

REPUBLIC OF SOUTH AFRICA



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

DELETE WHICHEVER IS NOT APPLICABLE:

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

19 April 2024
DATE: SIGNATURE:

CASE NR: 35419/2019

In the matter between:

KMS

PLAINTIFF

OBO PS

and

ROAD ACCIDENT FUND

DEFENDANT

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 19 April 2024

JUDGMENT

MARUMOAGAE AJ

- [1] In this case, the court is required to determine whether the defendant should be held liable to compensate the plaintiff for the injuries allegedly sustained by the minor child, PS, in the motor vehicle collision. The plaintiff is PS's mother.
- [2] If the defendant is found to be liable, the court is required to determine the amount of compensation that should be awarded regarding past medical and hospital expenses, future medical and hospital expenses, future loss of income, and general damages claimed by the plaintiff on behalf of PS.
- [3] Before dealing with this matter, it is important to point out that the Gauteng Division of the High Court, Pretoria has a high volume of Road Accident Fund matters on its daily roll. Based on the number of matters received, there are times when judges are allocated matters for which such matters are heard same day. For judges to do justice to these matters, there is a collaborative effort that is needed.
- [4] The way these cases are presented it is important as well as the full participation of all the litigants until the matter is concluded, particularly where liability has not been conceded by the defendant. To effectively do their work, presiding judges would benefit from all the relevant documents being placed before the court, including the documents and reports that substantiate the defendant's case as pleaded in the served and filed plea.
- [5] The reality is that these matters are heard by judges with varying degrees of expertise, some of whom may be acting judges with little or no experience in road accident fund matters. Irrespective of the expertise of the preceding

judge in road accident fund matters, the quality of justice must not be compromised.

- [6] Justice is unlikely to be compromised where both parties to the litigation fully participate in the process and provide the court with the necessary information and evidence that would assist in arriving at an equitable and just outcome. Most importantly, full participation by both parties would lead to the parties' respective approaches to how the relevant legal principles should be interpreted and applied to the facts being provided to the court.
- [7] However, my experience presiding over road accident fund matters is that the defendant starts positively by indicating the desire to defend these matters. It proceeds to enter a general plea which is mostly constituted of bare denials, with special pleas at times. As the matter progresses, the defendant chooses not to fully participate leading to a default judgment being requested against it.
- [8] On the hearing date, a practitioner may attend court on behalf of the defendant without any mandate to do anything. At times, there is no appearance at all. It seems to me that there is a general expectation that presiding officers should do that which must be done by the defendant when assessing claims and the quantum that should be paid.
- [9] In cases where the defendant decides not to fully participate, courts should meticulously go through all the expert reports of the claimants without any input from the road accident fund or expert reports of its own. Notwithstanding the delivered plea, there is usually one version before the court that the court must interrogate and assess whether what the plaintiff claims can be granted.
- [10] Speaking for myself, it is difficult to understand why the defendant would decide not to fully participate in the proceedings where it has not admitted liability and did not make any offer of settlement. The defendant's lack of participation disempowers the court and can lead to amounts that should not be granted, ultimately being granted.

- [11] In some cases, notwithstanding the lack of participation by the defendant, some presiding officers have found, among others, that road accident fund litigation is open to abuse¹ and the amounts claimed can be inappropriately inflated.² The defendant's full participation can assist courts in adequately assessing the claims against it.
- [12] Generally, legal practitioners try their level best to assist the process as much as they can by among others compiling heads of arguments that to some degree contextualize their clients' cases. The situation is totally different in this matter because the plaintiff's legal representatives did not provide the court with their client's heads of argument. It is not clear why heads of argument were not submitted in this matter.
- [13] Notwithstanding the general lack of assistance from the defendant on how the court should deal with the issue of compensation, the court also does not have the benefit of the plaintiff's written analysis of how the question of compensation should be approached and suggestions on the contingencies that ought to be applied.
- [14] It is advisable for the plaintiff's representatives in unopposed road accident fund matters to provide the court with a sense of comparable previous decisions from which the court can seek guidance in their heads of argument. This was unfortunately not done in this case.
- [15] In any event, in the plaintiff's particulars of claim, it is alleged that the plaintiff is the mother of the minor child, PS, who was a passenger in a motor vehicle that collided with a motor vehicle driven by a driver insured by the defendant (hereafter insured driver).

¹ See *L.N and Another v Road Accident Fund* [2023] ZAGPPHC 274; 43687/2020 (20 April 2023) para 3, where it was held that '[t]he unfortunate corollary of the RAF's litigation delinquency, is that a substantial number of legal practitioners who represent plaintiffs in this milieu of non-cooperation, abuse the processes of this court for purposes which are not beneficial to the proper functioning of the court and appear to be principally aimed at either generating fees or "engineering" default judgments. This cannot be in the interests of justice, particularly where, such as in the present instance, litigation is being conducted on behalf of a minor, of which the court is the upper guardian'.

² *T.B.M v Road Accident Fund* (21/50117) [2023] ZAGPJHC 299 (5 April 2023) para 5.

- [16] It is alleged that the accident was caused by the negligent driving of the insured driver who among others, failed to avoid the collision, when, by exercise of reasonable care, he could and should have done so. Further, the insured driver was travelling at an excessive speed and failed to stop at a stop sign thereby causing the accident where PS was injured.
- [17] It is further alleged that as a result of the accident, PS suffered serious injuries such as a fracture on the right femur, open fracture of the pelvis, head injury, soft tissue injury, abrasions, and laceration. To prove these claims, the plaintiff submitted reports by different experts which the court was urged in an open court to admit into evidence.
- [18] The first report is compiled by Dr Dannie Hoffman who is a plastic, reconstructive, and cosmetic surgeon. In his report, Dr Hoffman indicated that PS was a grade 3 learner at the time of the accident. Further, PS was taken to Bothaville Hospital, transferred to Bongani Hospital, and ultimately admitted to Pelononi Hospital.
- [19] Dr Hoffman indicated further that PS was treated at a provincial hospital and did not have to pay for medical assistance. He confirmed that PS sustained an injury on the right thigh with visible scarring and stitch marks. The scar is itchy and hypertrophic because of surgical clips. He recommended that the scar should be treated, and the costs of such treatment may be approximately R 37 000 with specialised scar plasters and treatment costing approximately R 2 500 per month.
- [20] The report compiled by Dr Kumbirai who is an orthopaedic surgeon was also provided to the court. According to Dr Kumbirai, PS is reasonably healthy with no obvious signs of systemic disease. He also confirms that PS has a scar measuring 22cm x 2cm on his right thigh. He further stated that PS continues to suffer the inconvenience and discomfort of chronic pain from the right femur.

- [21] Dr Kumbirai is of the view that PS will not be able to engage normally in activities that require prolonged standing, walking, and lifting heavy weights like he used to before the motor vehicle accident. He is of the view that the estimated cost of removing the implants on PS's right femur is R 40 000.00. He is also of the view that PS's injuries resulted in serious long-term impairment/loss of body function.
- [22] The court was also furnished with a report compiled by Ms Riska Malan, who is an occupational therapist. In this report, it is alleged that the occupational therapy findings revealed pain in PS's right hip and right thigh. Further, PS had a reduced walking speed, and a slight limp to the right side after prolonged periods of walking. He was unable to maintain the squatting position or to lift objects that weighed more than 14.5 kg.
- [23] Ms Malan stated further that PS is not expected to ever cope with very heavy work due to his accident-related limitations. Further, PS is expected to be able to perform sedentary, light, and medium physically demanding work in the future where he can alternate sitting, standing, and walking. Further, he is expected to battle with heavy or strenuous jobs. It was found that PS is not expected to progress to work beyond the low semi-skilled level in future jobs.
- [24] A report from a clinical psychologist, Ms Angela Molohe was also provided to the court. In this report, it was found that PS is often anxious around cars and the streets. When clinically assessed, PS showed difficulty in alertness, focus, attention, and concentration skills. He showed cognitive difficulty in restructuring unfamiliar circumstances.
- [25] Ms Molohe found further that PS is emotionally and socially withdrawn in social settings. Further, PS's psychometric performance, clinical assessment, and accompanying school progress results indicate a low average level of scholastic performance. The results of the clinical interview and psychometric tests conducted on PS indicate prominent and significant symptoms of anxiety and post-trauma due to the motor vehicle accident.

- [26] Ms Molohe also established that PS seems to be very self-conscious of the prominent large scar on his right thigh and resorts to wearing long pants to hide it. She opined that the reduction of the scar through a plastic surgery will ultimately bring psychological relief to PS.
- [27] Ms Molohe recommended that PS should undergo individual psychotherapy to treat anxiety and post-traumatic symptoms that she observed. Further, PS should attend family therapy sessions and undergo plastic and reconstructive surgery. She also expressed a view that PS should be compensated for the injuries sustained.
- [28] The report of the educational psychologist, Mr Lazarus Kgwete was also provided to the court. This report indicates that PS repeated Grades 2 and 4. While his mother passed Grade 12, his siblings and the deceased father did not make it passed Grade 10. From the test that he conducted, Mr Kgwete found that PS's vocabulary and ability to spell and write to be very poor.
- [29] Mr Kgwete also established that PS performed below his educational and grade level in some of the tests to which he was subjected. Mr Kgwete also noted that PS's intellectual assessment indicated that his intellectual functioning is within the low average range. Further, after the accident, PS became a slow learner.
- [30] It was pointed out that premorbid, PS had the potential to achieve a Grade 10 pass followed by TVET-type education to obtain an occupational certificate on NQF levels 4 and 5. Postmorbid, the reported emotional difficulties and poor self-confidence relating to scarring which were not managed have exacerbated PS's learning difficulties. Mr Kgwete opined that post-morbid, PS will benefit from special school placement where he can learn basic vocational skills.
- [31] The report of an industrial psychologist, Ms Hamilton was also furnished to the court. Ms Hamilton noted that PS appears not to have suffered any impairment or any other condition that would have prevented him from doing

any kind of work for which his educational background would have made him suitable. She also found that the combined impact of the residual physical and psychological pathology arising from his involvement in the accident is having a restrictive impact on his cognitive functioning. PS is no longer expected to be able to achieve his likely premorbid academic ceiling.

[32] It was also pointed out that PS will likely enter the open labour market with a low level of education, which will restrict him to employment of an elementary and unskilled nature. PS is expected to experience longer periods of unemployment when entering the open labour market. He will probably always be required to over-exert himself to some extent in any job that he manages to secure. This will result in increased pain and discomfort leading to a decline in overall performance and efficiency in the workplace.

[33] Ms Hamilton opined that PS's income will probably increase steadily in real terms to approximately between the median and upper quartile earnings for unskilled individuals in all sectors probably in the region of between R 66 000 and R 72 000 as his career ceiling earnings to be reached at about the age of 40. She stated that PS has not suffered a loss of earnings to date.

[34] Concerning the loss of future earnings, Ms Hamilton opined that PS is not expected to attain his likely premorbid career ceiling. He is expected to experience longer and more frequent periods of unemployment throughout his career. PS seems to be of low average cognitive capacity, with the potential to achieve Grade 10 followed by TVET type of education to obtain an occupational certificate on NQF level 4 or 5.

[35] Finally, the court was provided with an actuarial report compiled by Mr Gert du Toit. Based on Ms Hamilton's report, Mr du Toit made his estimates on the assumption that PS was going to complete Grade 10 in 2024 and attain NQF levels 4 or 5 in 2027. Further indicated that PS's salary is likely to be R 36 828 per annum from 2028 and ultimately earn R 140 952 per annum when he reaches 45 until he retires. Based on this assumption, Mr du Toit calculated PS's income, had the accident not occurred, to be R 2 219 938 and to be R 1

201 354 having regard to the accident with the difference of R 1 018 584 being the amount of loss of income.

[36] The defendant admitted liability in this matter. It is thus, common cause that PS was involved in a motor vehicle collision from which injuries detailed by various experts were sustained. The defendant did not participate in this matter to provide contrary evidence. There is nothing that prevents me from accepting the evidence of all the above-mentioned witnesses. It is also clear to me that the plaintiff is entitled to be compensated for loss of income, general damages, and future medical expenses. No evidence supports any claim for past medical expenses.

[37] Given the fact that the matter was not defended, and the plaintiff did not bother to submit heads of argument where the question of applicable contingencies that should be applied is addressed, I will defer to the actuary on the question of fair and reasonable compensation for loss of income. I doubt that it will be proper to dispose of the issue relating to the general damages. I am of the view that the plaintiff should be given a chance to reflect on this issue and make an offer that will be considered by the plaintiff.

[38] In the results, I make the following order:

1. The Defendant is ordered to pay the Plaintiff the amount of R 1 018 584 (One Million Eighteen Thousand Five Hundred and Eighty Four Rands Only) which amount shall be paid to the Plaintiff's Attorneys, MALULEKE SERITI MAKUME MATLALA INC, in payment of Plaintiff's claim for loss of income, in full and final settlement.
2. In the event of the aforesaid amount not being paid timeously, the Defendant shall be liable for interest on the amount at the prevailing prescribed rate per annum, calculated from the 180th calendar day after the date of this order to date of payment.

3. Defendant shall pay Plaintiff's taxed or agreed party and party costs of suit to date, on a High Court scale, such costs to include – The full and direct charges of counsel employed by the instructing attorney, including:

3.1 The costs to date of this order, including the costs of the attorneys, necessary traveling costs and expenses (time and kilometres), the costs incurred attending to and preparation for settlement including the reasonable costs of consulting with the Plaintiff to consider any offer made by the Defendant, the costs incurred to accept the offer and the costs of attendance at Court for purposes of making this an order of Court;

3.2 The costs for preparing the documentation required to give effect to this order;

3.3 The costs of all medico-legal, radiological, actuarial, and addendum reports obtained by Plaintiff for the purpose of assessing quantum;

3.4 The costs of and consequent upon ensuring compliance with Caselines (time and tariff);

3.5 The costs of senior-junior counsel's charges in respect of his full day fee as well as all reasonable preparation, excluding the costs of the preparation of the heads of argument which were not submitted in this matter.

4 In the event that costs are agreed:

4.1 The Plaintiff shall allow Defendant 14 court days from the date of agreement to make payment of agreed costs;

4.2 Should payment not be effected timeously, Plaintiff shall be entitled to recover interest at the prescribed rate per annum from the date costs were agreed to, to date of final payment;

5 In the event the costs are not agreed:

5.1 Plaintiff shall serve a notice of taxation on Defendant or Defendants attorneys of record;

5.2 Plaintiff shall allow Defendant 14 court days from date of allocator to make payment of the taxed costs;

5.3 Should payment not be effected timeously Plaintiff will be entitled to recover interest at the prescribed rate per annum on the taxed costs from the date of the allocator to the date of final payment;

5 The amounts referred to above will be paid to the Plaintiff's attorneys, MALULEKE SERITI MAKUME MATLALA INC, by direct transfer into their trust account, the details of which are as follows:

Account holder: MALULEKE SERITI MAKUME MATLALA INC

Bank: STANDARD BANK

Branch Code: 010045

Account no: 010217770

Ref: MVA.1006

6 Defendant is ordered to furnish Plaintiff with a 100% undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act in respect of injuries that she sustained.

7 The issue of General Damages is postponed *sine die*.

C MARUMOAGAE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

Counsel for the applicant: Adv M Upton

Instructed by: Maluleke Seriti Makume Matlala Inc

Counsel for the respondent: Mr Mostert

Instructed by: State Attorney

Date of the hearing: 8 November 2023

Date of judgment: 19 April 2024