

SOUTH AFRICA / JUDGMENT

H.P.M obo J.M v Road Accident Fund (282/2018) [2024] ZALMPPHC 55 (23 May 2024) [2024] ZALMPPHC 55

COURT

Limpopo High Court, Polokwane

BEFORE

Mashamba

CASE / FILE NUMBER

282/2018

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

LIMPOPO DIVISION,
POLOKWANE

CASE NO: 282/2018

(1)REPORTABLE:NO

(2)OF INTEREST TO

THE JUDGES: YES/NO

(3)REVISED

DATE: 23 - 05 -2024

SIGNATURE

In the matter between: H[...] P[...]
M[...] obo J M[...]
PLAINTIFF
And
ROAD
ACCIDENT
FUND
DEFENDANT

JUDGEMENT

MASHAMBA AJ

INTRODUCTION

- [1] The Plaintiff acts on behalf of her minor child namely J[...] M[...], a male minor born on the 25th October 2006, to whom I shall refer as a Plaintiff. The Plaintiff was 10 (ten) years old when the accident occurred and currently 18 (eighteen) years of age, at Grade 9.
- [2] On the 28th day of August 2016, at Moletjie, Ga-Legodi Village along Ga Ramongwana public road, the Plaintiff was a passenger in a Mahindra Balero Bakkie with registration number [...], at the time driven by Morukhu Mahlogonolo Sylvester, when the accident happened. The said vehicle lost control and rolled. As a result, the Plaintiff sustained head injury. The Plaintiff was unconscious for 2 (two) days and in pain. The emergency services attended the scene and the Plaintiff was taken to Seshego Hospital for medical treatment.
- [3] The merits were finalised on the 28th March 2021, by an order granted by Naude AJ, and the quantum was postponed sine die.
- [4] The Plaintiff has sued the Defendant for a total amount of R 12 000 000,00 (Twelve Million) which amount was calculated as follows;

4.1 Past Medical expenses

R 100 000.00

4.2 Future Medical expenses

R 900 000.00

4.3 Future Loss of Earning

R 6 500 000,00

4.4 General Damages

R 4 500 000,00

- [5] The Plaintiff abandoned the claim for past medical expenses since there were no proves of invoices and the Plaintiff submitted that the Future Medical Expenses should be substituted by a section 17 (4)(a) -(b) of the Road Accident Fund 56 of 1996, as amended, ("the Act") undertaking certificate.
- [6] The Plaintiff submitted that the Court should decide on the two heads of damages, the first for the Plaintiffs Past and Future Loss of Earnings and the second, General damages.
- [7] The above Court has no Jurisdiction to deal with general damages in this matter, since the Defendant has not yet taken a decision to accept nor reject the seriousness of the Plaintiffs injuries as required in terms of regulation 3(3) of the Road Accident Act, therefore, the issues of general damages should be postponed sine die.
- [8] The matter was set down for trial on the 06th May 2024, and the matter was allocated for trial Judge on the 08th May 2024. the matter was undefended. So, the Court allowed the Plaintiffs counsel to proceed with his submissions based on the experts' reports filed before Court.

PLAINTIFF'S EVIDENCE

- [9] The Plaintiff relied on the following medical experts reports to prove his case;

9.1.

Dr Johan J Viljoean (Neurosurgeon)

9.2.

Ronel (Audiologist & Speech Therapist)

9.3.

Dr Mokgadi Setwaba (Clinical Psychologist)

9.4.

Mabote (Occupational Therapist)

9.5.

VP Cloete (Educational Psychologist)

9.6.

Mrs Moiponi Kheswa (Industrial Psychologist)

9.7.

Robert J Koch (Actuaries)

- [10] In Prince v Road Accident Fund[1] the Court held at paragraphs 55, 56 and 59 in the evaluation of the probabilities in respect of expert evidence.

"[55] Sufficient proof is established when an inference can be drawn about the fact in issue, providing that the inference is consistent with all the proven facts. In civil matters, it suffices if the inference is the most probable inference.

[56] Further, once prima facie proof or evidence has been provided, that is proof calling for an answer. This becomes conclusive proof on the point in issue usually if no evidence is produced to rebut it. The fact of the matter is, however, that the Court must at the end of the case review all the evidence and evaluate this according to the applicable primary criterion.

[59] It must be accepted, of course, that where, for example, a Defendant fails to produce evidence, this does not mean necessarily that the opponent's version in the case, falls to be accepted. The acceptance of Plaintiff's case depends on the probative strength of Plaintiff's case, being whether it is sufficient to cast, an evidential burden on the Defendant to present evidence."

[11] After the occurrence of the accident the Plaintiff was evacuated to Seshego Hospital for medical treatment and later transferred to Pieterburg Hospital where he received the following definitive treatment being unconscious for two

(2) days, GCS 13/15: CT scan revealed fracture of the right temporal bone with pneumocephalus; Oozing blood stained CSF from right ear as a sign of fracture of base of skull; put on hard neck collar and hospitalized for more than three (3) weeks, thereafter he was bedridden for a further 2 (two) months at his home until November 2016.

[12] The Plaintiff was examined by the Neurosurgeon on the 22 August 2021, The Neurosurgeon opined that the Plaintiff sustained a moderate head injury, this is indicated by the following; by initial Glasgow coma scale of 13/15, post- traumatic amnesia or loss of consciousness for at least two days, sign of a base of skull fracture with CSF leaking out of the right ear and injury to the right tympanic membrane right sided transient 7th nerve palsy with facial weakness, impairment of cognitive functioning and CT-scan of the brain which revealed pneumocephalus.

[13] The Neurosurgeon opined that the sequelae of head injury is post-traumatic epilepsy. The early post-traumatic epilepsy could have happened within 7(seven) days from date of the injury. The Plaintiff did not develop an early post-traumatic epilepsy. Late post-traumatic epilepsy that might happened after 7 (seven) days. Predisposing factors to late post-traumatic epilepsy in this case, are as following: prolonged period of post-traumatic in this case, signs of a base of skull fracture, CT-scan of the brain with pneumocephalus, impairment of cognitive function.

[14] The neuro surgeon further opined that although is difficult to determine what percentage increase of late post-traumatic epilepsy in his case in comparison with the normal population but suggest figure is in the region of 7 to 10 %. There is an increased possibility of post-traumatic epilepsy. The Neurosurgeon further opined that it is obvious that the Plaintiff has impairment of his cognitive functioning and gave deference to clinical

psychologist as well as an occupational therapist to determine the exact nature and extent of the impairment of the

Plaintiff cognitive functioning and what effect it will have on his future.

- [15] The Plaintiff was examined on the 14th February 2019 and the 22 February 2019 by the Clinical Psychologist, the following findings were made; it is likely that Plaintiff involvement in the accident could have had an impact on him cognitively and predisposed him poor academic performance; The head and back injuries sustained seem to have also impacted significantly to his neuropsychological difficulties thus, normal functioning as a boy difficult thus making future prospects of work success difficult, poor performance and failing grade 5 affects his self-confidence and self-esteem thus aggravating his emotional challenges both at school and in other social settings; The Plaintiff quality of life seems to have been impacted significantly since his involvement in the accident as he has been persistently complaining of headaches and backaches which have the potential to affect his daily living activities. The neuropsychological impairment indicated by assessment tools used suggest that the Plaintiff could find himself experiencing academic challenges making his career advances tedious.
- [16] The Plaintiff was examined by Ronel (Audiologist and Speech Therapist) on the 15th May 2020 who has opined that the Plaintiff has a slight unilateral high frequency sensory neural hearing loss. Further opined that a child with a unilateral hearing loss may have trouble with localization, which is important for safety. Further that the Plaintiff may find it difficult to understand speech in noisy environment. Further opined that the hearing test results resembles what was found in a temporal bone fracture.
- [17] The Plaintiff was examined by Mabote (Occupational Therapist) on the 29th May 2020, who opined that the Plaintiff performance with regards to visual perception was average in both memory test. Further that the Plaintiff performance at school was reported to be poor. The plaintiff has residual ear pain which is triggered by running, He has reduced hearing in the same ear.
- [18] find that Occupational Therapist report has confirmed same sequelae that have been concluded by neurosurgeon, Audio and Speech Therapist and Clinical Psychologist.
- [19] The Plaintiff was examined by VP CLOETE (Educational Psychologist) on the 26 June 2020. Pre-accident, Cloete opined that based on the available information obtained from the biological mother of the Plaintiff there was no indicator of ill health or developmental delays or other accidents before the accident of the 28th August
2016. The available information further suggests normal birth and milestone development. The Plaintiff repeated grade 3 pre-

accident. This could have been an indicator that the Plaintiff could have had undiagnosed learning difficulties. There was probably a child of at least average intelligence with probably undiagnosed learning difficulties. The Plaintiff probably had an ability to pass grade 12 and probably the ability to pursue tertiary studies if he would have received the necessary interventions for his learning difficulties.

[20] Post-accident, Cloete opined that according to ISNSSP the Plaintiffs global intellectual ability tests in the average range. The Plaintiff performed below average in the following subtests of the SDAIS-R: Memory digits, this subtest measures working memory, mental manipulation, cognitive flexibility, attention, and encoding. He scored in the borderline range; Coding, this subtest measures processing speed, short-term visual scanning ability. Impairments in this subtest could have an effect on his working tempo and processing speed. This could affect his learning ability and possibly affect his ability to finish the exam timeously. The Plaintiff reading ability and spelling ability tested below his chronologic age in which is indicative of learning difficulties. The Plaintiff performed below his chronological age in basic numeracy which could be indicative of learning difficulties related to numeracy. The Plaintiff had some learning difficulties pre-accident and the head injury sustained probably exacerbated his learning difficulties. With the implementation of necessary interventions and support as indicated in the recommendations and if the Plaintiff responds positively to the interventions, he could probably complete grade 12. If he is not exposed to the relevant interventions and support as indicated in the recommendations, the Plaintiff might find it difficult to cope with his academic work and possibly not able to complete grade 12 and he could, may be follow a qualification at a TVET college or other institution.

LOSS OF EARNINGS

[21] The Plaintiff was examined by the Industrial Psychologist (Moipone Kheswa) on the 16 June 2021, who postulated the future loss of earning suffered by the Plaintiff. The Industrial Psychologist noted that the Plaintiff repeated Grade 3 prior to his involvement in the motor vehicle accident. The Plaintiff earning potential is likely to have been determined by the level of education he would have attained, and the availability of employment at the time. The Plaintiff is anticipated that he would have worked until he retired at the age of 65 years, depending on his health and his employer's retirement policy.

[22] The Industrial Psychologist further opined that; Scenario 1, that after completion of matric, probably in 2025, it could have taken the Plaintiff about 1-3 years to secure work. Further that he could have opted for available fragmented work, earning on a Paterson level A1/A2 (basic salary). After this period, the Plaintiff could have qualified for an income on Paterson A3 (also getting benefits such as a 13th cheque and provident fund contribution) reaching his earning ceiling at Paterson level B4/B5 upper quartile total package when he reached 40-45 years. Salary information for the above career paths is provided in the table (Corporate Survey Earnings, Quantum year book 2020).

[23] The Industrial Psychologist opined, scenario 2, that without Grade 12, the Plaintiff will mostly work in the unskilled category of employment. However, his reported challenges (i.e. headache, forgetfulness, lack of concentration and hearing difficulty) will impact negatively on his career progression. Should the Plaintiff secure employment in his injured state when he reaches adulthood, he is likely to earn at the lower quartile of unskilled non-corporate workers and he will progress to the median quartile band (lower quartile of semi-skilled workers) when the Plaintiff reaches 55 years with applicable inflationary increase thereafter. According to Koch (2020), unskilled non-corporate workers earn between R 21 600 - R 37 900- R86 000 per year and semi-skilled non-corporate workers earn between R 37 900- R86000- R 186 000 per year. The Industrial Psychologist further opined that his ability to perform optimally both scholastically and occupationally has been truncated and he is likely to remain disadvantaged in the open labour market.

[24] The Plaintiff used the services of Robert J Koch Consulting Actuaries and the calculations were done based on the Industrial Psychologist report. The calculations are as follows;

RESULTS: Uninjured

Injury

Net Value

Without epilepsy R 6 617 792,00

875 598,00 R 5 742 194,00

With epilepsy R 6 617 792 0

R 6 617 792,00

[25] The actuarial calculations are useful in that it provides the value of the loss on some logical basis. In *Southern Insurance Association Ltd v Bailey*, NO,[2] the court held:

"Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right" (per HOLMES JA in *Legal Assurance Co Ltd v Boles* 1963

(1) SA 608 (A} at 614F). One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may, in the result, have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd*[3]. The rate of the discount cannot of course, be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case".

[26] The Plaintiffs Counsel submitted that considering the Plaintiffs age, qualification, injuries and the injuries sequelae, 35% contingency deductions are reasonable.

[27] I took into account all the medical expert reports, particularly, the Industrial Psychologist who postulated of Plaintiffs future loss of earnings and the above calculations by Robert J Koch Actuarial Consultants. I accept that the Plaintiffs risk of epilepsy is 7-10 % as opined by the Neurosurgeon. The Plaintiff risk of epilepsy is higher than the normal population. The Court accept the actuarial calculations with epilepsy risk. The future loss of earning after the deduction of 35% contingency is calculated as follows;

R 6 617 792,00- 35 % (R 2 316 227,20) = R 4 301 564,80

[28] In the circumstances, the following is the order of the Court;

1. The Defendant shall pay to the Plaintiff the amount of R 4 301 564,80 (Four million, Three hundred and one thousand, Five Hundred and Sixty- four Rand, Eighty Cent) in relation to the future loss of earnings.
2. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4) of Act 560f 1996 for payment of 100% for the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supply of goods to her, arising from the injuries sustained by her in the motor vehicle collision on 28 August 2016.
3. The Amount in paragraph 1 above shall be paid into following Bank Accounts;

NAME OF BANK: [...]

ACCOUNT HOLDER: I[...] P[...] A[...]

ACCOUNT NO: [...]

BRANCH CODE: [...]

ACCOUNT TYPE: C[...] ACCOUNT

4. The Defendant shall be liable to pay interest on the aforesaid amounts tempore morae at the rate of 7% 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 C.
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 to be postponed sine die.

JUDGE OF THE HIGH COURT, POLOKWANE;

LIMPOPO DIVISION

APPEARANCES

FOR THE PLAINTIFF : PROF/ADV JLH LETSOALO INSTRUCTED BY : ISHMAEL PHALA

ATTORNEYS FOR THE DEFENDANT : NO APPEARANCE INSTRUCTED BY DATE OF HEARING : 08
MAY 2024 DATE OF JUDGEMENT : 23 MAY 2024

[1] (CA 143/2017) [2018] ZAECGHC 20 (20 March 2018)

[2] 1948 [1] SA 1988 at 1135

[3] 1980

(3) SA 105 (A) at 114 - 5

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