

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

IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG, PRETORIA

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED.

CASE NO: 58203/2013

15/5/2018

In the matter between:

L MPHAHLELE obo K MPHAHLELE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MOLOPA-SETHOSA J

[1] The plaintiff has instituted an action against the Defendant for damages arising out of a collision which occurred on 5 September 2011 between a motor vehicle with registration letters and number [...] ("the insured vehicle"), there and then being driven by one M J Dipuahe ("the insured driver") and the plaintiff who was a pedestrian at the time of the collision. The action was initially instituted by the plaintiffs mother, Ms Lorraine Mphahlele, on the plaintiffs behalf as she was a minor at that stage, but was substituted for the plaintiff in 2015 when plaintiff reached the majority age.

[2] As a result of the collision in question, the plaintiff sustained the following

bodily injuries, inter alia:

- [2.1] Left mandible fracture;
- [2.2] Haemorrhage of left cerebellar peduncle pneumocephalus;
- [2.3] Severe concussion; Fracture of the left wall of the sphenoid sinus.
- [2.4] Bled from ears and face; Fracture of the left mastoid air cells
- [2.5] Head injury (moderately severe) (Glasgow Coma Scale recorded as 9/15)
- [2.6] Fracture of the left orbital wall.

[3] The defendant has conceded 100% liability. When the matter came before this court for hearing on the quantum of damages, the parties had reached an agreement, in terms whereof the defendant agreed:

- [3.1] to pay the plaintiff 100% of the plaintiff's proven or agreed damages.
- [3.2] to provide an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act, 56 of 1996("The Act"), in respect of the plaintiff, wherein the defendant undertakes to pay the plaintiff's costs in respect of future accommodation in hospital or nursing home, or treatment of or rendering of a service or supplying of goods to the plaintiff arising out of the injuries sustained by the plaintiff in the collision aforesaid.

[4] The defendant has already paid R700 000.00 interim payment in terms of Rule 34A of the Uniform Rules of Court.

[5] The only outstanding issue which remained for adjudication related to the plaintiff's loss of earning capacity, a loss of past earnings and future earnings, and General Damages. The amount for loss of earnings was calculated by an actuary, Johan Sauer, using salary scales postulated in the medico legal report compiled by Dr A C Strydom, an Industrial Psychologist, dated 04 September 2015, following consultations with the plaintiff and references to a wide range of sources, including the medico legal report of Lida Moller, an Educational Psychologist, dated 21 May 2015.

[6] The parties have agreed that for purposes of the argument for the award

of general damages and loss of earnings, the reports filed by the experts in terms of Rule 36(9)(a) will be accepted as evidence before court and that there is no need to call all expert witnesses specifically. The only expert reports that served before court were those filed by the plaintiff. The defendant has not filed any expert reports.

[7] The main contention between the parties is whether the plaintiff's scholastic difficulties can all be attributed to the factors related to the accident in question. This would relate to the degree of the head injuries sustained by the plaintiff.

[8] The plaintiff, who was born on 28 March 1997, was 14 (fourteen) years old and in Grade 7, and was a pedestrian when she was injured when a truck passing her, carrying poles, lost some of the poles which hit her, amongst others against her head on the left hand side. The insured vehicle attempted to overtake a car in front of it, and had to return to its lane because a vehicle was approaching from the front. Apparently the plaintiff was rendered unconscious when the pole hit her.

[9] The following medical reports reflecting the injuries sustained by plaintiff, the *sequelae*, and damages suffered were filed on behalf of plaintiff:

Practitioner

Dr J H Kruger	Neurosurgeon
Dr J W Callaghan	Ear, Nose and Throat Specialist
Me T Pretorius	Audiologist
Prof R Lurie	Maxillo facial and Oral Surgeon
Me E Kingsley (Rita van Biljon)	
Me L Moller	Educational Psychologist
Me R du Plessis	Neuro Psychologist
Dr A C Strydom	Industrial Psychologist
Mr J Sauer	Actuary

[10] Dr J H Kruger, a neurosurgeon, in his report dated 22 October 2014 summarised the plaintiffs injury as follows:

" Moderately to severe diffuse axonal head injury with a base of skull fracture. "

Relevant to the serious injury and narrative test he remarked:

" From a neurosurgical perspective, the diffuse axonal head injury of this patient did not result in a whole person impairment rating of more than 30% and therefore the narrative test does apply.

By making use of the narrative test, a whole person impairment of more than 30% may be reached. "

[11] The plaintiff is thus entitled to general damages. The defendant does not dispute that the plaintiff is entitled to general damages; however the amount to be awarded for general damages is in issue. Counsel for the plaintiff submitted that the court should award R1 000 000.00 (one million rand) for general damages, whereas counsel for the defendant submitted that the court should award R600 000.00 (six hundred thousand rand) for general damages. Both counsel referred the court to various authorities/cases in support of their respective cases. I deal with the issue of general damages below.

[12] According to the report of Dr Callaghan, Ear, Nose and Throat specialist, dated 4 May 2015, the plaintiff was hospitalised after the accident firstly at the Taung Hospital, where she was treated conservatively, and transferred the same night to Tshepong Hospital, where the fractured mandible was attended to by wiring the teeth together together to reduce the fracture. She was released from hospital after three weeks on crutches. She has to walk with crutches for approximately six weeks.

[13] Ms E Kingsley, an Occupational Therapist recorded in her report dated 19 May 2015 that, a CT-brain scan indicated a haemorrhagic contusion of the left middle cerebella peduncle and analgesics and antibiotics were administered. Three days after the accident plaintiff required maximum assistance to get into sitting. Five days later she was responsive and aware of her surroundings, but still confused.

[14] Ms R Du Plessis, a counselling Psychologist reported in her report dated 20 October 2015 that the plaintiff apparently had to use a wheelchair for about two weeks after the accident. Both her hands were trembling and she could not feed herself for about two weeks. She was on nappies, and her legs were shaking. Stiches were applied to plaintiffs upper lip, and that she was referred to a dental clinic, and she underwent occupational therapy.

SEQUELAE

[15] Subsequent to the accident the plaintiff presented with the following *sequelae* , [as recorded by various experts who consulted with her]:

- [15.1] Classical muscle tension headaches;
- [15.2] Loss of short-term memory as well as lack of concentration;
- [15.3] Loss of vision in left eye;
- [15.4] Painful molars bilaterally;
- [15.5] Backache.
- [15.6] A mild loss in the left ear and a mild sensory neural hearing loss in the right ear.
- [15.7] Due to the fracture through the sphenoid sinus plaintiff has 80% chance of developing life threatening meningitis over the next ten years.

[16] Ms Moller and Dr A C Strydom, an Industrial Psychologist state in their respective reports that the plaintiff was an individual with promising potential. She probably would have been able to complete Grade 12 and thereafter be able to obtain tertiary studies (NQF 6). After studying towards a three-year diploma, she

would have entered into the labour market at B3/4 median, as her career ceiling in her mid-forties. After reaching her carrier ceiling, she would have received normal inflationary increase up to normal retirement age. Her pre-morbid retirement age would have been 65 years.

[17] The medical experts reported that the plaintiff was involved in an accident (first accident), when she was in Grade 1. That she could not complete Grade 1 in the year and re-entered the next year in Grade 1, whereafter she reported no failures at school. Ms Du Plessis records that Mr N C Mothibi reported in a letter dated 14 March 2013 that plaintiff was an above-average learner prior to the accident.

[18] Ms Moller states as follows in her report:

“With the identified learning difficulties present (arithmetic speed, higher cognitive problems, memory problems and visual motor integration) and injuries obtained in the accident (brain injury) it seems as if her post-accident performance and learning is challenged due her injuries. The accident also caused trauma, loss and emotional problems. She is rendered a vulnerable individual post-accident. She needs alternative educational placement, as she is not able to cope in main stream school any more. Her level of education and various employment possibilities are now limited. She will probably not be able to complete beyond Grade 10 if she remains in her current school environment. As an adult of 18 years she is better suited for enrolment at a PET College where she can receive vocational training with her post-accident problems and limitations taken into consideration. She will be better suited to work in a structured environment under supervision.

The writer is of the opinion that the accident under discussion caused learning difficulties and limited her level of education and work possibilities. She suffered a significant loss of income...

[19] Ms Du Plessis states as follows in her report:

"In her conclusion it is submitted that Ms Mphahlele presented with inconsistencies in some of the mental processes underlying her cognitive functioning. These examples of behaviour, especially with regard to sustained attention and working memory ability, can be partially associated with the outcome of the injury she had sustained in the accident. In my opinion the cumulative effect of the head injury she has sustained in Grade 1 and the head injury in question lie at the route of her neuro-psychological profile. The inconsistencies in the mental process have negative influence on her ability to apply the cognitive potential ... Not being able to achieve according her potential has a negative impact on her emotional well-being. She presents physical difficulties relating to the outcome expected after a head injury which affected her quality of life."

[20] Ms Kingsley, the Occupational Therapist states the following:

"From a physical perspective, the writer is of the opinion that Kegomoditswe should be able to perform at least work of a light nature when entering the open labour market. "

[21] The Industrial Psychologist, Dr Strydom states:

"Kegomoditswe would in all probability remain mostly unemployed in the open labour market compared to being employed and in the event that she would be able to secure within her residual work capacity, the writer opines that her earnings probably would range between R7 300-00 and R1 2 950-00 per annum depending on the work she is able to secure plus weather she is employed part-time. ... At this stage, the writer cannot foreseen (sic) that Kegomoditswe would reach her pre-morbid potential and should be compensated in this regard."

[22] Counsel for the plaintiff submitted that the calculations and assumptions of the actuary, Johan Sauer, should be accepted; that a pre- accident contingency

deduction of 5% is realistic, given plaintiff's injuries, and the psychological *sequelae* and suggested future medical treatment anticipated for the plaintiff. Further that contingency deductions of 10% total deduction for future losses (post-morbid) are both fair having regard to the contents of the reports of the Educational Psychologist-Moller and the Industrial Psychologist-Strydom.

[23] Counsel for the defendant however differs with the plaintiff's submissions. As much as the defendant seem to accept that the plaintiff has to some degree suffered a loss of earnings and earning capacity, counsel for the defendant submitted that having regard to what is stated in the report of Ms Kingsley (the Occupational Therapist) and the report of Dr Strydom (the Industrial Psychologist), a higher contingency deduction must be applied post morbid.

[24] Kingsley has stated the following in her report:

"It is noted that Kegomoditswe has transferred to Mankuroane Technichal and Commercial Secondary School 2014. It is noted that Kegomoditswe failed Grade 10 2014 and she is currently repeating Grade 10. According to Kegomoditswe she is experiencing difficulty to concentrate in the class and to memorize information. She indicated that she is attending additional classes for Accounting, Mathematics and English."

She concludes by stating that

*"...the plaintiff's current scholastic difficulties are likely to be attributed to multiple factors **unrelated** to the accident in question."* [My emphasis]

[25] Dr Strydom as well states as follows:

"Considering the above information the writer is of the opinion that Kegomoditswe Moditswe's current Scholastic difficulties are likely to be attributed to multiple factors unrelated to the accident in question. It is noted that she transferred to Mankuroane Technical and Commercial Secondary School in 2014 and that this school is far from where she lives. She has to walk 90 minutes to and from school everyday while carrying a

schoolbag and she does not always eat a proper meal before leaving for school or during her school day. Pain (in her lower back and left knee) and fatigue as result of the long walking distance as well as poor nutrition could have a negative impact on Kegomoditswe 's ability to sustain concentration in the classroom and to perform to the best of her ability. The Psychological adjustment to another school, which focuses on technical and commercial subjects and probability of higher educational standards should also be considered when determining the reasons for Kegomoditswe 's recent decline in school performance.

It is noted that she transferred to Technical Commercial Secondary School in 2014 and that this school is far from where she lives. She has to walk 90 minutes to and from school every day while carrying her schoolbag and she does not always eat a proper meal before leaving for school or during her school day.

... the long walking distance as well as poor nutrition could have a negative impact on Kegomoditswe's ability to sustain concentration in the classroom and to perform to the best of her ability.

*The psychological adjustment to another school which focusses on technical and commercial subjects and the probability of higher education standards should also be considered when determining the reason for Kegomoditswe 's recent decline in school performances. In addition, the result of the psychosocial screening indicate that Kegomoditswe currently experiences symptoms related to stress and anxiety within the severe-range. The writer is of the opinion that these psychosocial stressors are also likely to impact negatively on her ability to function optimally at school **Multiple other factors which could be impacting negatively on Kegomoditswe's school performance".** [My emphasis]*

[26] The legal position relating to a claim for diminished earning capacity is trite. In Sanlam Versekerings Maatskappy v Byleveldt 1973 (2) SA 146 (A at

p. 150B-D Rumpff JA, states the principle as follows:

" In 'n saak soos die onderhawige word daar namens die benadeelde skadevergoeding geeis en skade beteken die verskil tussen die vermoensposisie van die benadeelde voor die onregmatige daad en daarna. Kyk bv., Union Government v. Warneke 1911 A.D. 657 op bl. 665, en die bekende omskrywing deur Mommsen Beitrage sum Obligationenrech,t band 2, bl. 3. Skade is die ongunstige verskil wat deur die onregnatige daad ontstaan het. Die vermoensvermindering moet wees ten opsigte van iets wat op geld waardeerbaar is en sou insluit die vermindering veroorsaak deur 'n besering as gevolg waarvan die benadeelde nie meer enige inkomste kan verdien nie of alleen maar 'n laer inkomste verdien. Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie."

[27] In **Dippenaar v Shield Insurance Co Ltd** 1979 (2) SA 904 (A) at 917B the same learned judge articulated the principle in the following terms:

" In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss if such loss diminishes the estate. This was the approach in Union Government (Minister of Railways and Harbours) v Warneke 1911 AD 657 at 665 where the following appears:

"In later Roman law property came to mean the universitas of the plaintiff's rights and duties, and the object of the action was to recover the difference between the universitas as it was after

the act of damage and as it would have been if the act had not been committed (Greuber at 269). Any element of attachment or affection for the thing damaged was rigorously excluded. And this principle was fully recognised by the law of Holland.

[28] I agree with the defendant's counsel that having regard to all the factors, including what is stated by the above experts in their reports, more specifically taking into consideration that *the* plaintiffs scholastic difficulties were likely attributed to multiple factors **unrelated** to the accident, as for example the fact that she had changed schools and had taken different subjects to the ones she did at her previous school; she had to travel a long distance to and from school, at times without having had a meal. These factors would surely have an impact on her performance at school, and this cannot be said to be related to the accident in question herein. I am of the view that the best way to deal with this matter is to apply higher contingencies; [higher than the contingencies suggested by the actuary-Johan Sauer and the plaintiff's counsel. Counsel for the defendant suggested a contingency deduction of 40%. In my considered view a contingency deduction of 30% will be just and equitable. The award for loss of earnings will be R5 811 940.00. From this amount the R700 000.00 interim payment shall be deducted.

[29] Defendant did not provide the court with actuarial calculations on how much loss of income the plaintiff suffered or would suffer in the future. Defendant has however accepted method of calculation by the plaintiff's actuary, Mr Sauer. I shall make an award based on Sauer's report dated 23 February 2017.

[30] In so far as General Damages is concerned, it is trite that the amount of an award of general damages must be fair. It must pay due regard to the particular facts of the case, and against the background of the relevant case law, it must leave both parties with a sense that an award has been made which is fair and justifiable, that is which is neither overly generous nor stringent.

[31] I have been referred to various decided cases by both Counsel on the various awards made in various cases where Plaintiffs were involved in cases where they had suffered, amongst others, head injuries.

[32] As stated by my brother Du Plessis J in Lyndy-Lee and RK Green v RAF, an unreported case no. 30840/00,

"awards for general damages are no more than an effort somehow, as best we can, to compensate the injured. On the same basis previous awards are no more than guidelines. A court looks at the previous awards and tries to identify cases where the losses are similar, but more serious, thus meriting higher awards than the case at hand and also at cases in which the issues are less severe meriting lower awards. Within those parameters the court slots in the case at hand."

[33] In most of these head injury cases the awards in present day values vary between R300 000.00 and R1 000 000.00. On the lower end of the parameters now relevant there are cases of head injury with less serious sequelae than in the present case.

[34] I have considered the submissions by both counsel as well as all the evidence before this court. Having regard to all the circumstances and having regard to all that is stated in the various expert reports filed on behalf of the plaintiff, it is my considered view that an amount of **R800 000.00** general damages is appropriate in the circumstances herein.

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

1. The defendant is ordered to pay the plaintiffs attorneys the sum of R5 811 940.00, (Five Million eight hundred and eleven thousand nine hundred and forty rand only), made up as set out below, by way of a lump sum payment, details of which are set out hereunder ("the capital payment");

The capital payment is made up as follows:

Past and future loss of earnings: **R5 011 940.00** (five million and eleven thousand nine hundred and forty rand only)- as determined by the court.

1.1 General damages: **R800 000. 00** (seven hundred thousand rand

only)

2. The plaintiffs attorney's trust account details are as follows:

ACCOUNT HOLDER: VZLR INC
BRANCH: ABSAVAN DER WALT
STREET

BRANCH CODE: 323345
TYPE OF ACCOUNT: TRUST ACCOUNT
ACCOUNT NUMBER: [...]

[2.1] In the event of default on the above payment, interest shall accrue on such outstanding amount at 10.50% (at the mora rate of 3.5% above the repo rate on the date of this order, as per the Practice Rate of Interest Act, 55 of 1975, as amended) per annum calculated from due date, as per the Road Accident Fund Act, until the date of payment.

3. The defendant to pay the plaintiffs taxed or agreed party and party cost, in the above mentioned account, for the instructing and correspondent attorneys, which cost shall include, but not be limited to the following:

[3.1] All reserved cost to be unreserved, if any;

[3.2] The fees of Senior Counsel;

[3.3] The cost of obtaining all expert medico legal-; actuarial, and any other reports of an expert nature which were furnished to the defendant and/or its experts;

[3.4] The reasonable taxable qualifying, preparation and reservation fees of all experts, including the cost of consultation fees with the legal teams, if any;

[3.5] The reasonable travelling- and accommodation cost, if any, incurred in transporting the plaintiff to all medico-legal appointments;

[3.6] The reasonable costs for an interpreter's attendance at court and at the medico legal appointments for translation of information, if any;

[3.7] The above-mentioned payment with regard to costs shall be subject to the following conditions:

- [3.7.1] The plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the defendant's attorney of record; and
- [3.7.2] The plaintiff shall allow the defendant 14 (fourteen) calendar days to make payment of the taxed costs.

[4] The net proceeds of the payments referred to above, after deduction of attorney and own client costs (*"the capital amount"*) shall be payable by the plaintiffs attorney to the trust which has already previously been created and is currently being administered by Rubicon Trust Company (Pty Ltd) represented by Ms. Pillay and Andre Du Toit.

[5] Until such time as the Trustee is able to take control of the capital sum and to deal with same in terms of the Trust Deed, the plaintiffs attorney of record:

- [5.1] Are authorised to invest the capital amount in an interest-bearing account with a registered banking institution in terms of section 78(2) of the Attorney's Act, 53 of 1979, to the benefit of K Mphahlele, pending the finalisation of the the Trust.
- [5.2] Shall be prohibited from dealing with the capital in any other manner unless specifically authorised thereto by the Court, subject to paragraph5.3 hereunder;
- [5.3] Are authorised and ordered to make any reasonable payments to satisfy any of K Mphahlele needs that may arise and that are required in order to satisfy any reasonable need for treatment, care, aids or equipment that may arise in the interim;

[6] There exists a contingency fee agreement; same is not valid and therefore not applicable.

L M MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

Appearances as follows:

Counsel for plaintiff: Adv: J Bergenthuin S C

Instructed by: Van Zyl Le Roux ING.

Counsel for defendants: Adv: K Mhlanga

Instructed by: Tau Phahlane Incorporated