

SOUTH AFRICA / JUDGMENT

M v Road Accident Fund (514/2019) [2024] ZANCHC 21 (8 March 2024)

[2024] ZANCHC 21**COURT**

Northern Cape High Court, Kimberley

BEFORE

Olivier

CASE / FILE NUMBER

514/2019

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(NORTHERN****CAPE DIVISION, KIMBERLEY)****CASE****NUMBER: 514/2019****DATE****HEARD: 15 November 2023****DATE****DELIVERED: 8 March 2024****Reportable****Circulate****to judges****Circulate****to Magistrates****Circulate****to Regional Magistrates****In**

the matter between: J[...]
J[...] M[...]
obo
PLAINTIFF
R[...]
J[...] M[...]
and
ROAD
ACCIDENT
FUND
DEFENDANT

JUDGMENT

OLIVIER AJ

INTRODUCTION:

1. The Plaintiff in this matter sued herein in his representative capacity as father and natural guardian of R[...] J[...] M[...] (herein after referred to as “the Minor”).
2. The Plaintiff’s claim against the Road Accident Fund (“the Defendant”) was based on an accident that occurred on 14 April 2017 when the Minor was struck by a motor vehicle whilst the Minor was inside the yard of a premises in Upington, Northern Cape Province (herein after referred to as “the Accident”).
3. It was alleged that the Accident was caused by the sole negligence of the driver of the insured vehicle and that, as a result of the Accident, the Minor suffered serious bodily injuries which included:
 - 3.1 Multiple bruises and abrasions to the head;
 - 3.2 A fracture of the left leg; and
 - 3.3 A back injury.
4. It was furthermore alleged that as a result of the Accident and the above injuries sustained during the Accident, the Minor has since and as a result of the Accident:
 - 4.1 Been suffering from regular headaches;
 - 4.2 Become aggressive and has undergone a personality change;
 - 4.3 Suffered memory and permanent hearing loss;
 - 4.4 Suffered neurocognitive impairment with neuropsychological sequelae; and
 - 4.5 Suffered a permanent brain injury.

5. The matter served before the learned Lever J on 22 and 23 February 2023 who, after hearing the legal representatives for both parties, inter alia ordered:

5.1 That the Defendant is liable to compensate the Plaintiff for 100% of the Plaintiff's proven or agreed damages suffered as a result of the Accident;

5.2 That the issue pertaining to general damages is postponed sine die;

5.3 That an amount of R 1 177 895,00 (One Million, One Hundred and Seventy-Seven Thousand, Eight Hundred and Ninety-Five Rand) be paid

by the Defendant to the Plaintiff in order to compensate the Plaintiff for the Plaintiff's loss of earnings; and

5.4 That a trust be established for the estate of the Minor.

6. During or about October 2023, the Plaintiff (as Applicant) lodged an application in terms whereof the Plaintiff essentially sought

permission/leave from this Court for the Plaintiff to present his expert evidence in as far as the quantum of general damages is concerned, by way of affidavit.

7. This application was served on the State Attorney in Kimberley who, at all material times, represented the Defendant herein but the application was not opposed by or on behalf of the Defendant.

8. On the date of the hearing of this matter the respective parties' representatives advised that they were ad idem about the fact that the matter, in as far as the quantum of general damages was concerned, will be argued and that I will be tasked with deciding such quantum based only on the argument presented by the respective legal representatives as well as on the contents of the papers that served before me.

9. Mr. Mogano who appeared for the Defendant, confirmed that the Defendant will issue the Plaintiff with the relevant undertaking in terms of Section 17(4) of the Road Accident Fund Act[1] (herein after referred to as "the RAF Act").

THE DECISION BY THE APPEAL TRIBUNAL AND THE NARRATIVE TEST:

10. At the commencement of argument of the matter on 15 November 2023, I was reminded by the parties' representatives that central to deciding the quantum of the general damages in the present case, was a letter that was received from the Health Professions Council of South Africa (herein after "the HPCSA") which was dated 3 March 2022 and which in essence stated that during a meeting of the Road Accident Fund Appeal Tribunal (herein after "the Appeal Tribunal") the following was resolved by the Appeal Tribunal:

"That after taking all the medical evidence into account, the Tribunal was satisfied that the patient's injuries do qualify as serious injury under the narrative test 5.3."[2]

I will henceforth refer to the above decision of the Appeal Tribunal as “the Appeal Tribunal Decision”.

11. I do not intend to become embroiled in the details as to why the matter was referred to the Appeal Tribunal and why the HPCSA became involved in the matter since the said details are irrelevant for purposes hereof.

Suffice it to simply confirm that the matter was referred to the Appeal Tribunal primarily by virtue of the fact that the Defendant, at some stage during the proceedings, challenged and questioned the seriousness of the Minor’s injuries.

12. Before dealing with the present matter any further, I deem it necessary for the sake of completeness and also in an attempt to avoid possible confusion to, very briefly, deal with the issue of the narrative test and what the relevance thereof is in the present matter.
13. It is common cause that any person who wishes to claim compensation from the Road Accident Fund (“the RAF”) shall submit him-or herself to an assessment by a medical practitioner in terms of the provisions of the Road Accident Fund Regulations, 2008 as amended (herein after referred to as “the Regulations”).[3]
14. It is furthermore common cause that a medical practitioner who assesses a patient as mentioned above, shall complete the required serious injury report (“the RAF 4 Form”) in the case of an envisaged claim for general damages and shall indicate, inter alia, the whole person impairment (“the WPI”) of the relevant patient in the relevant RAF 4 Form.
15. The Regulations furthermore state that if the medical practitioner finds that the patient’s injuries resulted in a WPI of 30% or more, such injuries shall be regarded as serious[4] whereas injuries will only be regarded as serious in the event of a finding of a WPI of less than 30% , if that injury:

15.1 Resulted in a serious long-term impairment or loss of a body function;

15.2 Constitutes permanent serious disfigurement;

15.3 Resulted in severe long-term mental or behavioural disturbance or disorder; or

15.4 Resulted in the loss of a foetus.[5]

16. It is common cause that Part 5 of the RAF 4 Form more or less copied the above provisions of the Regulations in as far as a finding of a WPI of less than 30% is concerned and that the factors mentioned in paragraphs 15.1 to 15.4 above, are copied in paragraphs 5.1 to 5.4 of Part 5 of the RAF 4 Form.

It is therefore clear that where the Appeal Tribunal Decision refers to the narrative test 5.3, reference is made to an injury that is deemed to be serious based thereon that such injury resulted in severe long-term mental or behavioural disturbance or disorder.

17. I interrupt myself at this point to confirm that reports by the following experts were used by and on behalf of the Plaintiff in the present matter which reports were confirmed by way of supporting affidavits deposed to by the relevant experts:
 - 17.1 Dr. J. Wilkinson (Neurosurgeon);
 - 17.2 Me. A. Cramer (Clinical Psychologist);
 - 17.3 Me. L. De Rooster (Educational Psychologist);
 - 17.4 Dr. D. Schreuder (Industrial Psychologist);
 - 17.5 Me. A. Bester (Audiologist);
 - 17.6 Dr. R.L. Dippenaar (Ophthalmic Surgeon); and
 - 17.7 Dr. P.J. Viljoen (Ear, Nose & Throat Specialist).
18. It should also be stated that what is to follow should be considered against the backdrop of the fact that no expert reports were filed on behalf of the Defendant in the present matter.
19. If regards are to be had to the fact that the Appeal Tribunal Decision was made on 11 December 2021, I hold the view that it can be safely assumed that, apart from the hospital and other relevant medical records of the Minor, the only expert reports that would have served before the Appeal Tribunal, in order to determine the seriousness of the Minor's injuries at the time, were the following:
 - 19.1 The report by Dr. J. Wilkinson (Neurosurgeon) dated 4 December 2018;
 - 19.2 The report by Me. A. Cramer (Clinical Psychologist) dated 2 July 2019;
 - 19.3 The report by Me. L. De Rooster (Educational Psychologist) dated 30 May 2019; and
 - 19.4 The report by Dr. D. Schreuder (Industrial Psychologist) dated 12 February 2020.
20. The RAF 4 Form completed by Dr. Wilkinson would have been considered by the Appeal Tribunal as well since this document was completed on 23 December 2018 and most probably formed the catalyst for the referral of the matter to the Appeal Tribunal.
21. What is important for purposes hereof, is that according to the afore-said RAF 4 Form that was completed by the Dr. Wilkinson, he found a WPI of 29% in respect of the Minor and furthermore indicated that the Minor's injuries resulted in serious long-term impairment and loss of body function (the narrative test 5.1) as well as severe long-term mental or behavioural disturbance or disorder (the narrative test 5.3).

22. Dr. Wilkinson however specifically excluded the Minor's complaints in respect of hearing loss in the afore-said RAF 4 Form and although Dr. Wilkinson, in his report, does list a complaint by the Minor of impaired hearing in his left ear and refers to it in his notes regarding his physical assessment of the Minor, Dr. Wilkinson specifically recommends that the Minor's hearing deficit should be investigated and that the percentage WPI (awarded by Dr. Wilkinson) will exclude the Minor's hearing problems.
23. In her report of 30 May 2019, Me. L. De Rooster (Educational Psychologist) also recommends that the Minor should be referred to an Audiologist and Speech-Language Therapist for comment on possible hearing impairment and possible further intervention, but refrains from concluding whether the Minor definitely has an issue with hearing loss.

Me. A. Cramer (Clinical Psychologist) and Dr. D. Schreuder (Industrial Psychologist) refrains from dealing in any sort of detailed manner with the alleged hearing issues of the Minor in their above-mentioned reports.

24. The common thread throughout all of the above reports, were the focus on the Minor's cognitive and mental issues that arose as a result of the Accident and it is therefore no surprise that the Appeal Tribunal Decision refers to the fact that the injuries sustained by the Minor resulted in severe long-term mental or behavioural disturbance or disorder (the narrative test 5.3).

DOES THE DECISION OF THE APPEAL TRIBUNAL RESTRICT THE COURT?

25. In order to properly decide the quantum of the general damages in the present matter, the central question that needs to be answered first is whether the Appeal Tribunal Decision of 11 December 2021 serves as some sort of cut-off point in the sense that the Court may not take cognizance of any expert reports that were provided subsequent to 11 December 2021.
26. From the papers that served before me, it appears that the Minor was subjected to assessments by, amongst others, the above-mentioned Me. A. Bester (Audiologist) and Dr. P.J. Viljoen (Ear, Nose & Throat Specialist) subsequent to the Appeal Tribunal Decision of December 2021.
27. In her report of 26 July 2023, Me. A. Bester (Audiologist) inter alia finds the presence of spontaneous and positioning nystagmus which, according to Me. Bester confirmed the Minor's current complaints of vertigo and which, again according to Me. Bester, can be expected to become more pronounced over time.
28. It furthermore appears that Dr. P.J. Viljoen completed a RAF 4 Form in respect of the Minor on 4 September 2023 in terms whereof he found a WPI of 6% but in terms whereof he also indicated that the injuries suffered by the Minor resulted in serious long-term impairment and loss of a body function, in other words the narrative test 5.1.[6]

More importantly to the above is the fact that in coming to the above conclusion, Dr. Viljoen confirmed the above finding of Me. Bester of vertigo and also indicated a 16,7% permanent hearing loss for the Minor.

29. The facts that the Minor's hearing loss and vertigo were permanent and also that the hearing loss and vertigo were a result of the Accident, were never seriously disputed by Mr. Mogano for the Defendant and the fact also remains that the Defendant did not file any expert reports that could in some way or the other gainsay the evidence given by the experts for the Plaintiff/Minor.
30. The question is therefore whether I may also take cognizance of the contents of the reports by Me. Bester and Dr. Viljoen in deciding the quantum of the general damages to be awarded to the Plaintiff.
31. Mr. Mogano argued vigorously that the Appeal Tribunal Decision should take preference and may only be set aside by a Court of law.

Mr. Mogano further argued that the outcome of the assessment by the Appeal Tribunal cannot be overruled by any other expert and submitted that the subsequent reports mentioned in paragraph 26 above should be ignored.

32. If I understood Mr. Mogano's above arguments correctly, it would mean that I may only take cognizance of the various expert reports mentioned in paragraph 19 above as well as of the RAF 4 Form completed by Dr. Wilkinson.
33. During his argument, Mr. Mogano conceded that the Minor has suffered permanent loss of hearing as well as vertigo as a result of the Accident but then strangely enough submitted that this does not meet the threshold of the narrative test 5.1 in other words serious long-term impairment or loss of a body function.

Given the fact that the permanent hearing loss and vertigo of the Minor were never questioned or denied, I fail to understand Mr. Mogano's above submission and I find it to be without substance or proper reasoning.

It should again be reiterated that this submission by Mr. Mogano is in fact unsubstantiated as the Defendant did not file any expert reports that could (possibly) gainsay the contents of the reports by Me. Bester and Dr. Viljoen.

34. Mr. Ernst who appeared for the Plaintiff, unsurprisingly argued that the subsequent reports (to the Appeal Tribunal Decision) in respect of the Minor's permanent hearing loss with consequential vertigo should be taken into account when considering the quantum of the general damages to be awarded to the Plaintiff.
35. Mr. Ernst, again unsurprisingly, based his argument thereon:

35.1 That the Defendant presented no evidence to the effect that the hearing loss is not serious (in contradiction to the report by Me. Bester and RAF 4 Form completed by Dr. Viljoen);

35.2 That the Defendant filed no expert reports to gainsay the findings and recommendations made by the Plaintiff's experts; and

35.3 That the Defendant referred to no authorities in support of the contention that the Appeal Tribunal Decision is indeed final and binding and that subsequent findings and/or recommendations may not be considered.

36. Regulation 3(8)(a) of the Regulations makes provision for a dispute regarding the seriousness of injuries to be referred to an appeal tribunal paid for by the RAF (in this case the Appeal Tribunal).
37. Regulation 3(11) of the Regulations sets out the powers of an appeal tribunal and inter alia states that an appeal tribunal shall have the power to determine that an injury is indeed serious (as was the case in the present matter).[7]
38. In terms of the Regulations, as far as I could determine, the task of an appeal tribunal appears to be to only settle a dispute as to whether injuries are serious (for purposes of claiming and awarding non-pecuniary damages/general damages) and not to prescribe to the Court what should be taken into consideration and what not, in eventually determining the quantum of such damages.

I could find no authorities to the contrary and I was certainly not referred to any.

39. I therefore hold the view that I am not restricted in any way by the Appeal Tribunal Decision and that I may give consideration to all of the reports by all of the experts for the Plaintiff regardless of whether same was issued prior to or subsequent to the Appeal Tribunal Decision.
40. My above view therefore also puts paid to Mr. Mogano's argument that the quantum of the general damages to be awarded to the Minor, should be determined based only on the fact that the Minor's head injury was described by Dr. Wilkinson as being mild to moderate.[8]

The quantum of the general damages will therefore be determined based on the mild and moderate head injury as well as the permanent vertigo and hearing loss suffered by the Minor as a result of the Accident.

GENERAL DAMAGES:

41. The quantification of general damages to be awarded to a Plaintiff is a matter of judicial discretion as general damages, by their very nature, are not capable of being measured in monetary terms and a Court is therefore tasked with determining the quantum based on what is fair and just in the circumstances.[9]
42. It is also trite that in quantifying the amount of compensation in respect of general damages, a Court may take cognizance of comparable

earlier decisions, but that such earlier comparable decisions should be used only as a guideline to assist the Court to arrive at a conclusion that is not out of step with awards made in said earlier comparable decisions.[10]

It has been held that these comparable decisions should be viewed as being instructive, but not decisive.[11]

43. Mr. Mogano referred me to various comparable matters relating to mild to moderate head injuries and argued that an amount of R 500 000,00 (Five Hundred Thousand Rand) would in this case suffice as compensation in respect of general damages.

Mr. Mogano warned that an amount of R 1 200 000,00 (One Million, Two Hundred Thousand Rand) as prayed for on behalf of the Plaintiff might inflate the amount of damages to be awarded for mild to moderate brain injuries unnecessarily as sufficient authorities exist to support an award of R 500 000,00 (Five Hundred Thousand Rand) as prayed for on behalf of the Defendant.

44. I have to agree with Mr. Mogano in this regard and it has to be mentioned that Mr. Ernst also conceded as much during his argument on the quantum of general damages that would be reasonable and just in the present matter.

It should however also be stated that Mr. Ernst did qualify his above concession by submitting that the mild to moderate brain injury

coupled with the permanent hearing loss and vertigo suffered by the Minor, would justify an amount that is greater than the amount of R 500 000,00 (Five Hundred Thousand Rand) as prayed for on behalf of the Defendant.

45. On the last-mentioned argument I have to, in turn, agree with Mr. Ernst.

It is common cause that, as a result of the head injuries (although mild to moderate in nature) the Minor is still experiencing significant discomfort in the sense that he suffers regular head aches and back pains and it appears that the Minor will continue to suffer from these head aches and back pains for the foreseeable future.

The relevant experts are also ad idem about the fact that, as a result of the Accident and the consequential head injury, the Minor has undergone a significant change in his emotional state in that he became moody and often disobedient after the Accident and furthermore gets irritated and angers easily and it appears from the relevant reports that the Minor's head injury also had a significant impact on the Minor's memory and concentration.

Me. A. Cramer specifically states that the cognitive difficulties experienced by the Minor may hinder optimal future learning which may hinder his academic progress.

46. In view of the above undisputed facts in respect of the mild to moderate head injury and the sequelae thereof, coupled with the permanent loss of hearing in the Minor's left ear with the resultant vertigo and after having due consideration to the authorities that I was referred to, I find that a fair and just award for the Minor's general damages would be R 1 200 000,00 (One Million, Two Hundred Thousand Rand).

ORDER:

47. In view of the above, the following order is made:

47.1 The Defendant shall pay to the Plaintiff, as general damages, the amount of R 1 200 000,00 (One Million, Two Hundred Thousand Rand);

47.2 The Defendant will issue the Plaintiff with the relevant undertaking in terms of Section 17(4) of the Road Accident Fund Act; and

47.3 The Defendant shall pay the Plaintiff's costs of suit on a scale as between party and party which costs are to include the costs of Counsel.

A.D OLIVIER

ACTING JUDGE

NORTHERN CAPE HIGH COURT

For PLAINTIFF : Adv. J.R.F. Ernst

o.i.o Andre du Plessis Inc.

PRETORIA

c/o Engelsman Magabane Inc.

KIMBERLEY

For DEFENDANT : Mr. M.A. Magano

The State Attorney

[1] Act 56 of 1996.

[2] Reference is made to the injuries of the Minor.

[3] The Regulations as published under Gnr.770 of 21 July 2008 and in Government Gazette No 31249. Specific reference is made to Regulation 3(1)(a) of the Regulations.

[3] The Regulations as published under Gnr.770 of 21 July 2008 and in Government Gazette No

31249. Specific reference is made to Regulation 3(1)(a) of the Regulations.

- [4] See Regulation 3(1)(b)(ii) of the Regulations.
- [5] See Regulation 3(1)(b)(iii)(aa) to (dd) of the Regulations.
- [6] See Regulation 3(1)(b)(iii)(aa) of the Regulations.
- [7] See Regulation 3(11)(g) of the Regulations.
- [8] The relevant experts appear to be ad idem about this finding by Dr. Wilkinson.
- [8] The relevant experts appear to be ad idem about this finding by Dr. Wilkinson.
- [9] *Allie v Road Accident Fund* [2003] 1 All SA 144 (C), paragraph [36]. See also *AA Mutual Insurance Association Ltd v Maqula* [1978] 2 All SA 249 (A), page 252.
- [9] *Allie v Road Accident Fund* [2003] 1 All SA 144 (C), paragraph [36]. See also *AA Mutual Insurance Association Ltd v Maqula* [1978] 2 All SA 249 (A), page 252.
- [10] *Protea Assurance v Lamb* [1971] 2 All SA 100 (A), page 105.
- [11] See *Allie*, supra, paragraph [37].

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