

6. In the **first accident** the minor was asleep immediately before the accident and has no recollection of the accident. The minor remembers being taken to

the hospital by ambulance but does not remember being attended to by the doctor or experiencing any pain or being given an injection. The minor remembers going home with her father about daybreak. At the scene the ambulance record notes the minor's Glasco Coma Score as 15/15, with "convulsing" and "haemorrhaging" and at the hospital she was complaining of headaches at 00.20am and abrasions on the forehead were noted. At 2:55am she was still complaining of headaches. A Head injury was noted on the hospital records.

(CaseLines 08-83 to 08-84 paragraph 3.4.1 to 3.4.5 and 18-169 to 18-171; 18-174)

7. In the **second accident** the minor was at the back seat passenger while the wheel to their car was being replaced. A car came from the behind and drove into their car causing the minor to lose awareness for a few seconds and came to her senses while in the car. The minor was taken to Dumbe Clinic for injuries to her lower back and pelvis. On 9 May 2013 the minor attended Tambo Memorial Hospital complaining of backache.

(CaseLines 08-87 paragraph 6.1.2 and 08-89 to 08-90 paragraph 6.5.1, 7.1.1, 7.1.2 and 7.3.1 and CaseLines 18-176)

8. **GENERAL DAMAGES**

The injured minor sustained both orthopaedic and head injuries as a result of both accidents and the **HPCSA tribunal** assessment letter confirms that the injury sustained does not reach the WPI threshold of 30% and does not qualify as a serious injury under the narrative test.

9. The court, in its exercise of discretion, granted the application in terms of Rule 38(2) allowing evidence to be adduced by way of affidavits without oral evidence being proffered by the relevant experts.

10. THE PLAINTIFF'S MEDICAL EXPERTS:

10.1 A Date of assessment 11th October 2019 and the diagnosis

- Soft tissue injuries of the back and left leg
- A head injury with frontal impact, forehead laceration and facial

abrasions.

Experiences severe thoracolumbar backache persisting for 3 or 4 days approximately twice a month usually after walking to school carrying a backpack;

10.1. Experiences headaches, which is described as left-sided migraines occurring several times a week, accompanied by dizziness. More recently in 2022 these headaches have worsened.

10.2. Continues to experience pain in her left knee after walking distances and standing long.

10.3. Continues to experience lower back pain resulting in fatigue especially after walking long distances, sitting, or standing for long and carrying her school bag. She is required to walk 10 minutes to taxi rank and 30 minutes from taxi rank to the school(this has been the case in grade 3, 10 and 11);

10.4. Has poor concentration;

10.5. Has variable memory and is forgetful;

10.6. Is always tired;

10.7. Is irritable;

10.8. Was very emotional and tearful after the first and second accident;

(CaseLines 08-314 paragraphs 6.1 to 6.8)

10.9. Has multiple scars covering an area of 50mm x 30mm overlying the centre of the forehead;

10.10. Has a spread scar measuring 20mm x 4mm lying obliquely over the

centre of the left cheek;

(CaseLines 08-138 paragraph 4.2.1 and 4.2.2)

10.11. Was psychologically traumatised by the first accident, together with pain effects impacted her concentration and energy persisting at the time of the second accident.

10.12. Had a worsening of her back pain and headaches after the second accident and onset of pain in her left knee;

10.13. The second accident would have exacerbated the minor's earlier psychological traumatising and in combination of her experience of pain her lowered mood, low energy and concentration difficulties would have been further impacted by the second accident;

(CaseLines 08-327 paragraph 10.4.1 to 10.4.4)

10.14. Has variable concentration evident on neuropsychological testing and subtle difficulties in the form of variability, impacting on her immediate span of attention, rote verbal memory/retrieval and stimulus resistance;

10.15. Variable concentration is attributable to

10.15.1. the distracting effects of her experience of chronic pain, which is more intense after walking distances to and from school daily, impacting on her energy, frustration levels and concentration;

10.15.2. ongoing psychological difficulties related in part to her ongoing pain symptoms and psychological traumatisation/anxiety, which developed in a more vulnerable individual;

(CaseLines 08-331 paragraph 10.6.7.1 and 10.6.7.2)

10.16. Difficulties were noted in a neuropsychological assessment at the end

of 2017 including:

10.16.1. Attention;

10.16.2. Visual scanning'

10.16.3. Motor speed;

10.16.4. Speed of information processing;

10.16.5. Working memory on more complex tasks;

10.16.6. Immediate and delayed auditory recall introduction of new
material results in loss of previously learnt information;

10.16.7. Retrieval of information from memory;

10.16.8. Forward planning;

10.16.9. Cognitive flexibility;

10.16.10. Self-monitoring;

10.16.11. Conceptual reasoning;

10.16.12. Energy levels;

10.17. The above deficits were often subtle in nature and tie in with the type and severity of brain injuries sustained;

(CaseLines 08-199 paragraph 9.10 and 9.11)

10.18. Continues to demonstrate largely preserved cognitive function, but with some subtle difficulties relating to variable concentration (and with subtle difficulties also noted by Ms Bubb in 2017) (It is noted by Mazabow that the pattern of performances is not indicative of tbi but that the minor is functioning below her potential due to pain and psychological disturbances);

(CaseLines 08-333 paragraph 10.7.4 and 10.7.5)

10.19. Suffered a post traumatic epileptic seizure with a blow to her forehead in 2016 that might have aggravated the effects of the traumatic brain injuries suffered in 2012 and 2013;

(CaseLines 08-288 paragraph 5.1 to 5.4)

10.20. Cognitive assessment furthermore indicated that her rote verbal learning which is described as memorising information based on repetition was compromised by concentration challenges – pain and related frustration affected her ability to sustain focus on tasks which in turn has a debilitating impact on her capacity to learn and remember large volumes of data required during higher grades.

10.21. Delayed/long term memory was inconsistent and varied among sub-tests depending on her concentration.

10.22. Fluctuations in concentration affected her long-term memory, mental tracking, rote verbal learning, retrieval of general factual knowledge and visual discrimination.

(CaseLines 08-389 paragraph 107 to 109)

10.23. Contributed to shock and trauma experienced and although she attempts to suppress her emotions, reminders of the accident upset her. Currently she is fatigued and panics easily and all these factors affect her concentration abilities which will negatively impact on her ultimate academic performance;

(CaseLines 08-391 paragraph 115)

10.24. Is at risk of for the intensification of her psychological problems in future, given her tendency to downplay her symptoms and her ongoing post-traumatic anxiety symptoms and her ongoing chronic pain symptoms;

(CaseLines 08-334 paragraph 10.8.1)

10.25. Suffered from accident -traffic-travel -related-anxiety disorder;

(CaseLines 08-19 paragraph 3.2)

11. But for the accident the minor was probably of high average to superior ability

and had the academic and cognitive potential to have completed grade 12 as well as a bachelor's degree at an NQF 7 level. After graduating the minor would probably have worked in temporary or contract positions for a period of one or two years earning on the Paterson A1 level. She would then have been able to secure a position on the Paterson B4 level (median annual guaranteed package) progressing to the Patterson D1 Level (median annual guaranteed package at age 45, with inflationary increases thereafter until retirement at age 65.

(CaseLines 08-391 paragraph 116 and 08-200 paragraph 9.12 and 08-490 paragraphs 5.1 to 5.4)

12. Having regard to the accident the minor's ability lay in the average range and she progressed through school without repeating a grade, although underperformance was evident during FET phase (grade 10-12), with absenteeism (attributed to physical discomforts such as back pain and headaches) reflecting a lack of persistence and motivation, will struggle with abstract and multifaceted demands and lacks the determination and resilience to manage the effort required to cope with large complex volumes of information required at degree level, and she will more likely achieve a more human science-orientated national diploma course at NQF 6 level. If the minor does not apply hard work, determination and effort, she will

struggle to complete a national diploma and will be left with a NQF 5 higher certificate.

(CaseLines 08-127 and 08-128 and 08-177 paragraph 7.1.2 and 08-382 paragraph 7.1.3 as well as 08-200 paragraph 9.13)

13. Having regard to the accident it is probable that the minor will complete grade 12 and study towards a higher certificate for one or two years whereafter she will work in a contract position for two to three years earning on the Paterson A 1 level whereafter she will enter the labour market within the Paterson B3 level (median annual guaranteed package) progressing to the Paterson C1/C2 level by the age of 45 with inflationary increases until age 65.

(CaseLines 08-491 par6.2.1)

14. Another, possible scenario is that the minor will study towards a national diploma for three years whereafter she will work in a contract position for two to three years earning at the Paterson A1 Level and the entering the labour market at the Paterson B4 level (median annual guaranteed package) progressing to the Paterson C3/C4 level (median annual guaranteed

package) at age 45 with inflationary increases thereafter until retirement at age 65.

(CaseLines 08-492 paragraph 6.2.2)

15. The actuarial calculation of Algorithm dated 12 September 2024 sets the above two scenarios out and having applied a 23.5% contingency in respect of future uninjured income and 33.5% in respect of future injured income leaves a net loss in an amount of R2 937 084.00 (Scenario 1) and R2 482 104.00 (Scenario 2).

(CaseLines 08-525 to 08-526)

16. I accepted the assumption by the educational psychologist as well as the postulation made by the industrial psychologist with regard to the fact that the plaintiff would have attained a national senior certificate with a degree endorsement which would have enabled her to study at a tertiary Institution and obtain a degree if the accident did not occur.

17. I have equally accepted that, having regard to the accident, notwithstanding the injuries suffered and the resultant sequelae, she went on and obtained a national senior certificate with a degree endorsement which similarly allowed her to proceed to a tertiary institution to pursue a degree qualification of her choice. I am therefore not convinced that the sequelae of the accident is the reason why she intends to pursue a national certificate in accounting first then later pursuing a degree instead of pursuing a degree qualification from the beginning. In any event, she still harbours the desire to study further for a degree qualification even at this point in time.

18. Therefore, I am of the view that the fact that she chose to pursue a national certificate in accounting has nothing to do with the injuries and its sequelae, but it could have been motivated by other factors like socio-economic

conditions rather than accident-related circumstances. Furthermore, I am of the view that, it is out of her choice rather than cognitive deficits or learning challenges that she opted to pursue a national certificate in accounting at this stage.

19. Consequently, I am of the view that, a post-accident scenario that mirrors the pre-accident will be justified under the circumstances instead of the post-accident scenario as suggested in the actuary's report. Furthermore, scenario I of a national higher certificate and Scenario II of a diploma as suggested by the actuary negate the fact that she passed her matric with a degree endorsement but opted to pursue a national certificate in accounting instead.
20. I did not deem it necessary to request for a recalculation since, as alluded to earlier, I am of the view that, notwithstanding the injuries and its sequelae, she nonetheless attained a national senior certificate with a degree endorsement which is what is postulated in the but for accident scenario.

21. I am mindful of the fact that it is the court's prerogative to determine what contingency deductions are to be applied bearing in mind what is reasonable and fair to both parties. Therefore, the court is not bound by the contingency deductions applied by the actuary in the report including the postulations applied.

22. In the premises, I have applied 23% and 38% contingency deductions for uninjured and injured scenario, respectively. This translates to a 15% differential to cater for any diminished earning capacity that she may suffer in the future.

23. The application of the above contingencies yielded the following results:

Value of income uninjured: $R10,417,980 - 23\% = R8,021,845$

Value of income injured: $R10,417,980 - 38\% = R6,459,148$

Net value: $R1,562,697$

24. I then rounded off the above amount to: **R1,500 000-00**

25. In the result, I granted the order of **R1 500 000-00** as a globular figure in the judicial exercise of my discretion in accepting that the Plaintiff may suffer a diminished or reduced capacity which may translate to a loss of earning capacity hence a differential of 15% which I considered to be a fair compensation for the Plaintiff.

T.M MAMABOLO (AJ)
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Plaintiff	:	Adv Danie Combrink
Instructed by	:	Erasmus De Klerk Inc
For the Defendant	:	No appearance
Claims handler	:	Roseline Mashaba