



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 48025/2016

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

29 November 2022

Date

K. La M Manamela

In the matter between:

SHIRLEY MAMATIME KGOLE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **29 November 2022**.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] The plaintiff's minor child was injured on 17 March 2015 when she was hit by a motor vehicle whilst a pedestrian on the Monsterlus RDP Road in Groblersdal, Limpopo Province. The minor child was 11 years old at the time as she was born on 10 October 2003. She sustained injuries to the head (with loss of consciousness and hearing on both ears); right arm, right leg, neck and back. The plaintiff attributes the cause of the accident to be the negligence of the driver of the motor vehicle which collided with the minor child ('the insured driver'). The minor suffered damages as a result of the injuries sustained in the accident and/or *sequelae*.

[2] On 20 June 2016, the plaintiff caused summons to be issued against the Road Accident Fund in terms of the provisions of the Road Accident Fund Act 56 of 1996 ('the Act') for compensation in respect of the following damages suffered by the minor: past and future medical, hospital and related expenses; future loss of earnings or earning capacity, and general damages. The claim was initially in the amount of R2,2 million. The defendant denied liability and defended the claim by the plaintiff. But on 18 May 2022, the defendant's defence was struck out by the order of this Court *per* Fourie J. The order also granted the plaintiff leave to seek default judgment.

[3] On 6 October 2022, the matter came before me for hearing by way of video-link. Mr E Seima SC appeared for the plaintiff. The matter only proceeded in respect of the minor's loss of earnings or earning capacity, as the other heads of claim, including the issue of liability or merits were already finalised. The defendant amicably settled the issue of liability or merits by conceding same fully (i.e. 100%) in favour of the plaintiff. I reserved this judgment in order to reflect further on the issues whilst gratefully aided by both written and oral submissions by counsel.

[4] On 21 October 2022, I caused a request to be communicated to the plaintiff's legal representatives for purposes of finalisation of this judgment or aspects of this judgment. I requested that an actuarial recalculation be furnished of the figures proposed in counsel's written submissions, as well as a calculation (with suggested contingencies) on the basis that the plaintiff would be employed in an occupation of 'skilled to semi-skilled nature' as borne by expert opinion. I also allowed the plaintiff's legal representatives to file further submissions positing their client's legal position in respect of the expected new actuarial calculations. The request was gratefully complied with by 3 November 2022 and, therefore, within the timeframe imposed by the Court. I will deal with the revised figures or calculations, as well as counsel's further submissions, below.

Evidence and submissions on behalf of the plaintiff

General

[5] As already indicated, counsel, gratefully, has not only filed written submissions in terms of the practice directives of the Court, but has also acceded to my request for further submissions based on revised calculations suggested in my request, referred to above. But still this judgment is intended to be brief and to steadfastly avoid background material to the issues. Focus will be on the *quantum* of the minor's future loss of earning capacity.

[6] The plaintiff had filed medico-legal reports prepared by experts who had assessed the minor's injuries and their *sequelae*. These experts had also deposed to and filed affidavits to confirm their respective opinions and other contents of their respective reports, as envisaged by the practice directives of this Division and to qualify for an order in terms of Rule 38(2)¹ of

¹ Uniform Rule 38(2) reads as follows: 'The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.'

the Uniform Rules of this Court. Consequently, I allowed the expert reports, accompanied by the affidavits filed, to serve as evidence in terms of the aforementioned rule of practice.

[7] The minor is still at school and has no employment history. She completed grades R to 5 without repeating a grade. She was in grade 6 when she was involved in the accident. Following the accident the minor, reportedly, struggles at school. She would fail a term during the academic year but only to ultimately pass the grade at the end of the year albeit, with low marks. It is the opinion of the educational psychologist that the minor had the pre-morbid potential to obtain a grade 12 pass and acquire a 4-year professional degree qualification.

Expert medical opinion/evidence

[8] As already indicated above, the plaintiff's case is premised on the evidence of the expert witnesses adduced through the contents of their reports which were confirmed under oath through affidavits by the experts. The following are some of the opinions by the experts relevant for a determination to be made in this matter:

[8.1] when assessed by the occupational therapist, the minor presented with the following persistent concerns and conditions: memory problems; headaches; eye problem; restricted hearing on the right ear; pain on the right arm (during strenuous tasks), and low self-esteem. Also, physical and functional impairments or dysfunction were reported by the occupational therapist, including the following: impairments on the right eye; muscle tone dysfunctions; weakness (generalised); delayed motor proficiency, and pain (right arm and knee, left leg and low back). In the opinion of the occupational therapist, the weakness in the right hand is consistent with existence of brain injury. Further, it is also opined that the negative impact of these challenges and impairments on the minor's academic performance and vocational progression would persist. The occupational therapist concludes that the minor, due to the cumulative

effects of the identified impairments, the minor's prospects of future employment is dependent on the progression of the impairments and the degree to which she would be able to sustain any reasonable accommodation enjoyed from her future employer.

[8.2] the educational psychologist's opinions - after her assessment of the minor - include the following. The purpose of her assessment was to determine the minor's intellectual status and cognitive functioning; emotional status and academic potential; the extent to which the minor has been personally and scholastically compromised, due to the injuries and *sequelae*. Consequently, the assessment revealed deficits consistent with a history of brain trauma. Further, it is opined by the educational psychologist that the minor's young age at the time of the accident rendered her more susceptible to negative *sequelae*. In agreement with the occupational therapist, the educational psychologist is also of the opinion that the deficits and poor performance on the part of the minor are indicative of the fact that the learning impairments would always compromise her academic performance and future employment prospects. Overall, the educational psychologist is of the opinion that without the accident occurring the minor would probably have managed to function within the superior range of intelligence; could have progressed through the mainstream school system and obtained a matric qualification and, thereafter, proceeded to obtain, more likely, a 4-year professional degree. Consequently, the minor would have been employable as a skilled or professional person in the open labour market. Now that the accident has occurred, the educational psychologist opines that the minor is functioning below her age and grade level in key areas, but performs within the above average range of global intellectual functioning. Given the minor's struggles at school and performance, it is more likely that the minor will not complete her mainstream education and will quit school at grade 11 due to her post-accident impediments. In the event that the minor manages to obtain

a matric or grade 12 qualification, she would do so with low marks and, consequently, would only obtain vocational training and a two year certificate, post matric.

[8.3] the industrial psychologist expressed, among others, the following opinions in her report designed to indicate the extent to which the accident impacted on the minor's life, generally, and on her future employment prospects and earning potential. The industrial psychologist postulated the following scenarios with regard to minor's loss of earnings or earning capacity:

[8.3.1] scenario - disregarding the accident. The minor had the potential to obtain a 4-year professional degree. Armed with a degree she would have pursued her chosen career. She would then have entered the open labour market at the B4 level; reached her career ceiling at the D1/2 (upper quartile) at the age of 45 years, and would have retired at the age of 65.

[8.3.2] scenario - having regard to the accident. The minor may end up entering the open labour market with grade 12. Given her postulated academic achievement, according to the industrial psychologist, the minor is likely to be employed as an unskilled to semi-skilled worker in the informal and semi-formal sector. This would only beget her low monthly income of about R4 000 to R5 000 as a general worker, and between R21 400 and R88 000 annually in terms of the recommended minimum wage for unskilled workers. The minor will be restricted to sedentary type of work which do not require recurrent social interactions and repeated manual tasks, due to her impairments, this expert confirms the opinion by the occupational therapist. The industrial psychologist concluded that, given her deficits and the requirement to be accommodated at work, the minor will not be able to secure the required type of work in the

current highly competitive open labour market, and, thus, would probably remain unemployable as a result of her deficits.

Original calculation

[9] The report containing the original actuarial calculation is dated 8 June 2021. It was done on the basis of the industrial psychologist's opinion that the minor 'is unlikely to secure a position to accommodate her limitations and would probably remain unemployed'. The actuaries have assumed that the minor is 'unemployable'.

[10] With a contingency deduction of 15% on future (uninjured) earnings, the actuaries calculated the minor's loss of earnings as follows:

	Uninjured Earnings	Injured Earnings	Loss of Earnings
R	14 799 300	R	-
Contingencies	15%		-
<hr/>			
R	12 579 405	R	-
Total Loss of Earnings		R	12 579 405

[11] The so-called RAF Amendment Act cap is applicable to the abovementioned amount of R12 579 405 for the minor's loss of earnings. When it is applied after the contingency deduction of 15% the resulting figure or 'capped loss' is R9 645 700. The actuaries say this is a reduction of 23,32%.

[12] Counsel for the plaintiff, among others, submitted that that the calculations with regard to the possible award to the minor in respect of her loss of earnings or earning capacity be varied from the original amount of R14 799 200 to the amount of R 4 439 760.00. This was after application of suggested contingency deduction and other considerations. The motivation

for this approach was, mainly, due to counsel's consideration that it may not be completely probable that the minor would be unemployed as a result of the injuries sustained in the accident.

Revised actuarial calculation

[13] On 21 October 2022, I caused a request to be communicated to the plaintiff's legal representatives for purposes of finalisation of this judgment or aspects thereof. What was requested, essentially, was to seek that the actuaries furnish a recalculation of the minor's future loss of earnings or earning capacity on the basis of the submissions by counsel referred to above. The quest in this regard was to factor in the implications of the RAF Amendment cap and the application of the suggested contingency deduction. I also requested that the actuary furnish a calculation (with suggested contingencies) on the basis that the plaintiff would be employed in an occupation of 'skilled to semi-skilled nature' as postulated in the industrial psychologist's report.

[14] On 3 November 2022, the plaintiff's legal representatives furnished a revised actuarial calculation dated 27 October 2022 with calculations as at 1 November 2022 under two scenarios for the minor's loss of earnings:

[14.1] scenario 1 (on the basis that the minor's career and earnings would have progressed to completing a 4-year professional degree in December 2025 etc and with retirement at age 65). The contingencies applied under this scenario is 20% on future uninjured earnings and 50% on future injured earnings as follows:

	Uninjured Earnings	Injured Earnings	Loss of Earnings
Future	R 16 097 700	R1 584 700	-
Less contingencies	20%	50%	-
	R 12 878 160	R 792 350	R 12 085 810
Total Loss of Earnings			R 12 085 810

[14.2] Notably, there is an increase of R1 298 400 (i.e. R16 097 700 – R14 799 300) from the previous calculation, reflected above. I couldn't find any explanation for this considerable spike from the revised actuarial report, itself, or counsel's further submissions. The result is that the postulated pre-morbid income of R1 584 700 is wiped out aided by the 50% contingency deduction applied thereon.

[14.3] When the RAF Amendment cap is applied to the figures above, after contingency deductions, the minor's loss is in the amount of R 9 483 500. This is said to be a reduction of 21,53%.

[14.4] scenario 2 (on the basis that the plaintiff's career and earnings would have progressed to where she attains a 4-year professional degree in December 2025 and retire at age 65. Again the contingencies of 20% on future uninjured earnings and 50% future injured earnings are applied in this scenario on the capital value of loss of earnings in the amount of R16 097 700 stated as uninjured and injured earnings. The result being an amount of R4 829 310 (i.e. R12 878 160 uninjured earnings less R8 048 850 injured earnings) for the minor's total of earnings. The RAF Amendment cap does not have an impact on the claim under this scenario.

[15] As indicated above, the legal representatives were encouraged to furnish the revised actuarial calculations with written submissions. Mr Seima SC ably furnished further submissions dated 25 October 2022, which included the following:

[15.1] that, the basis of scenario 1 above is that the plaintiff would probably only be able to find a lower paying job in the future as asserted by the industrial psychologist and highlighted by the Court above.

[15.2] that, it is accepted that the plaintiff 'is not totally unemployable which proposition' as canvassed by the industrial psychologist but, that she has a residual earning capacity and might be able to secure a lower paying job in the future, possibly as asserted by the industrial psychologist, of an unskilled to semi-skilled nature in the informal and semi-formal sector.

[15.3] that, scenario 2 is widely speculative when compared to scenario 1 based on the findings in the expert reports.

[15.4] that, overall the Court is urged to adopt 'the more scientific and less speculative scenario 1' of the revised calculations.

[16] Counsel, further, relied on his earlier or main heads of argument. I have referred to the essence of these submissions above, including what prompted me to request a revised actuarial calculation. All these will be considered for purposes of the determination made.

Conclusion

[17] Given the evidence and submissions in this matter, some of which appearing above, I consider it appropriate to grant judgment in terms of scenario 2 of the revised actuarial calculations. The effect of this is that the minor child is awarded an amount of R4 829 310 as

compensation for her loss of earning capacity. This amount is fair and reasonable under the circumstances of this matter and considering that it is accepted that the minor, despite her debilitating injuries still has some residual work or earning capacity. Costs will follow this result.

Order

[18] In the premises, I make the order, that:

- 1) it is recorded that the parties have previously settled the issues relating to liability or merits at 100% in favour of the plaintiff; future medical, hospital and related expenses on the basis that the defendant shall furnish an undertaking in terms of section 17(4)(a) of the Road Accident Fund 56 of 1996, and general damages;
- 2) the defendant is to pay the plaintiff the amount of R4 829 310.00 (four million eight hundred and twenty nine thousand three hundred and ten rand) in respect of the plaintiff's claim for future loss of earnings relating to the motor vehicle accident which occurred 17 March 2015;
- 3) the amount in 2) hereof is payable into the following bank account, on or before the expiry of 180 days from the date of this order:

ACCOUNT HOLDER	: J M MODIBA ATTORNEYS
BANK NAME	: STANDARD BANK
BRANCH CODE	: 010545
ACCOUNT NUMBER	: 012400092
TYPE OF ACCOUNT	: TRUST ACCOUNT
REF	: MR PHALENG/SMK/TPC976

- 4) the defendant will not be liable for interest on the amount in 2) hereof provided that the amount is paid within 180 days from date of this order, failing which

interest at the prescribed rate of interest per annum will be payable calculated from the date on which this order;

- 5) the defendant shall pay the plaintiff's taxed or agreed costs on a High Court scale. In the event that the costs are not agreed, it is ordered that:

5.1 the plaintiff shall serve the notice of taxation on the defendant's attorneys of record;

5.2 the plaintiff shall allow the defendant fourteen (14) court days to make the said payment of the taxed costs; and

5.3 should payment not be effected timeously, the plaintiff will be entitled to recover interest at the prescribed rate of interest per annum on the taxed or agreed costs from the date of allocatur to the date of final payment.

- 6) the costs in 5) hereof will also be paid into the trust account stated in 3) above, which costs shall include the following:

6.1 senior counsel's fees, wherever employed, including reasonable preparation and appearance costs, costs of preparation of settlement memorandum of proposal to the defendant, and heads of argument including the costs of 6 October 2022, as well as costs relating to the further submissions and other activities at the instance of the Court between 21 October and 3 November 2022;

6.2 the costs of obtaining reports, joint minutes, reservation, and reasonable taxable preparation fees, if any for the following experts:

6.2.1 Prof Lukhele (Orthopaedic Surgeon);

6.2.2 Dr Dippenaar (Ophthalmologist);

6.2.3 Prof Lekgwara (Neurosurgeon);

6.2.4 Ms Gladys Maluleke (Clinical Psychologist);

- 6.2.5 Ms Zethu Gumede (Educational Psychologist);
- 6.2.6 Ms Yvonne Raganya (Occupational Therapist);
- 6.2.7 Ms Esther Sempene (Industrial Psychologist), and
- 6.2.8 Munro (Actuary).

6.3 the defendant shall also pay preparation, reasonable travelling, subsistence fee, qualifying and reservation fee (if any) of the experts subject to the Taxing Master's discretion and upon proof thereof.

6.4 the Plaintiff's reasonable travelling and accommodation costs for attending consultations with the experts as well as for attending court.



Khashane La M. Manamela
Acting Judge of the High Court

Date of Hearing	:	6 October 2022
Date of Further Submissions	:	3 November 2022
Date of Judgment	:	29 November 2022

Appearances:

For the Plaintiff	:	Mr E Seima SC
Instructed by	:	JM Modiba Attorneys, Pretoria
For the Defendant	:	No appearance