

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 2012/07895

| | |
|------------------|-------------------------------------|
| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED YES/NO |
| | |
| SIGNATURE | DATE |

In the matter between:

MDLULI MAKHOSAZANE PRECIOUS
obo KUTLWANO MATLOU

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

STRYDOM J

[1] On or about 14 March 2012, this action was instituted pursuant to the provisions of section 17(1)(a) of the Road Accident Fund Act 56 of 1996 (as amended) ("RAF Act"), in respect of personal injuries suffered by a minor child.

The plaintiff is acting in her representative capacity as the mother of the minor child, Kutlwano Nhlakanipho Matlou (the minor child).

- [2] The minor child was born on 15 December 2010 and about 6 weeks later, on 1 February 2011, the minor child was a passenger with his mother when the insured driver made a collision with the motor vehicle he was driving.
- [3] In the particulars of claim filed and dated 14 March 2012, a damages claim was made on behalf of the minor child for the payment of R872 202.37. This claim constituted a claim for medical expenses in the amount of R72 202.37, for an undertaking for future loss of income, an amount of R500 000.00 and general damages in the amount of R300 000.00.
- [4] After an amendment some 9 years later, dated 24 June 2021, this amount escalated substantially to the amount of R6 197 445.61. An undertaking pursuant to section 17(4)(a) of the RAF Act for guaranteeing payment for future medical expenses, was still sought. The amount claimed under the heading of future loss of earnings or earning capacity escalated from R500 000.00 to R5 411 949.00.
- [5] Initially, the defendant was represented by an attorney but at a previous hearing of this matter, the defence of the defendant was struck and the defendant was no longer before this court. The matter was heard through a virtual platform and during the hearing, a representative of the State Attorney, Ms Mhlongo, informed the court that she represented the Road Accident Fund (“the Fund”).

[6] The court was informed that the liability of the Fund had previously been settled and was not an issue before this court and that the Fund was prepared to provide the undertaking for future medical expenses. The court was also informed that the general damages were settled between the parties in an amount of R550 000.00. The only outstanding issue for decision by this court was thus to determine whether the minor child was entitled to be compensated for future loss of earnings and incapacity. On behalf of the plaintiff, expert reports were filed; supported by affidavits deposed to by them.

[7] Although this was a default judgment, the court ruled that it will require oral evidence from some of the expert witnesses to determine the defendant's liability to compensate the minor child for future loss of earnings and incapacity. For that purpose, the matter proceeded on a virtual platform to hear the evidence of various experts.

[8] The issues for determination by this court were the following:

8.1 Whether the minor child sustained any injuries as a result of the collision;

8.2 If so, whether these injuries have caused the minor child damages as a result of his loss of, or diminished earning capacity.

[9] Following the collision, the minor child was admitted to hospital where the following injuries were noted on medical records:

9.1 Left foot degloving injury;

9.2 Burn on the foot affecting the toes;

9.3 Injury to the left big toe which ultimately led to the amputation at the inter-phalangeal joint. This was described as the front portion of the toe where the nail was positioned.

[10] There is no evidence to counter these findings and the court accepts that the plaintiff has, on a balance of probabilities, proven that the minor child suffered these injuries during the collision.

[11] The plaintiff called an orthopaedic surgeon, who examined and assessed the minor child on 11 February 2021. This was approximately 10 years after the collision. She considered various documents, including the RAF1 form and the hospital records of the minor child. Her examination confirmed the left foot injuries and the amputation at the inter-phalangeal joint level. She also confirmed reconstructive surgery done by a plastic surgeon some two years after the collision.

[12] She noted her physical examination in her expert report which was received as exhibit A. As far as the left big toe is concerned, she further noted under the heading "feel" no area of tenderness. She noted a stiff metatarsal-phalangeal joint of the big toe. The x-ray examination revealed that the remaining bony elements of the foot appeared intact and suggested further conservative treatment which included the possibility of orthopaedic devices, which she described during her evidence as special shoes, should there be a need for that. No future surgical treatment was envisaged. She noted that the minor child's toe was tender over the stump. In relation to psychological sequelae, she stated it to be significant but deferred to an educational or child psychologist for their expert opinions.

[13] The minor child informed her that he enjoys playing soccer and she opined that the orthopaedic injuries should not affect the educational progress of the minor child. She, however, acknowledged the presence of psychological sequelae which may affect his school progress and ultimately his future career. She stated that this did not fall within her field of expertise and that she deferred to other experts to determine the psychological consequences which the injury may have on the educational progress of the minor child.

[14] The plaintiff then called a registered clinical psychologist, Ms Hleziphi Matlou, with a special interest in neuropsychology. She filed a neuropsychological report which was accepted into evidence as exhibit B.

[15] She did her assessment on 10 February 2021, and it was carried out by means of a clinical interview with the minor child and his mother, followed by neuropsychological testing. The minor child's mother reported that his developmental milestones were attained normally. There was no history of cognitive or developmental delays. She reported that the minor child's school performance was good.

[16] According to the report, the minor child's mother reported a further event of trauma suffered by the minor child. He was hit by a taxi whilst crossing the road during 2020. His mother reported a brief loss of consciousness. He further incurred a collar bone fracture and multiple bruises. His mother denied any prior head injuries or psychiatric conditions. She said that he had anger issues, sometimes bangs on doors and refuses to listen. Sometimes he refused to write at school.

- [17] She conducted a neurophysiological assessment covering a wide spectrum of cognitive functions including attention and concentration, memory and learning, visual-construction ability, reasoning and concept and planning ability.
- [18] This expert stated that due to early stage of development at which the accident occurred, there is insubstantial history of collateral information to enable comment on his pre-morbid neurocognitive functioning. Accordingly, she assessed the minor child with only reference to his post-morbid situation. With reference to his cognitive ability, in some instances, she noted his functionality range as average or high average, but in others, impaired or below average. She reported that the minor child's performance indicated a pattern of variability in his neuro-cognitive functioning in that there were skills that were intact and adequately functional, while there were areas of impairment and poor functioning. His weaker functioning related to concentration levels, attention, working memory and mental tracking.
- [19] The expert concluded that the minor child who sustained a big toe injury does present with neuro-cognitive difficulties but these would not be as a result of a head injury as he did not sustain such an injury during the collision. She opined with reference to *"Psychology"* after referring to the second accident that *"He currently has post-traumatic stress symptoms, he is short tempered, afraid of cars and he experiences nightmares"* She further concluded that his emotional difficulties and other extenuating factors, such as residual physical pain, may contribute to his neurocognitive difficulties. She reported that Dr Segwapa, a neurosurgeon, reported that the minor child has no neuro-cognitive impairments. His mother also reported that the minor child is performing

relatively well at this point of his academic journey. She stated that the minor child has permanent serious disfigurement and it is expected to have adversely affected his outlook of his body and on himself as he is now presenting with emotional difficulties. This resulted in him experiencing feelings of inadequacy. She confirms that the 2020 accident would have worsened the situation. She suggested that the minor child would benefit from psychotherapy intervention.

[20] As far as the scholastic functioning of the minor child is concerned, she described his performance as relatively good thus far. She qualified this statement by stating that this does not imply that the minor child's functioning is optimal and that he is not functioning at the level he would have been had the accident not occurred. She found that his neuro-cognitive and emotional difficulties mean that he is a child at risk, is liable to experience difficulties in school, as volumes and complexity of work increases. If his difficulties are not adequately addressed, he is likely to experience learning difficulties at school. For this purpose, she recommended intervention by an educational psychologist for comment on his educational prospects and remediation thereof.

[21] As far as his physical functioning is concerned, it is stated that the minor child presents with residual symptoms in the form of headaches, speech difficulties, pain on his neck and jaw and visual problems. She stated that these affected his physical functioning as he cannot wear closed shoes for long and experiences pain after playing. She stated that it is expected that his physical residual symptoms will continue to disrupt his recreational sports activities as he progresses with school and thus disadvantage him when compared to other

young men. She recommended that he be assessed by an occupational therapist to evaluate the impact of the accident on the minor child's abilities and functional capacity.

[22] It should be noted by the court that this witness, as the others, did not distinguish between the effects of the first accident in contrast to the effects of the second accident where the minor child was rendered unconscious for a while. Further, as no pre-morbid evidence could be utilised, it was merely assumed that the cognitive difficulties, which was not caused by physical injury to the brain, presented itself as a result of the injury to the left big toe suffered during the first collision.

[23] The next witness called by the plaintiff was an educational psychologist, Mr Zenzele Kubheka. He assessed the minor child during February 2021. He confirmed that the minor child sustained no head injuries and had no loss of consciousness as a result of the first collision.

[24] According to the minor child's father, he tends to isolate himself. He is short tempered, always bangs the door and has been involved in physical fights with other children at school. He is a defiant and stubborn child and he sometimes refuses to do house chores and also sometimes refuses to write in class. He is an anxious child and is afraid of the dark and being alone. He is bed wetting almost every night. He is a forgetful child.

[25] This witness referred to two school reports for Grade 3 and Grade 4 for the years 2019 and 2020 respectively. In both instances, his results were described as good and that he worked well in all his basic subjects.

[26] During the interview conducted and tests performed, the behaviour of the minor child was such that it was noted that he has difficulty with attention and effort. He tends to give up easily and required motivation to continue with tasks that he finds challenging. The majority of tests indicated an average performance, although in some instances there were low average performances. The witness concluded that the overall intellectual functioning of the minor child fell within the average range. There were however variations across different areas of his cognitive abilities.

[27] This witness also noted that there is no indication that he could objectively postulate his pre-accident learning potential with any level of certainty.

[28] It was noted that both his parents completed Grade 12 and his mother also completed a certificate in health and management.

[29] Using this information, the expert concluded that it would be appropriate to reason that the minor child had the potential to progress in a mainstream school, pass Grade 12 with a degree admission. As funding has now become available for tertiary education of socially economically disadvantaged learners, he would have probably completed at least a three-year bachelor's degree in a field of choice resulting in a NQF level 7 qualification. He noted that in current South Africa, many children achieve higher education levels than their parents which means that their educational level and social economic status are not necessarily a good indication of the child's pre-morbid academic achievement. As far as his post-accident learning potential is concerned, he stated in his report that since the time of the accident, he has not failed or repeated any

grades. The school however, according to his father, has raised concerns about his challenging behaviour.

[30] In paragraph 9.2 of this expert report, which was accepted into evidence as exhibit C, he concluded as follows:

“According to educational testing, Kutlwano’s performance on English reading, spelling, written expression and basic numeric reasoning does not match the marks reflected in his school records. He urgently needs intensive remedial intervention and learning support to bridge the learning gaps. However, it is also important to note that these learning gaps cannot be solely attributed to the accident in question. The causation is a combination of factors that inter alia the accident sequel and Covid-19 pandemic to Kutlwano’s educational progression. (sic) The traumatic progression of an accident is also likely to impact learning and skill acquisition.”

[31] This witness then refers to the reports of the various other experts and stated that it appears that the minor child suffers from significant traumatic stress symptoms which can have a long-term effect on his educational prospects. The emotional experience of psychological trauma can have a long-term cognitive effect. The hallmark symptoms of trauma involve alterations to cognitive processes such as memory, attention, planning and problem-solving.

[32] When all relevant information is considered, the expert’s assessment results suggested that the accident has brought about permanent left big toe amputee pain and significant psychological sequelae. The above variables would continue to interfere with his capacity to adequately cope with schooling demands.

[33] He concluded that the minor child's future academic progress will be determined by the extent and quality of psychological and medical intervention he will receive. The current results suggest that he will not be able to actualise his pre-accident potential. With relevant support/intervention, the minor child will probably achieve a low-level matric and be constrained to completing a one-year certificate at a college, resulting in NQF level 5. He then refers to the opinion of the occupational therapist for work suitability and ability. He also deferred to an industrial psychologist for more information on his post-accident career prospects and earnings.

[34] Towards the end of the evidence of this witness, he was referred to the 2021 school reports of the minor child, pertaining to the first two terms. These school reports were not available when he compiled his report and were handed in as exhibit D. According to these reports, the minor child's performance at school significantly dropped from 2020 to 2021. It was noted by a teacher that the minor child was capable of much better work. The expert explained the sudden drop in results as a manifestation of the problems he alluded to in his report.

[35] It should be noted that the deterioration of the marks of the minor child came about after his further accident which took place on 2 December 2020. Reference was earlier also made to the possible negative effect the Covid19 pandemic could have had on the minor child's performance at school.

[36] The next witness called was Ms Buthelezi, an occupational psychologist. She assessed the minor child on 9 February 2021. The purpose of her report was to comment on the effect of any injuries on the minor child's functional ability and to discuss additional assistance, special and adapted equipment and adaptations

needed. She deferred to the other experts and accepted the cognitive and/or perceptual limitations, emotional difficulties and psychological sequelae that could interfere with the minor child's occupational difficulties. She also recommended immediate and intensive occupational therapy.

[37] She noted that the minor child had no history of delayed cognitive or developmental milestones. He was a healthy baby who achieved all his developmental milestones around the same ages as his peers.

[38] She noted his current physical symptoms to be occasional pain in the left big toe, aggravated by cold and inclement weather; as well as when wearing a closed shoe for prolonged periods. He has impaired balance. With reference to cognitive limitation, she noted concentration difficulties. According to her, the minor child has impaired proprioception and balance reactions in his left lower limb but no pain in the big left toe was elicited or reported on the day of evaluation. As far as his neurological functioning was concerned, the clinical observation pointed to normal limits. In her report she repeats the findings of the other experts and stated that the best case scenario would be for the minor child to obtain Grade 12 certificate pass and a one-year college certificate that will enable him to enter the open labour market as a skilled/ semi-skilled worker as indicated by Mr Kubheka, the educational psychologist.

[39] It should be noted that this is not a motivated opinion as far as this finding is concerned. It is rather an acceptance of the view of Mr Kubheka.

[40] She then continued to explain which kind of careers the minor child would not be suited for as a result of his balancing and toe problems. This, she opined, would limit his career choices and would bring him within the category of being

subject to supportive and /or sympathetic employment where his limitations would be tolerated and/or accommodated.

[41] She also referred to the accident during December 2020 when the minor child was hit by a taxi, but stated that he has reportedly fully recovered from the injuries sustained in that collision.

[42] The last witness called was the industrial psychologist, Ms Fakir. The purpose of her report was described as to determine the extent and impact of the accident related injuries on the minor child's physical and cognitive functioning in order to predict his current and future work prospects and earning potential.

[43] This witness also relied on the findings of the educational psychologist who predicted the level of education which the minor child would have in all likelihood achieved, the so-called pre-morbid career path, against the post-morbid career path. She also referred to the second accident but made no findings in this regard. Her report, to a large extent, repeats all the findings of the other experts, which in itself repeated information from others.

[44] The witness omitted the administration of psychometric assessment. She however opined with reference to Mr Kubheka's opinion with regards to the minor child's pre-accident schooling potential, and considering that finances for studying would be available, that he would have been able to pursue a four-year degree of his choice. After having completed his tertiary qualification, he would have then been able to enter the open labour market after a period of 6-12 months. The witness then applied the Paterson Scales to predict his entry level at Paterson B3/B4 level and a career ceiling at Paterson D1+ earning level.

[45] As far as the post-accident, the witness also accepted the views of all other experts and concluded that it is apparent that the minor child has suffered some physical difficulties that are indirectly affecting his emotional state and cognitive functioning. All of these combined will in future impact on his emotional state and cognitive functioning. She then placed reliance on the prediction of Mr Kubheka's opinion that the minor child will, post-accident, probably achieve a low level grade 12 and a one-year certificate from a college, resulting in an NQF level 5 qualification. She then opined that he is likely to enter the open labour market and earn at the lower quartile of the semi-skilled informal level. He would have later entered the corporate sector and would have reached his career ceiling at Paterson B3 to B4 level.

[46] The opinion of the industrial psychologist is limited as she applied the views of others and then applied the Paterson Scales.

[47] All of this information was then provided to an actuary who did the actuarial calculations. The pre-accident and post-accident figures were calculated. As far as contingencies are concerned, 25% was deducted from pre-accident earnings and 40% from post-accident earnings. It was noted in the actuarial report that contingency deductions typically make allowance for: (1) loss of earnings due to illness; (2) savings in relation to travel to and from work and (3) risk of future retrenchment and resultant unemployment.

[48] The end result of the calculation was that a net loss of earnings in the amount of R 5 411 949.00 was calculated by the actuary. This amount was claimed.

[49] General contingencies are a matter for a court to decide. It is a discretionary finding. Any discretion can only be exercised with reference to accepted

evidence. From there onwards, arbitrary considerations will play a part. Courts have however used a half a percentage per year up to retirement age which calculates to about 25% as far as a child is concerned. See: *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (A). A contingency percentage is also applied on the post-accident earnings; normally at a higher percentage than the pre-accident figure. These contingency figures can have a marked effect on the final amount of damages awarded.

[50] The determination of a contingency remains highly speculative. Arbitrary consideration must inevitably play a part. See: *Goodall v President Insurance Company Co Ltd* 1978 (1) SA 389 (W). But, it is a known fact that in this country, the unemployment rate has sky rocketed. Even graduates find it difficult to obtain employment. In my view, the normally accepted contingency percentages should be used with caution. At least some evidence should be presented to court by an appropriately qualified expert in this regard. Only then can the guess work start. Evidence should explain if and why a different contingency percentage should be applied between pre-accident and post-accident calculations.

[51] The evidence in this matter revealed that the minor child was in a motor collision when he was 6 weeks old. He made a full recovery save for the amputation of the front portion of his toe. His development was normal and within accepted milestones. Nothing indicated any form of brain injury that affected his cognitive functioning. Dr Segwapa, a neurosurgeon, opined that he had no neuro-physical or neuro-cognitive impairments. As far as loss of amenities of life is concerned, the doctor opined that this was lost for about six

weeks. He performed well at school and passed grades 3 and 4 with compliments being noted by teachers on his school reports. He would have been 9 and 10 years old doing these grades, which were the same amount of years after the collision. He partook in soccer and enjoyed playing with his friends.

[52] Summons was issued during 2012 and he was, during the earlier part of 2021, sent to various experts to assess his injuries and its sequelae. Importantly, this was after he had suffered a further traumatic event. He was hit by a taxi and broke his collar bone. He was rendered unconscious for a short period. Not one of the experts opined what the effect of this collision and injuries suffered by the minor child would have been. Fact is however, after this second accident, the marks on his school report dropped considerably. Why would that have been the case? The extent and difficulty of the work in grade 5 could not have changed so suddenly, rendering the minor child incapable of keeping up. These were during the Covid19 times and it was suggested by the expert that this could have contributed to his bad results.

[53] It was expected of the plaintiff to prove, on a balance of probabilities, that the injuries sustained by the minor child during the collision mentioned in the particulars of claim, as well as the sequelae of these injuries, caused his diminished earning capacity. In my view, this the plaintiff has failed to prove as the experts called by the plaintiff relied too heavily on inference and speculation to support the claim of the minor child.

[54] Expert evidence must be evaluated in accordance with the principles enunciated by the Supreme Court of Appeal in *Michael and Another v Linksfield*

Park Clinic (Pty) Ltd and Another [2002] 1 All SA 384 (A), paragraphs 34-40. At paragraph 34 of this judgment, it was found as follows:

“...As a rule that determination will not involve considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning, preparatory to the court’s reaching its own conclusion on the issue raised.” And at para 36:

“That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are found on logical reasoning.”

[55] In my view, the evidence of the clinical and educational psychologists is too speculative to accept. Ms Matlou conceded that there was no evidence before the accident available to assess the possibility of cognitive difficulties before the collision. The minor child was just too young when the accident occurred. Without the benefit of such history, it is unclear how she could conclude that the accident caused emotional difficulties whilst the minor child was doing well in school and played soccer with his friends despite his disfigured toe, which on the evidence, healed well. His emotional difficulties were, in any event, limited. He had an attention problem and was lazy at times. He banged at doors but it is unclear whether this happened before or after the second accident. The question can rightfully be asked whether his behaviour is such that it cannot be expected of any other child faced with high emotions, for whatever reason. With regards to the allegations of bedwetting, it had not been considered whether there could have been other causes for such behaviour. The court was not provided with any evidence of when this behaviour started and for what

other reasons such bedwetting was sometimes found in children. The court is not convinced that it was related to an accident which occurred when the minor child was still *non compos mentis*.

[56] The educational psychologist, Mr Kubheka, relied heavily on the report of Ms Matlou and concluded that the minor child would have passed grade 12 with a degree admission and would have obtained a degree. He never considered what percentage of children with grade 12 and a degree admission, have access to sufficient funding to obtain tertiary education and what percentage manage to go to university and actually complete their degrees. It was merely accepted that the minor child would have obtained a degree just because the minor child's parents both obtained matric and his mother obtained a certificate after matric. His reason being that children normally outperform their parents. This statement was not supported by any further evidence or reference to academic writing or statistics. This may be the case, but it remains speculative as children are all different. Some children within the same family outperform others. The court is acutely aware that the entire process of predicting the future has an element of speculation, but if evidence can be led to assist a court to determine a likely outcome, such evidence should be led. It is not helpful to a court if all evidence presented is only and exclusively aimed at the best scenario for the injured victim.

[57] The educational, occupational and clinical psychologists all recommended remedial intervention in the form of psychological and medical intervention. It was opined that the minor child's future academic progress will be determined by the extent and quality of such intervention. This makes sense as the

mentioned sequelae was emotional leading to neuro-cognitive difficulties as opposed to a physical injury to the brain. Despite this it was not explained, or properly explained, to what extent such remedial intervention could have resulted in the minor child achieving in line with his full potential.

[58] The court has not been convinced and the plaintiff failed to prove, on a balance of probabilities, that the injuries sustained by the minor child have diminished his future earning capacity and the claim in this regard should be dismissed.

[59] As far as costs are concerned, the plaintiff would be entitled to costs incurred as the issue of general damages was settled and an undertaking tendered. The plaintiff would not be entitled to costs pertaining to expert witnesses called to mainly prove a claim for loss of earnings and earning capacity.

[60] An order is made as per the court order attached hereto which will be marked with an "X".

**JUDGE RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG**

Date of Hearing: 11 and 12 August 2022

Date of Judgment: 24 August 2022

Appearances

For the Plaintiff:

Instructed by:

Adv. K.T. Mathopo

N.T Mdlalose Incorporated

For the Defendant :

State Attorney

Ms. Mohlonga