

SOUTH AFRICA / JUDGMENT

Louw N.O obo O.O v Road Accident Fund (304/2019) [2024] ZAFSHC 221 (4 June 2024) [2024] ZAFSHC 221

COURT

Free State High Court, Bloemfontein

BEFORE

M.T. Jordaan

CASE / FILE NUMBER

304/2019

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case Number: 304/2019

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

In the matter between:

ADV LOUW N.O. obo O. O[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON:

7, 8 & 10 November 2023

CORAM:

JORDAAN, AJ

DELIVERED ON: 04 June 2024

[1] On the 24th of May 2018 at Namibia gravel road, Mangaung, Bloemfontein a motor vehicle with unknown registration numbers and letters (the insured

vehicle) driven by an unknown driver (the insured driver) collided with O[...] O[...] (hereinafter referred to as the minor) who was a pedestrian at the time.

[2] As a consequence, action was instituted in terms of the provisions of the Road Accident Fund Act 56 of 1996, as amended, for compensation in terms of the amended particulars of claim computed at R 8 010 205.00 for the following heads of damages:

2.1 Past Medical Expenses R5 000.00

2.2 Future Medical Expenses R1 000 000.00

2.3 Estimated Loss of Income R5 505 205.00

2.4 General Damages R1 500 000.00

2.5 Total Compensation R8 010 205

2.6 Costs of suit

[3] Adv MC Louw was appointed as curator ad litem on behalf of the minor pursuant an Order by Daffue J, dated the 31st of March 2022.

[4] The merits and future medical expenses was settled in terms of an Order of Court by Van Rhyn J dated the 18th of April 2023.

[5] At commencement of the trial, the parties addressed court that the Plaintiff's expert reports were accepted, except for the report of the Educational Psychologist.

[6] The Plaintiff no longer pursued their claim for Past Medical Expenses. The only heads of damages for determination by this court was the General Damages and the Estimated Loss of Earnings, properly construed- Estimated Loss of Earning Capacity.

[7] In establishing that as a consequence of the accident the minor sustained injuries and the sequelae of same, the Plaintiff presented the following expert evidence through the reports admitted by the Defence:

Dr Oelofse, the orthopaedic surgeon, reports that x-rays of the cervical spine, chest, pelvis and right femur were taken and computed tomography (CT) scans of the minor's brain and abdomen were done. Dr Oelofse notes that that the minors sustained a right shoulder dislocation and the CT scan revealed a fracture of the right iliac wing extending to the S1 vertebra. The minor experienced acute pain in his right shoulder, chest, abdomen, pelvis and left lower leg for approximately 4 weeks after the accident, which subsided to a moderate pain for a further 3 weeks. The minor experiences continuous pain in the pelvis, which is exasperated during winter and he struggles to perform physical activities. This injury had impact on his productivity, and

amenities of life, he will do better following successful treatment. Dr Oelofse diagnosed the minor with united pelvis fracture with residual pain and recommended physiotherapy.

Dr Mutyuba, the neurosurgeon, reports that the minor suffered traumatic brain injury (TBI) or concussion in the accident on the 24th of May 2018. This is evidenced by the period of alteration in level of consciousness (ALOC) and the soft tissue facial scalp injury

indicative of acceleration/deceleration forces applied to the cranium.[1] His current complaints is comprised of headaches, change in behaviour, poor school performance and anxiety symptoms can be classified a post- concussion syndrome.[2] These complaints are manifestations of neurocognitive/neuropsychological changes. A deterioration in the academic performance after the accident is reported. In his addendum report Dr Mutyuba diagnosed mild to moderate TBI.

Claire Hearne, clinical psychologist, notes that on the physical aspects the minor will have pain, headaches, discomfort, lifestyle affected and unable to master the challenges of daily life because of the injuries sustained in the accident and consequences of the accident. From a cognitive perspective the minor is performing between low and high average ranges. There is an impact on motivation on all levels of daily living. Because of the injuries sustained in the accident it is difficult for the minor to sustain memory and work on complex tasks, hence his ability to achieve what he would have been able to but for the accident is impacted and he therefore will need remedial support.[3] The minor has undergone psychological deterioration since the accident in learning and development, concentration, attention, motivation and work pace. The trauma led to feelings of ineffectiveness, feelings of shame and humiliation which will lead to social withdrawal. He is at risk of falling out of the education system completely. His behaviour strongly points to attention deficit. The minor has a high mark on the depression scale which puts him at risk of suicide or self-harm. The minor would benefit from learning support and may have limited employment opportunities.

Anel Booyse, occupational therapist, report that the minor present with several physical limitations., he has moderate depression, anxiety and anger. The minor was impacted by the injuries sustained and will continue to do so, he will need training by an occupational therapist in social skills with peer and family relationships. Without training, his career options will be limited. The minor complains of headaches and hip pains more than 5years after accident. The minor will need assistive devices going forward.

Dr Anel Strydom, industrial psychologist, reports having regard to the expert reports, pre-morbid the minor would have completed Grade 12 and a two to three-year certificate of some sort and would have earned B2/3 median and with straight-line increases he would have progressed to a C1/2 median as his career ceiling in his mid-forties. As a result of the accident, the minor needs special education, learning support and psychotherapy to be able to complete his vocational training to a Grade 9 level. He would probable secure employment in a non-corporate labour market. His earning would range between the lower quartile and median of unskilled workers earnings, as his earnings would always depend on the type and hours of work, he is able to secure

at any given time. He is seen to suffer long periods of unemployment between jobs, as he must compete with better qualified job seekers. The minor is regarded as a vulnerable scholar and future candidate in the open labour market from a physical cognitive and psychological

perspective. The minor requires treatment and intervention to perform at the required standard. As it is uncertain when he would receive the treatment, he should develop certain behavioral sequela. A substantially higher post morbid contingency deduction is suggested to accommodate the possibility that he may even be left unemployable from his mid 30s purely because of the neuropsychological sequela. The minor's continued employment is not guaranteed at all in the open labour market.

- [8] Ms Lida Roos, the educational psychologist, testified that the tests she conducted on the minor showed a decline in the minor's cognitive functioning from the test results obtained four years ago. The dramatic scattering between the verbal and non-verbal functioning of the minor indicates that the minor has a learning disability which is entrenched, making him a candidate for special school. The minor needs remedial education, learning support psychotherapy to complete matric. He is practically inclined and as result will struggle to find employment with his orthopaedic injuries. It was her evidence that post morbidly the minor will only be able to obtain NQF1, while his average potential indicates a matric with NQF6. During cross examination she was confronted that that her initial report indicate that considering the minor's family and learning environment it is possible that his learning problems are reflective of his pre-morbid functioning, which she justified as the diagnosis of the brain injury changed this position, however in her initial report on page 92 of the same report line 1066 he reports the minor sustained a mild head injury in the accident thus she was aware of the brain injury at that time.
- [9] It is true that that Ms Lida Roos' evidence disclosed intra contradictions and calls into question on what she based her opinion that the minor will not be able to achieve his pre-morbid educational potential, having regard to her contradictions. The witness' evidence that the minor's educational potential has been negatively affected post-morbid, was arrived at after a battery of tests were done which were not all done in her first report and importantly her evidence is externally corroborated by Dr Mutyuba in that he concurs with her findings with regard to the minors inability to perform post-morbidly according to his educational potential as these are manifestations of neurocognitive and neuropsychological deficits of traumatic brain injury. Ms Roos was indeed obtuse in not answering that Ms Hearne indicate inattention and attention deficit in her report, but she cannot be faulted for stating that ADD was not diagnosed, as it was indeed not diagnosed by any of the experts. In the circumstances this

court finds that Ms Roos' opinion is founded on logical reasoning and accept her opinion, with the caveat that the court

accept the school report marking system as it was adapted to fit outcomes-based grading and was further adjusted during Covid-19. It must be borne in mind that the evidence indicated that the minor is now being assisted with his schoolwork by a private tutor. Thus the evidence indicates the assistance and support, though possibly not to the full extent, is already present.

[10] It is trite that to succeed in a delictual claim, a claimant would have to prove the following requirements: causation, wrongfulness, fault and harm. A successful delictual claim entails the proof of a causal link between a defendant's actions or omissions, on the one hand, and the harm suffered by the plaintiff, on the other hand. This is in accordance with the 'but-for' test.[4] Legal causation must be established on a balance of probabilities. There can be no liability if it is not proved, on a balance of probabilities, that the conduct of the defendant caused the harm.[5]

[11] The merits was settled, RAF hereby thus admitted liability that the collision occurred as a result of the sole negligence of the insured driver. In terms of the case of Minister van Polisie v Ewels[6] wrongfulness in RAF cases is inferred from the fact that the insured driver negligently caused the accident.

[12] Whether the plaintiff sustained injuries in the undisputed collision, is found in the undisputed expert reports that explain the

direct injuries which were sustained by the minor as recorded in their reports as:

1. Mild-moderate Traumatic Brain Injury
2. Fracture of the Right Iliac Wing extending to the S1 Vertebrae
3. Free Fluid in the Left Upper Quadrant
4. Right Shoulder Dislocation
5. Multiple Abrasions and Haematoma to the Left side of the face
6. Swelling of the Left Scalp with Abrasions and Swelling nasal bridge
7. Multiple Abrasions to the Lower Legs
8. Chest Injury
9. United Pelvis Fracture with residual pain
10. Post Traumatic Stress Disorder
11. Post Traumatic Headaches
12. Mild to moderate Persistent Depressive Disorder

[13] Dr Oelofse, the orthopaedic surgeon, noted that the injuries sustained orthopaedically in the accident has left the minor with

continuous pelvic pain, which is exasperated during cold weather conditions and he noted that minor walks with a slight limp. The

minor's injuries impacted his productivity and amenities of life. In the RAF4 FORM, Dr Oelofse determined the minor suffered WPI of 37%, while Dr Mutyuba on the narrative test classified the minors as qualifying for general damages as Serious long-term mental or severe long-term behavioural disturbances or disorder.

[14] Mr. Mutyaba, the neurosurgeon, diagnosed that the minor suffered mild to moderate traumatic brain injury and the soft tissue facial/scalp injury is indicative of acceleration/deceleration forces applied to the cranium. The minor currently still suffer from headaches, change in behaviour, poor school performance, anxiety which is classified as post-concussion syndrome. These neurocognitive and neuropsychological fallouts are manifestations of traumatic brain injury.

[15] All the undisputed expert reports confirmed that the sequelae outlined in their respective reports are due to the injuries

sustained by the minor as a result of the collision.

[16] The cardinal principle in making an award for general damages is that the court has a wide discretion to award what the judge, in the circumstances considers to be fair and adequate compensation to the injured party for the sequelae to the injuries.[7]

[17] General damages is often determined by comparing cases under scrutiny and those previously decided, it is generally accepted that previously decided cases are never similar and that their purpose stops at comparing them to the current. This court was referred to comparable cases of which the court found the April case comparable:

April obo a minor v Road Accident Fund [2021] LNQD 32 (GJ) the plaintiff was an 8year old, who suffered serious injuries which included a closed head injury and facial abrasions, loss of consciousness, neck pain, right distal radius and ulna fracture and injury of the right ulna nerve, left clavicle fracture, a pelvis

fracture and multiple abrasions. The sequelae include a decrease in cognitive functioning, general concentration ability and a decrease in reading ability. The Educational psychologist suggested placement in a special needs school. The minor suffered from chronic daily headache and loss of use of the dominant right arm due to ulna nerve injury with residual pain, post-traumatic stress and major depressive disorder. The plaintiff was awarded an amount of R500 000.00 for general damages on 29 September 2021.

[18] The Defendant suggested R600 000.00 to be a fair and reasonable award, while the Plaintiff submitted that R1 400 000.00 to be a fair award.

[19] In casu the minor suffered orthopaedic injuries coupled with a mild to moderate Traumatic Brain Injury with neuro-cognitive and neuro-psychological

fallouts which have a significant impact on his activities of daily living and on his education. I have dealt with these issues supra.

[20] I therefore consider an amount of R700,000 to be fair and adequate compensation to the plaintiff in respect of his general damages.

[21] The minor's Estimated Loss of Earnings has been calculated by the Actuary, Mr. Sauer and the basis of the calculations accord with the expert reports. It is proven that the minor suffers from the sequelae of his mild to moderate TBI as well as physical injuries sustained in the accident, through the expert reports and the evidence of Ms Roos.

[22] It is presumed in the joint minutes of Dr Strydom and Ms Lestie- the Industrial Psychologists, based on the expert reports of the Neurosurgeon and Educational Psychologist, that, had the accident not occurred the minor would have achieved his matric and a 2 or 3year certificate after completing matric, which in turn would have enabled him to earn a salary of a person at the level of a person with a National Diploma qualification. Now that the accident has happened the joint minutes of the Industrial Psychologists defer to the report of the Educational Psychologist.

[23] I am of the view having regard to the minor's family background, his pre-morbid performance in school and post-morbid performance in school-with the help of a private tutor, that the postulations accord with the facts and realities in this matter, except insofar as it did not take the consistent progress with the help of the private tutor into account. Furthermore, it was the submission of the Plaintiff's Counsel that special school was looked at and it would not be suitable for the minor. This fortified the court's view that the minor's potential with support, though not realized to its full potential, is not lost. This court finds the postulation in Ms Roos' first report that, had the accident not occurred the minor would have achieved his matric and a 2 or 3year certificate after completing matric, which in turn would have enabled him to earn a salary of a person at the level of a person with a National Diploma qualification is in accordance with the facts and realities in this case; and now that the accident has happened that the minor with the interventions and assistance that will be provided will at least complete matric to be in accordance with the facts as objectively shown in the school reports and realities in this case, because this minor has consistently performed post-morbidly with the help of a private tutor. The actuarial calculations provide for this scenario.

[24] The calculation would therefore be as follows as regards the pre-morbid future income: R7 479 080.00 – R1 869 770.00 (25% contingency) = R5 609 310.00. Bearing in mind the minor was only 7years old at the time of the collision, the court allowed the higher contingency for the post-morbid projected income: R6 455 422 - R3 227 711.00 (50% contingency) = R3 227 711.00. That in turn result in the following calculations in respect of the minor's future loss of earnings R5 609 310.00 (pre-morbid income) – R3 227 711.00 (post-morbid income) = R2 381 599.00. This is the total amount I intend awarding to the Plaintiff as representing the minor's loss of income.

[25] The general rule in matters of costs is that the successful party should be given his or her costs and this rule should not be departed from except where there are good grounds 4 doing so.[8] I can think of no reason why I should deviate from this general rule. Accordingly, I intend awarding costs in favour of the Plaintiff

against the Defendant.

[26] Counsel for the Plaintiff requested that in accordance with the recommendation of the neurosurgeon, Dr Mutyaba's recommendation, that the financial award be protected for the minor, by the formation of a Trust into which any award to be paid by the Defendant must be paid, in the best interest of the minor.

[26] In the circumstances I make the following order:

ORDER

1.1 The Defendant is ordered to pay the Plaintiff's attorney the sum of R3 081 599.00 (Three Million and Eighty-One Thousand Five Hundred and Ninety-Nine Rand) "capital" in respect of loss of earning capacity and general damages, eat out as follows:

Loss of earning capacity: R 2 381 599.00

General damages: R 700 000.00

TOTAL:

R 3 081 599.00

The Plaintiff's Attorney's trust account details are as follows:

ACCOUNT HOLDER: VZLR INC BRANCH: ABSA BUSINESS BANK HILLCREST BRANCH CODE: 632005 TYPE OF ACCOUNT: TRUST ACCOUNT ACCOUNT NUMBER: 3[...] REFERENCE: MAT124038

1.2 Interest shall accrue on such outstanding amount at 11.75% (at the mora rate of 3.5% above the repo rate on the date on this order, as per the Prescribe Rate of Interest Act, 55 of 1975, as amended per annum calculated from the due date, as per Road Accident Fund Act, until the date of payment;

2.

2.1 The defendant is ordered to replace the Sec 17(4)(a) Undertaking ordered on 18 April and furnish the Trustee appointed in respect of O[...] O[...] (the Patient/Plaintiff) with an Undertaking in terms of Section 17(4) (a) of the Road Accident Fund Act 56 of 1996 for the costs of the future accommodation of the Patient in a hospital or nursing home or treatment of or the rendering of a service or the supplying of the Patient arising out of injuries sustained by him in a motor vehicle collision on 24 May 2018, in terms of which Undertaking the Defendant will be obliged to compensate the Trustee in respect of the said costs after the cost have been incurred by the Patient or by the Trustee or by any party on behalf of the Patient and thereof. The Defendant is

ordered to pay the reasonable travelling costs and accommodation for the Patient and his/her caretaker to and from the location where he/she is to receive treatment covered under the undertaking.

2.2 Without derogating from the generating of the foregoing, the undertaking shall include the reasonable costs of the formation of an inter vivos trust for the benefit of the Patient and the costs of administration of the said trust by the Trustee, including the costs attendant upon provision of security by the Trustee, and auditing /or accounting services.

2.3 A case manager to be appointed, of which the cost of appointment is covered under Section 17(4)(a) Undertaking.

3.

3.1 The defendant is to pay the Plaintiff's taxed or agreed-on party cost, up to and including the trial dates of 7,8 & 10 November 2023 and the date when this order is made an order of the court, for the minor patient's attorney which cost shall include, but not be limited to the following:

3.1.1 The costs caused by the postponement of 12,13 & 15 September 2023, which cost shall include the following;

3.1.1.1 The reservation and qualifying fees of the of the following experts for 12,13 & 15 September 2023;

Dr LF Oelofse Orthopaedic Surgeon Dr D Mutyaba Neurosurgeon Ms L Roos Educational Psychologist Ms Claire Hearne Clinical Psychologist Ms A Booyse Occupational Therapist Dr AC Strydom Industrial Phycologist John Sauer Actuary

3.1.1.2 The preparation and full-day fees of counsel for 12,13 & 15 September 2023;

3.1.1.3 The fees of Curator ad Litem for the 12,13 & 15 September 2023;

3.1.2 The fees of counsel, including but not limited to a refresher fee for preparation, consideration, and completion of the heads of argument and day fees in respect of the trial dates of 7,8 & 10 November 2023;

3.1.3 The fees of the Curator ad Litem for the 12 13 & 15 September 2023;

3.1.4 The cost of obtaining all expert medico-legal-and any other reports of an experts which were furnished to the Defendant and /or its experts;

3.1.5 The reasonable taxable reservation, qualifying, preparation and appearing fees at the court of Lida Roos on 7 November 2023.

3.1.6 Interest shall accrue on such outstanding amount at the mora rate of 3.5% above the repo on the date of taxation/settlement of the bill of cost,as per the Prescribe Rate of Interest Act 55 of 1975, amended, per annum, calculated from the due date of payment.

4

The award to the Plaintiff shall be protected through a trust to be formed for the Minor patient's benefit.

5

Until such time as the Trustee, JEANNE HELEN RABIE, still to be appointed and the trust to be erected, is able to take control of the capital sum and to deal with the same in terms of this order, the Plaintiff's attorney of record:

5.1 Shall be prohibited from dealing with the capital in any other manner unless specifically authorised thereto by the court, subject to paragraphs 5.2-5.5 hereunder;

5.2 Are authorised to invest the capital amount in an interest-bearing account with a registered banking institution in terms of Section 86(4) of the legal Practise Act, Act no: 28 of 2014 to the Patient and will only be allowed to pay such monies over over to the Trustee of the trust to be created in terms of paragraph 5 of this order, once the Master of the High Court has issued the Trustee with the necessary letter of authority;

5.3 Are further authorised to pay the cost to set the security of the funds held in trust, from the capital received, to the relevant

insurer by the Trustee of the trust to be created, which costs, in turn, must be refunded by the Defendant to the Plaintiff;

5.4 From the date of receiving the capital and up and till the Master of the High Court has issued the Trustee with the necessary letters of authority, are authorised and ordered to make payment in the amount of R5000,00 per month as, as well as such other amount(s) that may reasonably be indicated and/or required for the wellbeing of the Plaintiff and /or in his/her interest which a diligent Trustee been appointed;

5.5 Are authorised to make payment of the attorney and own client costs, being fees, Disbursements and interest on paid disbursements, of the Plaintiff's attorneys.

6

The nominated Trustee is ordered to furnish security to the satisfaction of the Master of the High Court.

7

The nominated Trustee shall attend to the creation of an inter vivos trust to protect the awarded funds to the exclusive benefits of the Plaintiff.

8

That the trust to be erected for the benefit of the Patient on these papers, with powers which shall include (but not be limited to) the powers as referred to in the Trust Deed attached hereto as Annexure “A” and the content of the proposed Trustee attached hereto Annexure “B” are regarded as incorporated into this order.

9

The defendant is ordered to pay the costs for the creation and future administration of the said trust, to be formed to manage and

administer the compensation payable to the Patient as referred to in this order, which costs will include the fees of the Trustee.

10

The reasonable remuneration to which the Trustee will be entitled in respect of execution of the Trustee’s official duties is as follows:

10.1 An acceptance/establishment fee of 1% (Excl. VAT) on all capital introduced into the Trust.

10.2 An annual administration fee based on a percentage of the value of the assets under administration, which percentage will be subject to the following sliding scale.

10.2.1 R0.00-R500 000.00-1.5% (Excl. VAT)

10.2.2 R500 000.00-R1 000 000.00-1.25% (Excl. VAT)

10.2.3 1 000 000.00-1% (Excl. VAT)

10.3 The undertaking contemplated by section 17(4)(a) of Act 56 of 1996 will be administrated by the Trustee, and the Trustee or his/her agent/attorney will be entitled to an administration fee of 10% on all successful claims.

10.4 Travel expenses for purposes for attending to Trust-related matters.

10.5 A termination fee of 2% (Excl VAT) on the assets of the Trust at the time of termination/ dissolution of the Trust.

10.6 The parties recognise that the Trustee, an attorney, is a professional Trustee and agree that the Trust shall pay the Trustee

the Trustee’s usual charges for any work performed by the Trustee beyond the ambit of the Trustee’s official duties in her capacity as an attorney acting on behalf of the Trust.

11

A valid contingency fee agreement exists between the Plaintiff and Plaintiff’s attorneys in terms of the Contingency Fee Act.

M.T. JORDAAN

ACTING JUDGE OF THE HIGH COURT, BLOEMFONTEIN

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[1] Expert Notices Volume 2 pages 184- 200 at page 194

[2] Ibid at page 197

[3] Expert Notice Volume 1 page 49 paragraph 11.3.5

[4] International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) ([1989]ZASCA

138) at 700F-I; Siman & Co (Pty) Ltd v Barclays National Bank Ltd 1984 (2) SA 888 (A) at 915B - H

[5] Lee v Minister of Correctional Services 2013 (2) SA 144 (CC)

[6] 1975

(3) SA 590 (A)

[7] Protea Assurance Company Ltd v Lamb 1971 (1) SA 530 (A)

[8] Meyers v Abramson 1951 (3) SA 438 (C).

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