

Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates	NO

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



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHWEST DIVISION, MAHIKENG**

CASE NUMBER: RAF 68/2022

In the matter between: -

ADV. MENDREW SIBUYI N.O
obo [M...M...G]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: MFENYANA J

This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be 14h00 on **27 March 2024**.

ORDER

1. *The defendant shall pay to the plaintiff an amount of:*

 - i) *R999 551.25 in respect of future loss of earnings for [M...M...G].*
 - ii) *R2 200 000.00 in respect of general damages for the injuries sustained by [M...M...G].*

2. *The amounts in i) and ii) shall be paid within 14 days of date of this order.*

3. *In the event of the defendant's failure to pay the amount as aforesaid, the defendant shall pay interest at the rate of 7% per annum from a date 14 days after the date of this order to date of payment.*

4. *The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4) of the Road Accident Fund Act, no 56 of 1996 for 100% of the costs of future accommodation of [M...M...G] in a hospital, or clinic medical institution rendering a service to her in relation to*

the injuries she sustained in the collision on 4 July 2020.

5. *The defendant shall pay the plaintiff's costs of suit on a party and party scale to be taxed, with interest thereon calculated from 14 days from the date of the allocator to date of payment.*

JUDGMENT

MFENYANA J

FACTUAL MATRIX

- [1] The plaintiff in this matter issued summons against the defendant in her capacity as the biological mother of [M... M...G], who sustained injuries in a motor vehicle collision on 4 July 2020.
- [2] The facts giving rise to the application are that on the day in question, the [M...M...G] was a passenger in a motor vehicle, a taxi, with registration number J...N ...NW, driven by E. L Mogorosi when it collided with another motor vehicle

with registration number H...G...NW, driven at the time by A.A Moabi.

[3] The summons was issued on 7 February 2022. In the particulars of claim, it is alleged that the sole cause of the collision was the negligence of the driver of the other vehicle with registration number [...] NW, alternatively, the joint negligence of the drivers of both vehicles.

[4] The specific details of the negligence are set out in paragraph 5 of the particulars of claim. It is further alleged that as a result of the collision she sustained severe head injuries characterized *inter alia* by a period of unconsciousness, amnesia, brain damage, poor mental efficiency, poor eyesight and dilapidating headaches. She sustained a fracture to the base of the skull, a fractured left clavicle and multiple abrasions and lacerations. Further because of the collision, she experiences a change in personality, characterized by short temper, irritability and aggression.

[5] The plaintiff claimed damages for past and future medical expenses, pain and suffering, loss of amenities of life,

disfigurement, disability, hospitalisation and medical treatment, and future loss of earnings to the total amount of R6 000 000.00.

[6] On 9 February 2023 Adv. Mendrew Sibuyi was appointed as *curator ad litem* to [M...M...G]. In due course a notice of substitution was subsequently delivered amending the particulars of claim to reflect Adv. Sibuyi suing in his representative capacity as the *curator ad litem* to [M...M...G].

[7] On 6 December 2022, the defendant served its notice of intention to defend. There is no indication on the notice of intention to defend that it was filed with the Registrar of this Court. It was only on 14 February 2023 that the defendant filed its plea together with three special pleas. The first special plea relates to the *locus standi* of the plaintiff to act on behalf of the minor child. The second and third special pleas are identical and pertain to Section 17(1) of the Road Accident Fund Act¹ and submission by the plaintiff, of a Serious injury Assessment Report (RAF4 form) after presenting herself for assessment by a medical practitioner.

[8] The first special plea had been rendered superfluous by the

¹ Act 56 of 1996.

appointment of Adv. Sibuyi as *curator ad litem* to [M...M...G].

It further appears from the evidence that the plaintiff had already filed the RAF 4 form on 19 July 2022, prior to the filing of the special pleas, thus obviating the second and third special pleas.

[9] The plea itself is essentially a bare denial alternatively that the plaintiff contributed to the collision and the negligence in that she failed to fasten the seatbelt when she was required to do so. The defendant claims that negligence should be apportioned in terms of the Apportionment of Damages Act².

[10] On 6 December 2022, prior to filing its plea, the defendant served notices in terms of Rule 36(4) and 35(14) for the plaintiff to deliver medical reports, hospital records, x-ray reports and other documents relevant for the assessment of the plaintiff's claim. The plaintiff replied to both notices on 18 January 2023 and provided the requested documents. Thereafter the plaintiff filed its discovery, expert, and pre-trial notices none of which was complied with by the defendant to date.

² Act 34 of 1956.

[11] Having applied for a trial date, the matter was allocated to 14 August 2023. The plaintiff proceeded to set the matter down for hearing and served the notice of set down on 24 May 2023 on the defendant.

[12] The issue of merits was settled between the parties. The matter served before me only on the issue of general damages and future loss of earnings.

EVIDENCE

[13] When the trial was called on 14 August 2023, Mr. Setati informed the Court on behalf of the defendant that he held no instructions on the matter and would thus not be participating in the proceedings. An order was granted for the evidence of the plaintiff's expert witnesses to be given by affidavit in terms of Rule 38(2) of the Uniform Rules of Court.

[14] Mr. Mosenyehi submitted written heads of argument to substantiate the plaintiff's claim. Relying on the judgment in *Mabye v Road Accident Fund*³ he argued that even though

³ (4677/2017) [2020] ZALMPPHC 77 (21 August 2020).

the defendant had participated in the litigation, its failure to appear in court without providing any explanation qualified it as a defaulter.

[15] What stands for determination is whether the plaintiff has made out a case on a balance of probabilities, for its claim against the defendant. In the heads of argument the claim amount set out in the particulars of claim, was not persisted with. Instead, an amount of R4 176 171.00 was said to be fair and reasonable to compensate for the injuries sustained by [M...M...G] made up of an amount of R3 000 000.00 for general damages and R1 176 171.00 for loss of earning capacity and future medical expenses.

[16] In respect of general damages, Mr Mosenyehi averred that the amount of R3 000 000.00 is justified in the circumstances. He stated that [M...M...G] had lost consciousness after the collision and was transported to Thusong hospital and later transferred to Mafikeng hospital. The injuries she sustained included a fracture of the base skull, pneumocephalus and post traumatic amnesia with subarachnoid haemorrhage.

[17] Various medico legal reports were submitted and relied on by the plaintiff. The defendant submitted no expert reports. It appears from the medico-legal reports that [M...M...G] was admitted in the intensive care unit for five weeks. She was managed conservatively for the head injury and left clavicle fracture and given anti- epileptic medication. She was thereafter transferred back to Thusong hospital and referred for rehabilitation. The report further records that forty-six days after the accident, she was still confused. Her mental ability was put into question by the nursing personnel and remains low as assessed by the neurologist.

[18] Post injury, it is recorded that [M...M...G] suffers from memory loss, difficulty speaking, poor coordination and tremors of her hands, poor balance. It is further reported that she experiences difficulty standing and walking and has poor balance. She mobilizes with a walking frame. Dr Moja, the neurosurgeon who examined her concluded that [M...M...G] suffers from 'significant residual neurocognitive and neurophysical problems, and a speech problem related to her organic brain dysfunction.' According to Dr Moja she has reached maximum medical improvement. Dr Moja evaluated

her WPI at 75%.

- [19] A report from the urologist, Dr Qubu, indicates that [M...M...G] has neurogenic bladder dysfunction and difficulty passing urine which he associates with the phenytoin (anticonvulsant treatment) she is receiving. Regarding her loss of amenities of life, Dr Qubu deferred to the occupational therapist.
- [20] The occupational therapist, Ms Mashishi explains that [M...M...G] has muscle tone abnormalities in her upper and lower right and left limb muscles. She is expected to struggle with prolonged standing and walking, only being able to stand for a continuous period of 20 minutes and walk continuously for 30 minutes before fatigue sets in. She further explains that [M...M...G] can sit continuously for prolonged periods without any difficulty. Ms Mashishi stated that [M...G...M] is precluded from entering the open labour market as a result of her neuropsychological and neurobehavioural deficits, and therefore functionally unemployable.
- [21] The above findings from the plaintiff's experts have not been contested.
- [22] At the time of the collision [M...M...G] was 31 years old. She

was employed as a cleaner earning R3 000.00 per month. Her duties involved a fair amount of standing and walking around attending to cleaning classes and bathrooms. She had been employed for a month when the collision occurred earning an amount of R3 000.00 per month.

[23] The industrial psychologist estimated her career prospects, pre- accident, to include any unskilled position for which she was qualified, with earnings varying from the median to the upper quartile of an unskilled worker. She would have been expected to retire at the age of 65.

[24] Post- accident, she has not been able to return to work, and has been receiving a government disability of R23 880 per year, since July 2020.

[25] The assumptions made are essentially that [M...M...G] would have continued to work as an unskilled worker at her pre- accident earnings (R36 000.00 per annum), 'increasing in a straight line until reaching R75 500 per year... at age 45, thereafter increasing with earnings inflation until retirement at age 65.'

LOSS OF EARNING CAPACITY

[26] With regard to loss of earning capacity, counsel for the plaintiff relied on *Bee v Road Accident Fund*⁴ for the proposition that the younger the victim the longer the period over which vicissitudes of life will occur, thus deviating from the 15% contingency allowance proposed by the actuary and opting for 20%. Indeed, that consideration by the plaintiff's counsel, was well taken in my view. A further consideration in this regard, is in my view, the disability grant of R23 880 per annum which [M...M...G] has been receiving since 2020. This should be factored in as income as a contingency having an effect on the percentage of contingency to be applied. In this regard if [M...M...G] continues to receive the disability grant I consider that a contingency deduction of 25% post-morbid should be applied. I am of the view that the remainder of the actuarial scenario presented by Mr Johan Potgieter is probable in the circumstances of this case. Thus, I consider an amount of R999 551.25 to be appropriate in respect of future loss of earnings.

⁴ (093/2017) [2018] ZASCA 52; 2018 (4) SA 366 (SCA) (29 March 2018).

GENERAL DAMAGES

[27] In determining the amount to be awarded for general damages the court is granted a wide discretion. In exercising its discretion, the court is called upon to consider the available evidence and consider what the probable scenario is, taking into account the circumstances of the matter. Having done that the court must determine whether the plaintiff has discharged the onus which rests upon it and determine the appropriate amount to be awarded.

[28] It is generally accepted that a court in those circumstances, should “not pour out largesse from the horn of plenty at the defendant’s expense”⁵, but seek to make an award that would be fair to both parties, taking into account the circumstances of the matter. The amount to be awarded is not cast in stone. Nor is there a mechanical method of determining it. Nor is it capable of mathematical precision. Neither can it be ascertained by gazing into a crystal ball. The Court must have regard to previous awards in circumstances closely resembling the circumstances the court is faced with, bearing in mind that no two cases are the

⁵ See in this regard: *Pitt v Economic Insurance Co Ltd* 1975 (3) SA 284 (N).

same. The value of such previous awards is to provide guidance on how the courts in general, have approached the issue in comparable circumstances.

[29] I was referred to various awards from various Divisions, where the plaintiffs in those matters had suffered brain injuries, as the plaintiff did in this case. In others, the injuries were assessed as serious by the medical experts. In my view the injuries sustained by [M...M...G] have a direct bearing on her daily life as she is reportedly unable to heavy physical activities, unable to play sports or to exercise and unable to drive.

[30] I have considered the decisions pointed out by Mr Mosenyehi, for which I am grateful. Notably, in *Bonnesse v Road Accident Fund*⁶ in which the injuries sustained bear a closer resemblance to the present case, it had been assumed that the plaintiff, who was 13 years at the time, would have progressed to acquire a tertiary qualification postulated at a four-year study period. In that regard what axiomatically follows is that the exigencies of life and

⁶ (1505/2009) [2014] ZAECPEHC 7 (20 February 2014).

consequently assumptions applied for and against the plaintiff would differ.

[31] I have also considered that [M...M...G] needs help with daily activities. I have considered that she is unable to relate well with her two children and is said to sometimes forget their names and has a speech impediment. She presents with episodes of headaches and urinary difficulties and is reported by the clinical psychologist to be easily irritable, cries easily and mentally slow. Due to her speech difficulties, she is not able to articulate what her feelings are at any given time. Her left eye also injured.

[32] Notably, I have considered the recommendations of the neurologist to the effect that [M...M...G] sustained a moderate to severe head injury which resulted in severe neurological sequel, mild to moderate cognitive difficulty and post-traumatic stress disorder. It is clear that the effects of the accident continue to mar her enjoyment of life and for which she will require medical attention in future as detailed in the report of the industrial psychologist.

[33] Taking into account the circumstances of the present case,

the injuries sustained by [M...M...G], comparative awards, and the time- value of money, I am of the view that an amount of R2 200.000 would be fair and reasonable in these circumstances.

COSTS

[34] In the particulars of claim the plaintiff seeks costs of suit, VAT on the said costs, as well as interest on the said costs from the date of the allocator from the Taxing Master, to date of final payment. Once again, this was not followed through in the heads of argument. No case has been made for the levying of VAT on the costs. For that reason, this Court will not accede to the relief sought. I can in any event find no justification why such a costs order should be granted.

ORDER

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

- 1. The defendant shall pay to the plaintiff an amount of:*

- i) R999 551.25 in respect of future loss of earnings for [M...M...G].
 - ii) R2 200 000.00 in respect of general damages for the injuries sustained by [M...M...G].
2. The amounts in i) and ii) shall be paid within 14 days of date of this order.
 3. In the event of the defendant's failure to pay the amount as aforesaid, the defendant shall pay interest at the rate of 7% per annum from a date 14 days after the date of this order to date of payment.
 4. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4) of the Road Accident Fund Act, 56 of 1996 for 100% of the costs of future accommodation of [M...M...G] in a hospital, or clinic, or medical institution rendering services to her in relation to the injuries she sustained in the collision on 4 July 2020.
 5. The defendant shall pay the plaintiff's costs of suit on a

*party and party scale to be taxed with interest thereon
calculated from 14 days from the date of the allocator to
date of payment.*

S MFENYANA
JUDGE OF THE HIGH COURT
NORTHWEST DIVISION, MAHIKENG

APPEARANCES

For the appellant:

TJ Mosenyehi

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Instructed by:

Mafori Lesufi Incorporated
c/o Mokhetle Attorneys
mafori@maforilesufi.co.za
rodney@maforilesufi.co.za

For the respondent:

No appearance

Date reserved:

14 August 2023

Date of judgment:

27 March 2024