

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

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 77573/2018

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

Date: 26 September 2022 E
van der Schyff

In the matter between:

ADV A KNOETZE OBO N[...] M[...]

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

REASONS FOR THE ORDER GRANTED ON 14 MARCH 2022

Van der Schyff J

[1] A motor vehicle accident occurred on 2 September 2017, and N[...] M[...], a minor male born on 20 July 2005, was injured. His mother instituted action against the defendant in her representative capacity. The claim was timeously submitted to the Road Accident Fund. Advocate Anton Knoetze was subsequently appointed as *curator ad litem* for the minor.

- [2] The matter was enrolled for trial on 27 January 2022. The matter proceeded in the absence of the defendant despite the notice of set down being served on the defendant on 9 November 2021. The plaintiff obtained a referral to proceed with the trial as required in terms of the Practice Directive dated 11 June 2021.
- [3] The plaintiff sought an adjudication on both the merits and quantum. In light of the fact that the matter was adjudicated on a default basis, I ordered that the evidence be adduced on affidavit.
- [4] The issues of merits and the quantification of the plaintiff's claim for loss of earning capacity were separated from the claim for general damages and future medical and hospital expenses. The latter two issues were referred to a Full Court compiled by the Acting Judge President. The issue of merits and the quantification of the claim for loss of earning capacity were dealt with, and an order was handed down dated 14 March 2022. I indicated that the reasons for the order would be provided upon request from the plaintiff. I cannot recall being made aware of the fact that a request to furnish reasons had been filed before September 2022. The request for reasons, however, is dated 23 March 2022. The reasons for the order granted by me follows.

Ad merits

- [5] The evidence of Ms. M[...], the plaintiff's mother is contained in an affidavit commissioned on 10 October 2010. It is stated in the affidavit that the plaintiff was a pedestrian hit by metro police van with registration number [...] GP on 2 September 2017. Ms. M[...] related that her son was walking on the side of the road with other children. The police van approached at a high speed and knocked him down. This is the only evidence before the court relating to the incident. Although it is recorded in the accident report that: 'It was alleged that vehicle A was

travelling direction West when the pedestrian direction north ran after his ball and into vehicle A', there is no evidence before the court that disputes the evidence on affidavit. On the evidence before me the plaintiff succeeded in proving negligence attributable to the insured driver. The plaintiff is entitled to 100% of the proven or agreed damages.

Ad quantum: loss of earning capacity

[6] When a very young plaintiff is injured in a motorvehicle accident, the future economic loss the plaintiff suffers is not a loss of income. It is not the earnings that are being calculated, it is the capacity itself to earn that has been lost, and must be quantified.

[7] It is trite that any inquiry into damages for loss of earning capacity is of its nature speculative. It involves a prediction as to the future 'without the benefit of crystal balls, soothsayers, augurs or oracles.'¹ Stratford J explained:

'It [the Court] has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award.'

¹ *Hersman v Shapiro and Company* 1926 TPD 367 at 379.

[8] In the present matter, I considered the minor-plaintiff's socio-economic circumstances, his parents' and sibling's level of education and employment, the reports of the expert witnesses, his injuries, the reported *sequelae* of his injuries and the calculations done by the actuary, as guiding factors in determining a lump sum that I regarded as just and fair compensation for his capacity loss.

[9] The neurologist found that the plaintiff sustained a significant concussive head injury with an associated moderately-severe diffuse axonal brain injury. The most frequently reported *sequelae* suffered by the plaintiff are a degree of memory loss, difficulty in concentration, and a degree of behavioural change. It is apposite to state, however, that although it was reported by his grandmother that he is more aggressive after the accident, the plaintiff maintains that he still has a group of friends and his social interaction, except to an extent with his younger siblings, does not seem to be negatively affected by any mood and behavioural changes.

[10] The occupational therapist stated the following in her report:

'Considering the occupational therapy findings and documented evidence on school reports about his academic performance, it is my opinion that N[...] does not have developmental delay, sensorimotor dysfunction and cognitive and perceptual impairment that could effect his progress at school.'

She reiterated that he does not suffer from visual perceptual and cognitive difficulties, and opined that:

'It appears that N[...] would successfully complete his education and training to embark upon any work of his choice.'

- [11] The educational psychologist found that the results obtained during his evaluation did not demonstrate any significant discrepancy between the plaintiff's cognitive ability and his academic performance. She cautioned that the test results indicate 'slight vulnerabilities with regard to auditory attention abilities' which 'could impact negatively on academic performance.'
- [12] The neuro-clinical psychologist is the only expert that reports that the minor suffered a noticeable decrease in his academic performance. The report, however, reflects that Dr. Swanepoel was under the impression that the plaintiff failed grade 8. No evidence substantiates this opinion, in fact, the other expert reports reflect that the minor has not failed any grade before or after the accident. His academic performance remained consistent despite progressing to secondary school from primary school after the accident. This, however, renders Dr. Swanepoel's report less helpful.
- [13] The expert reports reflect the challenges regarding memory and concentration suffered by the plaintiff post-accident. The extent of the vulnerabilities identified is, however, that he reported that he now needs to study longer, particularly if the work is more complex. The plaintiff's available scholastic profile, and the reports of particularly the occupational therapist and the educational psychologist, do not indicate that the plaintiff suffered a major capacity loss.
- [14] The plaintiff is predominantly being cared for by his maternal grandmother and aunt. His contact with his parents is reported to be sporadic. His father is a forklift driver, his mother is unemployed, his eldest brother (26) is reported to be a cook and to do ad hoc jobs, and his second eldest brother (22) is unemployed. The evidence does not support a finding that the plaintiff was, but for the accident, set on his way to obtain a degree, or even a post-matric diploma. Having said that, the evidence indicates that the accident did not significantly detract from the plaintiff's inherent capacity and potential, and if he was able to excel before the accident and rise above his socio-economic and familial circumstances, he is still able to do so

after the accident. To cater for the vulnerabilities brought about by the accident that may impact the plaintiff's earning capacity the amount of R 750 000.00 is considered to be sufficient compensation. The amount was calculated by using the actuarial calculation postulated on the presumption that the plaintiff would not proceed with any tertiary qualification and applying a 25% contingency differential to the 'but for' and 'having regard to' the accident scenarios.

E van der Schyff
Judge of the High Court