

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

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2018/35795

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
.....
DATE	SIGNATURE

In the matter between:-

ROAD ACCIDENT FUND

Applicant

and

**MZIZI PROMISE BONGI obo
M M**

Respondent

In re:

**MZIZI PROMISE BONGI obo
M M**

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Judgment on postponement

N Mayet AJ

A. INTRODUCTION

1. The Plaintiff, acting in her representative capacity as the biological mother and natural guardian of her minor child, M M born on [..] [...] 2007 (the minor child) sues the Defendant in terms of the Road Accident Fund Act 56 of 1996 (the Act), as a result of injuries the minor child sustained in a motor vehicle collision on 26 December 2017.
2. The matter was set down for 31 January 2023¹ and was allocated on 1 February 2023.
3. The Defendant applied for a postponement of the trial. The Plaintiff opposed the application.

B. LITIGATION CONTEXT

4. Summons was issued on 1 October 2018.² The Defendant entered an appearance to defend³ and filed a special plea and plea.⁴ Pre-trials were

¹ Initial trial date: 18 May 2020 Caselines 029-1/044-1

² Caselines 004-1; POC Caselines 013-1-6

³ Caselines 038-1

⁴ Caselines 030-1-5

held on 11 March 2020⁵ and 7 October 2021.⁶ On 14 October 2021, Oosthuizen-Senekal AJ ordered the Defendant to instruct its experts to attend to joint minutes within 10 days of service of order failing which their medio-legal reports would be excluded.⁷ The Defendant failed to comply. The medico-legal reports of the Defendants educational psychologist, occupational therapist and industrial psychologist are accordingly excluded from the trial proceedings. Plaintiff complied with the relevant case management directives⁸ and Judge Opperman certified the matter as trial ready on 19 April 2022.⁹

5. The parties informed the court that whilst awaiting allocation:
 - 5.1. The Defendant conceded 100% liability in favour of the Plaintiff;
 - 5.2. The parties had agreed on the amount payable in respect of the claim for general damages; and
 - 5.3. An undertaking for the minor child's future treatment and ancillary services in terms of section 17(4)(a) of the Road Accident Fund was to be furnished.
6. The only issue which remains in dispute is the determination of the minor child's future loss of earnings. The claim is substantial, in a total amount of

⁵ Caselines 029-7; 043-1

⁶ Caselines 029-30; 043-9

⁷ Caselines 074-1

⁸ Caselines Maier-Frawley J 0001-1; Victor J 029-30; Carlese J 029-7

⁹ Caselines 029-20; Certificate 076-1

R11 3312880.00¹⁰ of which an amount of R9 630 488.00 is future loss of earnings.¹¹

C. APPLICATION FOR POSTPONEMENT

7. A postponement is an indulgence purely within the discretion of the Court.¹² This discretion must be exercised judicially.¹³ It should not be exercised capriciously or upon wrong principles but for substantive reasons.¹⁴

8. In *Shilubana and others v Nwamitwa and others*¹⁵ the Constitutional Court held that the party applying for postponement must show good cause that one should be granted and the factors to be taken into account include:

*“whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed.”*¹⁶

9. In *Lekolwane and Another v Minister of Justice and Constitutional Development*¹⁷ the constitutional court held that the overarching approach

¹⁰ Caselines 013-6

¹¹ Caselines 013-5

¹² *Lekolwane and Another v Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC) at para 17 p284

¹³ Erasmus, *Superior Court Practice*, Vol 2, pp D1-552A,

¹⁴ *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398

¹⁵ *Shilubana and others v Nwamitwa and others* 2007 (9) BCLR 919 (CC)

¹⁶ *Shilubana and others v Nwamitwa and others* 2007 (9) BCLR 919 (CC) at 922 para E ll 12

¹⁷ *Lekolwane and Another v Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC)

of a court faced with an application for postponement is to balance the conflicting interests of the parties.¹⁸

10. Applying these principles to this application, it is necessary to assess whether the Defendant has discharged the onus demonstrating:

10.1. Good cause for the postponement,

10.2. *Bona fide* and the postponement is not for the purpose of delay;

10.3. It is in the interests of justice that the trial be postponed to ensure the proper ventilation of the issues between the parties and this justifies the interference with the Plaintiff's procedural right to proceed in having the matter finalized; and

10.4. No prejudice which cannot be remedied by an appropriate order as to costs.

11. I bear these principles in mind when considering the submissions in this application.

12. Mr Khan appearing on behalf of the Defendant, based his application for postponement on the need for the minor child to undergo treatment to enable the experts to properly assess his epilepsy prognosis in terms of his future employment. Mr Khan envisaged that the epilepsy treatment is relevant to employability and submitted that this will enable a more comprehensive determination of the extent of the minor child's

¹⁸ Lekolwane and Another v Minister of Justice and Constitutional Development 2007 (3) BCLR 280 (CC) p284

vulnerability and longevity. Mr Khan submitted that whilst compromised longevity is mentioned, there is no indication of the extent of the curtailment, and this compromises the ascertainment of the loss of future earnings. Mr Khan also referred to the uncertain concept of the minor child's "vulnerability" in the Plaintiff's industrial psychologist report.¹⁹ Lastly, Mr Khan pointed out that the discovered school reports are limited to the period between 2017-2019 and there are no recent school reports before the experts or the court.

13. Ms Davidson appearing on behalf of the Plaintiff submitted that the accident happened on 26 December 2017, and the delay in the trial proceedings is reason enough to refuse the postponement. Ms Davidson pointed out that the Defendant had sight of the expert reports and the joint minutes at least since 2020 and Defendant had not furnished a full and satisfactory explanation of the circumstances necessitating this application.
14. Ms Davidson proposed that the matter proceed on the existing medico legal reports as the matter was ready to proceed. It was her submission that the reports do not prejudice the Plaintiff as these reports are undisputed and the Plaintiff is entitled to finality of the matter.
15. The concept of good cause²⁰ requires that the Defendant provides a full and satisfactory explanation²¹ of the circumstances giving rise to this application.²² The Defendant must satisfy the court that the postponement

¹⁹ Caselines 033-73

²⁰ Ecker v Dean 1939 SWA 22, at page 23

²¹ Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 399

²² National Police Service Union v Minister of Safety and Security 2000 (4) SA 1110 para 4

is required for the proper presentation of the action and is not a delaying tactic or an attempt to evade the consequences of inexcusable dilatoriness.²³

16. It is unfortunate, but the majority of the medico legal reports before the court are based on assessments of the minor during 2018 and 2019 when he was 12 years old. The report of the Plaintiff's neurologist is dated 3 December 2019.²⁴ The report of the Defendant's neurosurgeon is dated 4 December 2018.²⁵ The report of the Plaintiff's clinical psychologist is dated 17 November 2019.²⁶ The report of the Defendant's clinical psychologist is dated 30 November 2018²⁷ with addendum 20 March 2020.²⁸
17. The Plaintiff's neurologist and the Defendant's neurosurgeon²⁹ agreed in the joint minutes that the minor child suffered a severe primary diffuse traumatic brain injury.³⁰
18. The joint minutes of the clinical psychologists agree³¹ that the plaintiff sustained a traumatic head injury in the accident which correlates to the respective assessment and supporting documentation perused. The head injury is expected to result in long-term sequelae. Cognitive difficulties exist as evident from the respective assessments. Neurocognitive, neurobehavioral and neuro-physical effects will have an impact on his

²³ Road Accident Fund v Barnard (2599/06) [2008] ZAECHC 15 (21 February 2008) para 5

²⁴ Caselines 033-1

²⁵ Caselines 033-86

²⁶ Caselines 033-24

²⁷ Caselines 033-94

²⁸ Caselines 033-118

²⁹ Caselines 045-1

³⁰ Caselines 045-1 at para 2

³¹ Caselines 045-2

learning ability and education. As he progresses through school, he will encounter academic difficulties and will struggle to cope in mainstream education due to the complexity of the work and the workload. With envisaged compromised educability, his future employment capacity will also be negatively affected. Neurocognitive, neurobehavioural and neuro-physical effects will impact his area of functioning.³²

19. The minor is currently 15 years old. The medico-legal reports are outdated³³ but there is no bar to this court accepting outdated reports. The difficulty is that any opinion of an expert must be based on facts which have been proven before the court. An opinion based on facts not in evidence has no value for the court.³⁴ A court must ascertain whether the opinions expressed by the experts are based upon facts proved to it by way of admissible evidence. With this principle in mind, a recent factual assessment of the minor child must inform the evidence on which the expert report is based. This is because in a trial action *‘It is fundamental that the opinion of an expert must be based on facts that are established by the evidence and the court assesses the opinions of experts on the basis of “whether and to what extent their opinions advanced are founded on logical reasoning”.* It is for the court and not the witness to determine whether the judicial standard of proof has been met.’³⁵

³² Caselines 045-2

³³ Caselines 033-123 Addendum Defendant’s clinical psychologist dated 20 March 2020

³⁴ *PriceWaterhouse* fn 3 above para 99.

³⁵ *MV Pasquale della Gatta; MV Filippo Lembo; Imperial Marine Co v Deiuemar Compagnia di Navigazione Spa ZASCA* 2012 (1) SA 58 (SCA) paras 25-27. See also *Michael & another v Linksfeld Park Clinic (Pty) Ltd & another* 2001 (3) SA 1188 (SCA) paras 34-40.

20. There is little evidentiary value in the court having regard to medical assessments conducted on the minor child three years ago.³⁶ This is of particular concern when having regard to the joint minutes of the clinical psychologists which states that the minor child's neurological deficits are likely to manifest and worsen as time progresses.³⁷ The Plaintiff's neurologist notes the minor child's condition will stabilize after a period of seven years.³⁸
21. Recent facts are not before this court, and as the supreme court in *MV Pasquale* held: *'[T]he court must first consider whether the underlying facts relied on by the witness have been established on a prima facie basis. If not then the expert's opinion is worthless because it is purely hypothetical, based on facts that cannot be demonstrated even on a prima facie basis. It can be disregarded.'*³⁹ As the Upper Guardian of the minor child, it would not be in the minor child's best interest to finalise the case on the basis of the current medico-legal reports presented.
22. The prejudicial consequences which flow to the minor child in the event that the trial proceeds without updated medico-legal assessments, far outweigh any benefit as this matter is concerned with compensation which requires a just and equitable remedy.

³⁶ *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH 1976 (3) SA 352 (A) at 371F-H '... an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness.'*

³⁷ Caselines 033-32; 045-2

³⁸ Townsend report at para 10.3.1.2 Caselines 033-7

³⁹ *MV Pasquale* fn 1 above para 26.

23. Fresh medico legal reports are needed to serve the best interests of the minor child and avert any possible claim of negligence against the legal representatives.
24. It is therefore in the interests of justice that the postponement be granted to enable full and proper ventilation of the issues between the parties at trial.
25. In *AG Petzetakis International Holdings Limited v Petzetakis Africa (Pty) Ltd*⁴⁰ the court held that a standard way to mitigate prejudice to the other parties, particularly one requested at the last minute, is to offer or to be ordered to pay the costs of the postponement. The Defendant has tendered the costs of the postponement.

D. Order and Costs

26. In exercise a courts duty as an upper guardian of a minor, I have considered factors such as the socio-economic circumstances of the minor child⁴¹ and the current duration for a new court date in this Division. I have had regard to the provisions of the Uniform Rules of Court as well as the interests of the minor child and the courts obligations in terms of section 173 of the Constitution, regarding the interests of justice.

⁴⁰ *AG Petzetakis International Holdings Limited v Petzetakis Africa (Pty) Ltd* 2012 (5) SA 515 at 519A

⁴¹ *Hlatshwayo v Road Accident Fund, Mpumalanga Division case 3242/2019*, unreported case dated 24 January 2023 Plaintiff first pay for the minor child's treatment and remedial schooling and then claim the monies back from the Road Accident Fund, which is currently not functioning optimally

27. In exercising my discretion regarding costs, I have taken into account the Defendants delay in approaching the court for a postponement and raising its concerns, specifically in light of its social obligations to victims of motor vehicle accidents.

28. Having heard counsel for both parties and having considered the papers, in accordance with of the order attached to this judgment, the following order is made:-

1. Plaintiff to receive 100% of her agreed or proven damages.
2. By agreement between the parties, the Defendant is ordered to pay to the Plaintiff an amount of R 1 000 000.00 (one million rand only) in full and final settlement of the Plaintiff's claim for general damages with link number: 4370197. Payment to be made to the Plaintiff's Attorneys of record within 180 days, by payment into their trust account.
3. The Defendant is ordered to furnish the Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for the costs of the future accommodation of M M (hereinafter referred to as "the minor") in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him, the treatment of the epilepsy and the placement of the minor child in an appropriate LSEN school, arising out of the injuries sustained by him in the motor vehicle collision of 26 December 2017, after such costs have been incurred and upon proof thereof.

4. In terms of the statutory undertaking referred to in paragraph 3 above, the Defendant shall pay:-

4.1 the reasonable costs of the creation of the Trust referred to in paragraph 5 below and the appointment of the Trustee;

4.2 the reasonable costs of the furnishing of security by the Trustee;

4.3 the costs of the Trustee in administering the minor's estate, as determined by Section 84(1)(b) of the Administration of Estates Act 66 of 1965, as amended, according to the prescribed tariff applicable to curators;

4.4 the costs of the Trustee in administering the minor's Estate and the costs of administering the Statutory Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, as determined by the Administration of Estates Act, 66 of 1965 as amended, limited to the prescribed tariff applicable to a Curator Bonis, as reflected in Government Notice R1602 of 1st July 1991, specifically paragraphs 3(A) and 3(B) of the schedule thereto.

5 The Plaintiff's claim for loss of earnings is postponed *sine die*, and on the following terms:-

5.1. The Defendant shall ensure that the minor child is assessed by a treating Neurologist for therapeutic intervention within 30 (thirty) days from the date of this order;

5.2. A case manager shall be appointed by the Defendant within 30 (thirty) days from the date of this order for purposes of monitoring the minor child's progress therapeutically and academically as well as to monitor that the minor child's medical needs are being met;

5.3. The Plaintiff shall endeavour to obtain any reasonable and available hospital records and/or clinical notes and/or prescriptions arising from the treatment of the minor child's epilepsy on or before 31 March 2023;

5.4. The Defendant shall furnish the Plaintiff with copies of the treating Neurologist's clinical notes on or before 30 June 2023;

6.1 The Plaintiff shall furnish the Defendant with updated addendum medico-legal reports, if any on or before 28 July 2023;

6.2 The Defendant shall furnish the Plaintiff with updated addendum medico-legal reports from its Neurologist and/or Neuropsychologist on or before 30 August 2023, if it intends to file such addendum reports;

4 Should either party fail and/or refuse to comply with the time periods above, the Plaintiff shall be entitled to approach her Ladyship Acting Justice Mayet to hear this matter.

5 That the Defendant will pay the agreed or taxed party and party High Court costs of the action up to and including the date on which this draft is made an order of the above Honourable Court, such costs to include:-

5.1 the costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 1 above;

5.2 the trial costs up to and including 2 February 2023;

5.3 the costs of the Plaintiff's expert reports. Such experts to include, but not limited to Dr. Townsend, Dr. Makua, Ms. Da Costa, Ms. Mattheus, Ms. Fletcher, Ms. Leibowitz, and Mr. Loots, if any as may be agreed or allowed by the Taxing Master; and

5.4 the Plaintiff's attorneys shall serve the notice of taxation on the Defendant's attorneys and the Defendant shall make payment of the taxed costs by the end of the month following the month in which the costs are taxed or settled, failing which the Defendant shall be in mora.

N. Mayet

Acting Judge of the High Court: Johannesburg

This judgment was prepared and authored by Acting Judge Mayet. It is handed down in open court on 02 February 2023 and electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 02 February 2023.

HEARD ON:

01 February 2023

DELIVERED ON:

02 February 2023

For the Plaintiff:

Mrs. N. R. Davidson (082

498 2567)

For the Defendant:

Mr. Khan (071 167 0671)

(State Attorney)

Instructed by

Road Accident Fund –

Johannesburg

