

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA,  
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 3745/2018

In the matter between:

**E[...] S[...] LENCOE obo  
N.O. LENCOE**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

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**HEARD ON:** 29, 30 AUGUST 2023 & 01 SEPTEMBER 2023

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**JUDGMENT BY:** DANISO, J

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**DELIVERED ON:** This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 12H00 on 21 DECEMBER 2023.

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[1] In this matter, the defendant is being sued for damages arising from the head and wrist injuries sustained by the plaintiff's 16-year-old daughter (the minor

child) in a motor vehicle accident which took place on 23 September 2017. At the time of the accident, the plaintiff and the minor child were passengers in the motor vehicle with registration numbers and letters FHG 823 FS when it was collided into by another motor vehicle with registration numbers and letters CLX 107 FS.

- [2] It is common cause that as a result of the injuries, the minor child was transported from the scene of the accident by an ambulance to Pelonomi Hospital where she was admitted until discharged on 5 October 2017.
- [3] The defendant has since conceded the merits, 100% of the plaintiff's proven or agreed damages. The only issue that I have to determine is the quantum pertaining to general damages and loss of earnings resulting from the injuries.
- [4] The plaintiff testified and also called Dr Denis Kitavujja Mutyaba a Neurosurgeon, Ms. Maria Magdalena Lautenbach an educational psychologist and Dr Lindelwa Grootboom a clinical psychologist as witnesses.
- [5] At the time of the accident the minor child was ten years old and in grade 4. She was performing well at school averaging between level 6 and 7 and had no behavioural issues. It was the plaintiff's testimony that after the accident, the minor child's school marks dropped significantly. She is presently in grade ten and although she has not failed a grade as yet, she has failed the first two grades. Her behaviour has changed. The school has reported at least four complaints to the plaintiff regarding the minor child's misbehaviour. The minor child is also short tempered, aggressive and constantly fighting with her sister. Her memory has also been adversely affected, she struggles with forgetfulness and lack of concentration.
- [6] With regard to her own educational background, the plaintiff stated that she went to school up to grade 12 though she did not pass grade 12.

- [7] Dr Mutyaba confirmed that he concluded the joint minutes with the defendant's Neurosurgeon, Dr Maharaj.<sup>1</sup> The experts agreed that the minor child's head injury resulted in a brain injury but disagreed on its classification for that reason, their point of departure in concluding the joint minutes was the classification of the brain injury.
- [8] Dr Mutyaba diagnosed a severe traumatic brain injury. His conclusions are based on the fact that pursuant to the injury, the minor child was in a coma state. Her Glasgow Coma Score (GCS) was recorded as 5/15 and she subsequently spent about six days in the Intensive Care Unit (ICU). See page 49 and 65 of the hospital records.<sup>2</sup> All these factors indicate a severe brain injury resulting in the minor child's current sequelae which include complaints about headaches, poor school performance and behavioural changes. Although Dr Maharaj was of the view that the minor child sustained a mild brain injury, he nevertheless confirmed that the injury resulted in the residual headaches, labile mood, poor memory and concentration the minor child is complaining about.
- [9] According to Dr Mutyaba, the sequelae are expected to get worse as the minor child gets older. She is now at high risk of developing post-traumatic epilepsy which triggers seizures. She is also pre-disposed to early Alzheimer's or Dementia, and all these conditions have an effect on both her future employability and lifespan which will be reduced by 5 to 10 years.
- [10] Dr Mutyaba conceded that at the time he assessed the minor child he was not privy to the CT scans and the MRI scans. It was his explanation that CT and MRI scans were not necessary because at the time he examined the minor child the haematoma had resolved and all the necessary information was available from the medical records. He disputed the contention that the low GCS might have been caused by the medication (Midazolam and Morphine) that was administered in hospital and pointed out that the medication was necessary to intubate and sedate the minor child during the mechanical ventilation to aid

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<sup>1</sup> Exhibit "B205-209."

<sup>2</sup> Exhibit "A".

brain healing in any event, the critical GCS readings are the ones recorded upon admission not in the ambulance or after admission.

[11] Ms Lautenbach concluded the joint minutes with the defendant's educational psychologist.<sup>3</sup> It was her testimony that both the experts agreed that the injuries had impacted negatively on the minor child's academic ability. They also agreed that prior to the accident the minor child had no history of neurological, emotional and structural difficulties including learning challenges, therefore, she had the potential of obtaining grade 12 and a degree at a tertiary level. The defendant's expert postulated a grade 12 NQF level 4 whilst she posited as a grade 12 NQF level 8.

[12] It was her testimony that her conclusions were based on the fact that the minor child was not academically vulnerable pre-accident, her father was highly educated as a mechanical engineer and genetics play a role. She also took into account the minor child's outstanding performance as evidenced by the school reports<sup>4</sup> indicating that she was averaging between 80 to 90% which is a good indicator of excellent academic future and her father's level of education. Post-accident, from the last term of grade 4 there was a serious decline on her scholastic progression. According to the school reports, the minor child had been performing higher than her peers since grade 3. Post accident, she started to struggle and performed below her peers and this continued onto the next grades indicating that she will struggle from grade 10 onwards as she will be required to work independently, consequently, the minor child would only be able to reach an NQF level 4 and settle for studying at FET colleges for vocational and practical training.

[13] Dr Grootboom, assessed the minor child on 18 July 2019 and again on 26 August 2023. She told the court that the reason for the re-assessment was because the initial assessment was conducted four years ago and since then the minor child's physical ailments have worsened.

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<sup>3</sup> Exhibit "G".

<sup>4</sup> Exhibit "I".

- [14] It was her testimony that the severe brain injury has left the minor child with psychological ailments which include hallucinations, mood swings, irritability and behavioural changes, poor self-esteem and anger control which have an adverse effect on her executive functions which in turn affects her scholastic performance. The minor child has also attempted suicide which can be attributed to the low self-esteem, she also suffers from headaches and chest pains which could be linked to the anxiety of not performing well at school.
- [15] Dr Grootboom agreed that genetics do play a role in a child's prospects of succeeding educationally, however, despite the fact that the plaintiff failed grade 12 there is no evidence of cognitive difficulties in the family in fact. The minor child's father has a Diploma and her sibling is performing adequately.
- [16] Thus was in short the plaintiff's evidence. In addition to the *viva voce* evidence, the plaintiff's experts' reports by orthopaedic surgeons, Drs L.F. Oelofse and MB Deacon, industrial psychologist, Texalitrix (Pty) Ltd, actuaries Johan Sauer and neurologist, Dr L.M. Wynand-Ndlovu were handed in by concurrence of both parties for the matter to be further determined on the conclusions as expressed in the said reports.
- [17] The experts agree that there are no present complaints with regard to wrist injury and that this injury will not have an effect on the minor child's productivity or retirement.
- [18] With regard to the brain injury, the minor child's enjoyment of life and quality thereof has been curtailed by the sequelae from the accident as the pain and suffering is ongoing. She is battling with chronic headaches and chest pains which can be alleviated by pain medication however, the chronic use of analgesics will put her at risk of developing serious side effects. The minor child is still experiencing periods of "day dreaming" as a result, further neurological evaluation is required. Due to her cognitive challenges, she can no longer dance or draw which are the activities she enjoyed as a hobby prior to the accident.

- [19] According to the experts, it will be difficult for the minor child to secure employment in the open labour market for that reason, the actuary has suggested an amount of R8 261 143.00 as compensatory damages in respect of the minor child's future loss of earnings with a contingency deduction calculated at 40%.
- [20] Dr Naledi Mqhayi testified for the defendant's case. She is a clinical psychologist with a neuropsychologist expertise. She assessed the minor child on 6 October 2022 when the minor child was 15 years old. Although she agreed that pursuant to the accident, the minor child suffers from inadequate concentration, below average performance and that her attention span is not at an optimum level it was her view that the brain injury has not caused an adverse effect on the minor child's executive functions because during the assessment the minor child was able to follow instructions and wait her turn when spoken to. She was also able to respond when required to. The minor child is functional, there is no structural damage to the brain therefore there is a good chance of rehabilitation.
- [21] With regard to schooling and academic performance, she was adamant that the brain injury sustained by the minor child was not so severe to have an effect on her scholastic performance. She told the court that that the minor child simply needs to put more effort in her work because it's not that she cannot absorb anything.
- [22] She concluded her testimony by conceding that she did not classify the head injury during the assessment and that at the time she rendered her report she had not had sight of the minor child's previous school reports. She also did not contact the school to obtain the minor child's pre-morbid school performance related information she simply based her conclusions on the documents presented to her which include Dr Maharaj's report.
- [23] The nature and seriousness of the brain injury sustained by the minor child is indisputable. It was argued on behalf of the plaintiff that the amount that would be just and equitable under these circumstances would be an amount of R1,5

million in respect of the general damages and an amount of R8 261 143.00 in respect of future loss of income with a contingency deduction reckoned at 40% which is fair considering that the minor child is not faring well at school and there are chances of failing when she grows older.

- [24] On the other side, it was the defendant's submission that the amount claimed by the plaintiff is excessive. Counsel for the defendant insisted that the brain injury was not so severe to diminish the minor child's future earning capacity. The amount that would be fair in respect of general damages is an amount of R700 000.00 (seven hundred thousand rand) and for future loss of earnings is a sum of R2 045 193.75 (two million, forty-five thousand, one hundred and ninety three rand and seventy five cents).
- [25] Counsel for the defendant referred to authorities in support of her argument. I do not deem it necessary to rehash the submissions made in that regard because all the authorities referred to are not relevant to the facts of this matter. The plaintiffs in those matters were adults and where a child was involved, the injury involved a minor brain injury.
- [26] Regarding general damages, it was said in *A A Mutual Insurance Association Ltd v Maqula*<sup>5</sup> that the determination for the award for such damages has never been an easy task. There is neither a mathematical nor a scientific formula to compute the monetary value on pain and suffering, and loss of amenities of life.
- [27] The plaintiff's version regarding the impact of the injuries on the minor child's physical, psychological and neurological effects stands to be accepted as no evidence was proffered by the defendant in contradiction. It was expected of Dr Mqhayi to dispel the plaintiff's contentions in this regard but her cross-examination revealed that she did not only omit to classify the brain injury, her conclusions were also based on the disputed report by Dr Maharaj who was not called as a witness. The veracity of Dr Maharaj's conclusions was accordingly not tested under oath.

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<sup>5</sup> 1978 (1) SA 805 (A)

[28] Taking into consideration the facts of this matter I find that the amounts suggested by the plaintiff as compensatory damages are indeed excessive. No evidence of permanent disfigurement has been proffered and in relation to loss of future earnings, the minor child's future physical abilities have not been completely curtailed. On the plaintiff's own version as relayed by her educational expert, both in the injured and un-injured state the minor child has the capacity to obtain at least a diploma. She is therefore not completely unemployable in the open labour market. Based on all these reasons, I find that the amount that would be adequate to compensate the plaintiff for the injuries suffered by the minor child and also be fair and equitable to both parties is the amount of R1 000 000.00 (one million rand) in respect of general damages and R5 000 000.00 (five million rand) for future loss of earnings.

[29] In the result I make the following order:

#### Order

1. The Defendant is to pay the plaintiff an amount of R6 000 000.00 (six million rand) into the plaintiff's attorney's trust within 180 (one hundred and eighty) calendar days from date of the granting of this order. This amount incorporates:
  - 1.1. General damages: R1 000 000.00 (one million).
  - 1.2. Future loss of earnings: R5 000 000.00 (five million).
2. The defendant to pay the plaintiff's taxed or agreed party and party costs including the costs the reasonable qualifying and reservation fees and expenses (if any) of the plaintiff's experts.
3. Payment of the taxed or agreed costs shall be made within 180 (one hundred and eighty) days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney.



4 Interest shall accrue at 7% (the statutory rate per annum), compounded, in respect of:

4.1 the capital claim, calculated from 14 (fourteen) days from date of this order.

4.2 the taxed or agreed costs, calculated from 14 (fourteen) days from date of taxation, alternatively date of settlement of such costs.

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**N.S. DANISO, J**

APPEARANCES:

Counsel on behalf of the plaintiff:

Adv. CG Cross

Instructed by:

VZLR INC

C/O DU PLOOY ATTORNEYS

**BLOEMFONTEIN**

Counsel on behalf of the defendant:

Ms. P. BANDA

Instructed by:

Office of the State attorney

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