

SOUTH AFRICA / JUDGMENT

S.J.D obo M.A v Road Accident Fund (EL 781/2021) [2022]

ZAECELLC 34 (29 November 2022)

[2022] ZAECELLC 34

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Laing

CASE / FILE NUMBER

EL 781/2021

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IN

THE HIGH COURT OF SOUTH AFRICA
(EAST
LONDON CIRCUIT LOCAL DIVISION)

Case

no. EL 781/2021

In

the matter between:

S[....]
J[....] D[....]
on
behalf of M[....]
A[....]
Plaintiff
and
ROAD
ACCIDENT
FUND
Defendant

JUDGMENT

LAING J

- [1] This is an application for default judgment in terms of which the plaintiff seeks compensation

for damages arising from the negligent driving of a motor vehicle.

Background

- [2] The plaintiff is the natural guardian and biological mother of a seven-year-old male, MA. On 6 March 2020, at Phumla Mqeshi Location, in the Sterkstroom district, a motor vehicle struck MA while he had been walking along the pavement. As a result, MA sustained a severe brain injury and blunt abdominal trauma, requiring hospitalisation and medical treatment.
- [3] Proceedings were instituted against the defendant for the payment of damages in the amount of R 11 million. The parties have reached settlement regarding the claims for medical expenses and general damages. The plaintiff now seeks an order for payment of the amount of R 9,319,588 for future loss of earnings.

Plaintiff's evidence

- [4] At the hearing of the matter, an occupational therapist, Ms Ncumisa Magakwe, testified in relation to a medico-legal report that she had prepared. She indicated that MA displayed significant limitations regarding his cognitive and perceptual skills and presented with behavioural problems. He would benefit from attendance at a special needs school. Ms Magakwe stated that MA's future learning capacity and the probabilities of his entering the labour market remained uncertain.
- [5] The next witness was a counselling psychologist, Ms Linda Maye. She referred to an assessment that she had carried out on MA and averred that there was strong evidence to suggest that he had suffered brain impairment. There was, however, no clear indication that MA's neuro-cognitive functions had been significantly different prior to the accident by reason of the limited cognitive abilities and demands that characterised MA's developmental age at the time. He

remained vulnerable to more adverse consequences than if he had sustained the injury later in his formative years.

[6] An educational psychologist, Dr Geoff Swana, then testified for the plaintiff. He confirmed that MA did not come from a high-functioning background; family members had not progressed significantly in their education. It was not possible to assess MA's pre-accident scholastic potential with certainty because he had been four years old at the time, but it was probable that he would have passed grade 12 and entered the labour market with better earning prospects than

his parents. His post-accident learning abilities had been compromised and it would be best for him to be placed at a special needs school. It was now unlikely that he would reach and pass grade 12.

[7] The final witness for the plaintiff was an industrial psychologist, Mr Tshepo Kalanko. He stated that he had prepared a medico-legal report to deal with the question of MA's future loss of earnings. To that effect, Mr Kalanko sketched various pre-morbid employment scenarios, considering, inter alia, his socio-economic background and education potential; these fell within the range of semi-skilled to middle management positions. He went on to testify about the possible post-morbid scenarios, the first of which being that MA would not acquire a qualification and would remain unemployed, the second of which being that he would secure employment as an unskilled worker. Overall, Mr Kalanko asserted that MA's future loss of earnings could be calculated as the difference between his pre- and post-morbid potential.

Discussion

[8] The court is required to determine the quantum of damages for future loss of earnings. This will entail taking into consideration the evidence of the plaintiff's witnesses as well as the actuarial report provided. By reason of MA's being a young child, it is especially difficult in these circumstances to arrive at an amount on a purely mathematical basis. The law makes provision, in claims for prospective loss, for contingencies. These are described in academic writing as follows:

"Contingencies include any possible relevant future event which might otherwise have caused the damage or a part thereof, or which may otherwise influence the extent of the plaintiff's damages. In a wide sense, contingencies are described as "hazards that normally beset the lives and circumstances of ordinary people". This may, for example, imply that provision is made for the fact that the prospective loss which is possible at the time of assessment of damage might in any event possibly have occurred independently of the delict or the breach of contract in question.'[1]

[9] The determination of the relevant contingencies to take into consideration in any matter is certainly not an exact science. The court is dealing with future events that may have either positive or negative implications (or both) for the claimant.[2] Whereas a likely trajectory for the different stages of life can be postulated, having regard for the general socio-economic circumstances of a claimant, the truth is that each person's journey is different. Consequently, it would seem inevitable that arbitrary considerations would play a part in the

determination required.[3] A useful guide, however, remains the actuarial evidence available.[4]

- [10] In the present matter, the actuarial report relies considerably on Mr Kalanko's medico-legal report, which sets out employment scenarios upon which pre- and post-morbid income levels were calculated. The key assumptions used in the actuarial report are: (a) that MA would have passed grade 12, obtained a tertiary degree, and eventually advanced to a middle management position in the corporate sector, but for the accident; [5] and (b) that, as a result of the accident, MA will not earn any income at all. The actuarial report, as pointed out by senior counsel

for the plaintiff, is based on a 'best case' scenario.

- [11] In his report, Mr Kalanko presents an alternative pre-morbid employment scenario, in terms of which he postulates that MA would have passed grade 12 (at best) before entering the labour market, whereafter he would have become a skilled worker in the corporate sector.[6] From the evidence of Ms Maye and Dr Swana, it is clear that MA did not come from a high-functioning background. Of the numerous family members mentioned, only an uncle has reached grade 12 and found employment. Furthermore, it is clear that MA has suffered a brain impairment and that his learning abilities have been compromised. It is also clear, from the evidence of Ms Makagwe, that his future learning abilities and the chances of his entering the labour market remain uncertain. It would seem reasonable to find that the 'best case' scenario that informs the actuarial report is unrealistic. It appears that both key assumptions can be criticised. Firstly, it is unlikely, from the evidence of the witnesses, that MA would have advanced to a middle management position in the corporate sector; and, secondly, it is unlikely that MA stands to earn no income at all.

- [12] Consequently, the 'best case' scenario relied upon for purposes of the actuarial report ought to be modified by taking into consideration the alternative scenario presented by Mr Kalanko. Senior counsel for the plaintiff submitted a set of calculations that takes the alternative scenario into account; it also makes provision for contingencies and residual earning capacity and ultimately arrives at an amount based on the mid-point of the 'best case' and alternative scenarios. In that regard, provision for residual earning capacity could possibly be better accommodated under the umbrella of contingencies overall. Moreover, the calculations may result in under-compensation. The damages amount is usually reduced by 10% to 50%, on average;[7] here, the figure is closer to 55%.

Relief and order

- [13] The court enjoys a discretion in deciding what is reasonable and fair in relation to the determination of contingencies and (ultimately) the claimant's loss of earnings.[8] Mindful of the comments made in the preceding paragraphs, the court is satisfied that the amount claimed, based upon the 'best

case' scenario indicated in the actuarial report, must be adjusted by a percentage of 40%. This would seem to be a fair and

reasonable percentage for the contingencies involved.

[14] In the circumstances, the following order is made:

- (a) the defendant is directed to pay the plaintiff the amount of R 5,591,753 for future loss of earnings;
- (b) the defendant is further directed to pay:
 - (i) interest on the above amount at the prescribed legal rate, calculated from the date of this order until the date of payment;
 - (ii) costs of suit, including those of senior counsel and the plaintiff's experts (plus qualifying expenses, if any); and
 - (iii) interest on the above costs, calculated from ten (10) court days after the finalisation of taxation.

JGA LAING

JUDGE OF THE HIGH COURT

Appearing on behalf of the Plaintiff:

Adv Cole SC, instructed by N. Tyatyeka attorneys, EL.

Appearing on behalf of the Defendant:

No appearance

Date heard: 30 August 2022

Date delivered: 29 November 2022

[1] Dendy M, 'Damages', in LAWSA (vol 14(1), 3ed, 2018), at paragraph 27.

[2] See Southern Insurance Association Ltd v Bailey 1984 (1) SA 98 (A), at 117B-D.

[3] Dendy M, op cit, at paragraph 89.

[4] See Paton v Santam Insurance Co Ltd 1965

(1) QOD 637 (E) 645.

[5] This is described in Mr Kalanko's report as a 'career ceiling within the lower quartile and median range for Paterson level D1... by the approximate age of 45.'

[6] He indicates a 'career ceiling within the lower quartile and median range for Paterson level C1/C2... by the approximate age of 45.'

[7] See *Van der Plaats v SA Mutual Fire & General Insurance Co Ltd* 1980 (3) SA 105 (A), at 114-115. In relation to young children, see *Singh and another v Ebrahim* (2)

[2010] 3 All SA 240 (D), at paragraph [9].

[8] See *Southern Insurance Association Ltd* (n 2, *supra*); also see *Nationwide Airlines (Pty) Ltd (in liquidation) v SA Airways (Pty) Ltd*

[2016] 4 All SA 153 (GJ), at paragraph [147].

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