



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 5 April 2023

Case No. 21/50117

In the matter between:

TBM on behalf of NSM, a child

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

WILSON J:

- 1 The Plaintiff, TBM, sues in her capacity as the guardian of the minor child, NSM. She seeks damages for NSM's injuries arising from a motor vehicle collision which took place on 19 February 2018. NSM was a passenger in a car involved in a multi-vehicle collision near the Johannesburg Central Business District. In the plaintiff's particulars of claim, in which NSM is erroneously described as an adult with full legal capacity, it is alleged that NSM suffered injuries to her head and to her lower left leg.

- 2 One consequence of the head injury was said at trial to have been a mild concussion that had resulted in diffuse axonal injury. Diffuse axonal injury is a brain injury that can be too subtle to detect using imaging equipment, but may nonetheless affect a person's higher brain functions. In a child, such an injury can stunt intellectual development. It can have an insidious effect on their scholastic achievement and, accordingly, on their capacity to acquire the qualifications necessary to compete on the labour market.
- 3 Injuries of this nature, in children, are generally compensated for, where all the other requirements for liability have been met, with a lump sum for loss of future earnings. The amount awarded is representative of the difference between the child's earning capacity before the injury and their capacity after the injury, less any contingency deductions a court may decide to make.
- 4 Injuries of this nature can result in very large claims being made. This case is no exception. In his written submissions, filed somewhat prematurely before any evidence was led, Mr. Ndou, who appeared for TBM, sought an award marginally in excess of R10 million, almost three quarters of which was TBM's claim for NSM's loss of future earning capacity. Mr. Ndou also motivated for an award of R300 000 for future medical expenses and an amount of R 2.5 million for general damages.
- 5 There is good reason to believe that these figures have been inappropriately inflated. There is no indication on the papers that NSM's alleged impairment is such that an award for general damages is justified or that any award at all for future medical expenses should be made (see section 17 of the Road Accident Fund Act 56 of 1996).

- 6 Be that as it may, I need not consider the appropriate quantum of any award to which NSM may be entitled. This is because no evidence whatsoever was placed before me that NSM has actually suffered a head injury. TBM's case consisted entirely of expert evidence that assumed that a head injury had been suffered. But none of the experts was able to say that this was actually so. They relied on what they had been told, usually by TBM, who was not called to give evidence. NSM's hospital records show no indication of a head injury. No-one who treated NSM's injuries was called to testify, and no-one was called to say what actually happened during the accident.
- 7 In those circumstances, it has not been proven that NSM has suffered a diffuse axonal injury as a result of the accident. Nor has it been proven that what was presented at trial as a post-accident decline in her scholastic performance was actually the result of such an injury.
- 8 In any event, there is no evidence that there was a decline in NSM's scholastic performance after the accident. This is because the educational psychologist called to give evidence on MSM's behalf compiled her report on the basis that the accident took place on 19 February 2019, a year after it was agreed that the accident actually took place. Her report was compiled on evidence that pre- and post-dated 19 February 2019. None of the school reports to which she had regard pre-dated the actual date of the accident. Her conclusions were accordingly meaningless. I enquired whether her reference to the date of 19 February 2019 in her report might have been a typographical error (albeit one that was repeated several times). The educational psychologist vehemently asserted that she had the date of the

accident right, or at least that she had correctly recorded the date on which she had been informed the accident took place.

9 In these circumstances, nothing has been proved, and an order absolving the defendant, the RAF, from the instance must follow.

10 This outcome is in no small part due to inadequate preparation for trial on the part of both parties' legal representatives. At the outset of the trial, I was informed by counsel that the parties had settled what counsel described as "the merits" of TBM's claim. But it emerged during the trial that this could not have been true. The RAF had clearly not conceded the nature and extent of NSM's injury, because the RAF had not accepted that NSM had suffered a head injury. Mr. Ngomane cross-examined extensively on the absence of any evidence of a head injury. He argued at the close of the trial that a head injury had not been proved.

11 It ought to have occurred to the parties' legal representatives that this meant that the "merits" of the trial – in the sense of the RAF's liability to compensate MSM for her proven losses – could not have been settled. A separation of issues between liability and quantum of damages is only possible if the nature of the injuries is conceded, but the amount to be awarded to compensate for the consequences of those injuries is not agreed. Here, a critical part of the "merits" of the claim – the nature of the damage suffered – had not been conceded, and so it could not be said that the "merits" had been settled.

12 For these reasons, I do not think any costs order is justified. The trial proceeded on a wholly mistaken shared assumption. Nor do I think that the

plaintiff's legal representatives ought to be permitted recover their fees and disbursements from the plaintiff. TBM was entitled to expect a higher standard of representation than she received.

13 Accordingly –

13.1 The defendant is absolved from the instance, with each party paying their own costs.

13.2 The plaintiff's attorneys may not recover from the plaintiff fees or disbursements relating to the hearing before Wilson J between 7 and 13 March 2023.

S D J WILSON
Judge of the High Court

This judgment was prepared and authored by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 5 April 2023.

HEARD ON: 7, 8, 9 and 13 March 2023

DECIDED ON: 5 April 2023

For the Plaintiff: ML Ndou
BH Taula Attorneys

For the Defendant: T Ngomane
Instructed by the State Attorney