

SOUTH AFRICA / JUDGMENT

Mratyuli v Road Accident Fund (43/12)

[2013] ZANWHC 78 (12 December 2013)

[2013] ZANWHC 78**COURT**

North West High Court, Mafikeng

BEFORE

Chwaro

CASE / FILE NUMBER

43/12

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IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 43/12

In the matter between:-

MRATYULI, MQOKELELI..... Plaintiff

On behalf of M[...], B[...]

and

ROAD ACCIDENT FUND.....Defendant

JUDGMENT

CHWARO AJ:

Introduction:-

- [1] This is an action for damages instituted by the Plaintiff, in his representative capacity as the natural guardian and father of B[...] M[...], the minor child, arising from injuries sustained by the latter when a collision occurred between the minor child and an identified motor vehicle, the insured vehicle, on the 30 July 2007 at Phokeng, in the North West. The minor child, who was five years at the time, was a pedestrian.
- [2] The Plaintiff's claim for damages is in the total amount of R3 250 000-00 (three million two hundred and fifty thousand rand) computed and set out under the following heads:
- Past hospital and medical expenses..... R50 000- 00

- Future medical and hospital expenses.....R200 000- 00
- Future loss of earnings.....R2 000 000- 00
- General damages..... R1 000 000- 00

- [3] Before the trial and on the 5 June 2013, the issue of liability on the merits was settled in favour of the Plaintiff by an order of Court which effectively ordered the Defendant to pay 100% of the Plaintiff's proven damages.
- [4] At the commencement of the trial, the parties further agreed that the Defendant would furnish the Plaintiff with a statutory undertaking in terms of section 17(4)(a) of the Road Accident Fund 56 of 1996, for payment of 100% costs and expenses for future accommodation of the minor child in a hospital or nursing home, or treatment of or rendering of a service or supplying of goods to him, arising out of the injuries sustained in the collision and the sequelae thereof, after such costs have been incurred and upon proof thereof.

Issues

for determination:-

- [5] It follows therefore that the remaining issues for determination are the amounts payable to the Plaintiff under the headings of future loss of earnings and general damages respectively.
- [6] No oral evidence for either party was led following an agreement by the parties, at the commencement of the proceedings, that the medico-legal reports and joint minutes prepared by the various experts on behalf of the parties be admitted as evidence. In this regard, I now turn to deal with the evidence of the parties in the manner as agreed to by the parties in determining the quantum payable to the Plaintiff in respect of the two heads below.

General damages:-

- [7] The pleadings and the medico-legal report filed by Dr Tshepo Moja, a specialist neurosurgeon, reveals that on the 30 July 2007, the minor child, who was then a pedestrian, was knocked down by a motor vehicle as he was crossing a street. As a result of the said accident, the minor child was rendered unconscious and then taken to Rustenburg Provincial Hospital for treatment by the emergency medical services. Upon his arrival at the hospital, a Glasgow coma scale of 15/15 was recorded and later transferred to George Mukhari Hospital for neurosurgical treatment. At the latter hospital, a CT brain scan performed on the minor child showed a haemorrhagic contusion of the right frontal lobe and an intracerebral haematoma. There was also evidence of an interhemispheric haemorrhage, temporal and orbital fractures and intracranial air.

- [8] The injuries described above resulted in the minor child sustaining a severe focal injury to the brain and base of skull and mild diffuse brain injury which may result in change in personality, memory loss and a decline in intellectual ability. It is also common cause that the minor child suffered acute pain from the head, facial and soft tissue neck injuries and has a scar on the right side of the face.
- [9] The assessment of general damages is a discretionary function of the Court which has been described in the matter of Road Accident Fund v Marunga 2003 (5) SA 164 (SCA) at page 169E-G thus:

“This Court has repeatedly stated that in cases which the question of general damages comprising pain and suffering, disfigurement,

permanent disability and loss of amenities of life arises, a trial Court in considering all the facts and circumstances of the case has a wide discretion to award what it considers to be fair and adequate compensation to the injured party...”

- [10] The exercise of the discretion referred to above is not always an easy task. In this regard in the matter of Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) at paragraph 17 the court put it thus:

“The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that...”

- [11] It is against the guidance as laid down in the cases referred to above that I turn to deal with the payment for general damages

suffered by the minor child. In her submission, Ms Hawman, Counsel for the Plaintiff, referred me to the decision of Kgomo v Road Accident Fund 2011 6 QOD A4-62 (GSJ) where an award of R800 000-00 was made in respect of severe head injuries sustained by a 13 year old boy which resulted in neuro-cognital deficits and neuro-psychological difficulties. The present value of the said award is an amount of R891 000-00. I was urged to award an amount of R950 000-00 for general damages in the present matter. Mr Kanyane, on behalf of the Defendant, submitted that the case referred to above is not comparable to the present case but did not refer me to any other similar case. He further submitted that an award of approximately R500 000-00 must be made to the Plaintiff in this regard.

- [12] I have had the liberty of considering the decision of Minnie NO v Road Accident Fund 2012 6 (6A4) QOD 82 (GSJ) where the Court awarded damages in the amount of R800 000-00 to a 5 year old girl who had a severe head injury with serious injuries requiring repeated surgery and causing permanent and extensive disfigurement. The present value of the award is R936 000-00. In

the matter of Pettersen obo J ST I v Road Accident Fund 2012 6 (6A4) QOD 88 (GSJ) an award of R750 000-00 was made to a 4 year old boy who sustained significant brain injury resulting in daily seizures

and cognitive deficits and vulnerability in the open labour market.

[13] Having considered the injuries sustained by the minor child and the sequelae, I am of the view that a fair and reasonable amount of compensation that is in line with the decision of Marunga above, would be an amount of R600 000-00.

Loss of earnings:-

[14] The general approach in the assessment of damages for loss of earnings has been restated in a number of decisions. In the matter of Southern Insurance Association v Balie NO 1984 (1) SA 98 (A) at page 113G-I the position was stated as follows:

“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 mathematical calculations, on the basis of 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.”

[15] Since the parties herein have sourced expert opinion, including actuarial calculations, to deal with the basis upon which a

determination on loss of earnings is to be made, one is therefore inclined to opt for the second approach referred to in the Southern Insurance Association case above. In this regard, reference will be made to the expert reports filed and used by mutual consent and agreement between the parties.

[16] According to the joint minute of the two educational psychologists, Mr Kumalo and Ms Sepenyane:

“pre-morbidly there were no reports of ill-health or any serious developmental delays”.

[17] However, they disagree on the minor child's prospects of attaining matric. Mr Kumalo, for the Plaintiff, is of the opinion

that with the necessary intervention in the form of remedial education, the minor child will most likely obtain a grade 11 educational qualification whereas Ms Sepenyane, for the Defendant, opines that with the necessary intervention, hard work and supportive environment, the minor child will be able to reach grade 12 level of education within the mainstream.

- [18] The joint minute prepared by the clinical psychologists, Ms N Sewpershad and Ms Tromp records that they are in agreement that the minor child suffered neuropsychological impairments which are permanent and irreversible. They further agree that the extent of the neurocognitive deficits identified will require intervention to assist the minor child with his schooling and that he would not be employable in the open labour market as a result thereof.
- [19] The industrial psychologists, Mesdames Sandra Moses and Moipone Kheswa, prepared a joint minute in which they agreed that the minor child would have entered the open labour market with a matric or grade 12 educational qualification. They further agreed that he would have been able to work until normal retirement age of between 60 to 65 years. However, the industrial psychologists differ with regard to the employment prospects of the minor child with Ms Moses being of the opinion that the minor child is practically unemployable and Ms Kheswa being of the view that the minor child's pre-accident career prospects are the same as his post accident career prospects.
- [20] I have also considered the actuarial reports prepared by Munro Consulting Actuaries on behalf of the Plaintiff and Deloitte, on behalf of the Defendant. The first scenario is based on the assumptions made by Ms Moses to the effect that the minor child has been rendered effectively unemployable. This scenario assumes that but for the accident, the minor child would have passed grade 12 and enter the labour market at the median Paterson A3 and proceed to Paterson C2/C3 level at age 45.
- [21] The total loss of income is calculated to be an amount of R3 752 800-00 before the contingency deductions. Given the opinions by educational psychologists referred to above, it is my view that scenario 1 needs to be considered on the basis that there exists a strong possibility of a career prospect up to supervisory level for the minor child and to that effect, a substantial percentage of contingency deductions be made accordingly.
- [22] In considering the contingency deductions, one need to bear in mind that such a deduction is made to allow for general hazards of life which might be both favourable and adverse. As submitted by Ms Hawward, it is a well accepted principle that every year of a person's remaining working life should, as a basis, represent 0,5% contingency deduction. I have also considered various decisions where contingency deductions were made in respect of young children. In this regard, in Southern Insurance Association case referred to above, a contingency of 25% was made in respect of a 4 year old. In *Nanile v Minister of Post and Telecommunications* 4 C&H A4-30 a deduction of 30% was made in respect of a child of 3 years of age. In *Maitla v Road Accident Fund* 5 C&H B3-1 a deduction of 35% was made in

respect of a 4½ years old.

[23] I have duly considered the various scenarios given and on the application of a 50% contingency deduction on an uninjured income

given at R3 752 800-00, the amount payable to the Plaintiff amounts to R1 876 400-00. Counsel for the Defendant has also urged me to further deduct an amount representing 20% of the said amount. Upon being probed further on the submission, Counsel could not sustain it. I do not find the basis for such a submission and accordingly am not persuaded that such a further deduction is plausible and necessary. Accordingly, the Plaintiff's damages for loss of earnings is an amount of R1 876 400-00.

Costs:-

[24] As a general rule, costs follow a suit unless there are extraordinary circumstances that militate against a successful party being awarded costs. Accordingly, the Defendant is ordered to pay the party and party costs of suit, in the manner set out in the order below.

Order:-

[25] Consequently, the following order is made:-

1. The Defendant is ordered to pay Plaintiff delictual damages in the amount of R2 476 400-00 in respect of B[...] M[...]

("the minor"), which amount shall be paid on or before 14 days from date of this order to the Plaintiff's attorney,

Mphela & Associates, in settlement of the Plaintiff's claim, by direct transfer into their trust account , the details of which are the following:

MPHELA & ASSOCIATES TRUST ACCOUNT

Bank: Standard Bank

Branch code: 05-26-47-41

Account no: 2[...]

Type: Current Account

2. Defendant is not liable to pay interest on the aforesaid payment if timeously made;
3. Defendant is ordered to furnish Plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund act 56 of 1996 in respect of the following:

3.1. For the costs of future accommodation of the minor 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 the 30 July 2007, after such costs have been incurred and upon proof thereof;

-
- 3.2. For establishing and administering a Trust referred to in paragraph 5 below;
- 3.3. Furnishing security to the satisfaction of the Master of the High Court in respect of the Trust referred to in paragraph 5 below.
4. The Defendant is ordered to pay Plaintiff's taxed or agreed costs on the High Court scale as between party and party up to and including the 9 December 2013, which costs shall include but not limited to:
- 4.1. The costs of obtaining the reports and joint minutes of the following experts:
- 4.1.1. Dr S Sombili;
- 4.1.2. Drs Mkhabele & Indunah Radiologists;
- 4.1.3. WM Kumalo;
- 4.1.4. Dr TP Moja;
- 4.1.5. A Pasha;
- 4.1.6. N Sewpershad;
- 4.1.7. S Moses.
- 4.2. The reasonable taxable reservation and/or preparation fees, if any, of the following experts:
- 4.3.1. Dr S Sombili;
- 4.3.2. WM Kumalo;
- 4.3.3. Dr TP Moja;
- 4.3.4. A Pasha;
- 4.3.5. N Sewpershad;
- 4.3.6. S Moses.
- 4.3. The costs of obtaining the report by Munro Consulting;
- 4.4. The costs of Counsel up to and including 9 December 2013.
5. The net proceeds of the payment referred to in paragraph 1 above shall be payable to a Trust to be established within three (3) months from the date of this Order which Trust will be created to administer and control the capital amount on behalf of the minor with the approval of the Master of the High Court.
6. Should the Trust referred to in paragraph 5 above not be established within the three months period the Plaintiff is directed to approach this Court within a month thereafter in order to obtain further directives in respect of the manner in which the capital amount is to be utilised in favour of the minor.

7. Until such time that the Trust is established and the nominated Trustee(s) is/are able to take control of the capital amount and administer it on behalf of the minor, the Plaintiff's attorneys are:

7.1. Authorised to invest the capital amount in accordance with the provisions of section 78(2A) of the Attorneys Act, to the benefit of the minor with a registered banking institution;

7.2. Prohibited from dealing with the capital amount in any other manner unless specifically authorised thereto by this Court;

7.3. Authorised and ordered to make reasonable payments to meet and/or satisfy the needs of the minor that may arise and that are required for reasonable treatment, care, aids or equipment that may arise in the interim.

OK CHWARO

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:-

DATE OF HEARING: 09 DECEMBER 2013

DATE OF JUDGMENT: 12 DECEMBER 2013

COUNSEL FOR THE PLAINTIFF : ADV HAWMAN

COUNSEL FOR THE DEFENDANT: ADV KANYANE

ATTORNEYS FOR THE PLAINTIFF: GURA TLALETSI INC.

ATTORNEYS FOR THE DEFENDANT: DC KRUGER ATTORNEYS

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