

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: 34669/2018

Reportable: No
Of interest to other Judges: No
Revised: No
Date: 12 April 2024

SIGNATURE

In the matter between:

R[...] O[...] S[...] OBO
R[...] S[...]

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGEMENT

MOOKI J

- 1 The plaintiff sues on behalf of her minor child. The child was a passenger in a taxi which was involved in an accident. The child was injured during the accident. The accident occurred on 29 October 2016, when the child was 4 years old. She had not started school and was attending a creche. The child was 12 years old at the start of the trial. She was in grade 6.
- 2 I accept that the insured driver was negligent and that the RAF is liable on that account. There was no evidence that the insured driver did not bear some degree of negligence in what led to the accident. It is sufficient for a plaintiff to show that the insured driver was at least 1% negligent.¹ The child was a passenger in a taxi. The child could not be said to have contributed to the accident. The RAF is thus liable for 100% of any agreed or proven damages by the plaintiff.
- 3 Dr L F Segwapa, a neurosurgeon, described the “current symptoms and complaints” as reported in the RAF 4 form and pertaining to the child as “hearing loss to the left ear and Tinnitus.” The “hearing loss to left ear and tinnitus” constituted a “permanent serious disfigurement.”

¹ *Prins v Road Accident Fund*, (21261/08) [2013] ZAGPJHC 106

- 4 The plaintiff claims both for loss of earnings and general damages. The plaintiff did not contend that the RAF accepted that the minor suffered a serious injury. There was no evidence that the Health Professions Council of South Africa had determined that the child suffered such an injury. The court therefore cannot consider the claim for general damages.
- 5 The defendant's defence was struck before the commencement of the trial. The matter was considered as an undefended trial. The plaintiff was granted leave in terms of Rule 38 (2) and led evidence by way of documents.
- 6 The plaintiff engaged the services of several experts, who prepared reports pertaining to injuries suffered by the child.
- 7 Ms Koketso Rakgokong, an industrial psychologist, assessed the child on 8 February 2024 when the child was 11 years and 7 months old. She concluded that, before the incident, the child was likely to have passed Grade 12 and would have attained a diploma level education. The child would then reach her career ceiling at age 45 and would, thereafter, retire during the customary age.
- 8 Dr Seleka Kenneth Mafeelane, an orthopaedic surgeon, examined the child on 25 June 2018. He re-examined the child on 16 January 2024. The "present complaints" in the re-examination was described as a painful left ear. There was "nothing of note" in relation to the shoulder. Dr Mafeelane considered x-rays done by Dr Androos on 16 January 2024. The x-ray on

the left clavicle showed that “there are no fractures or dislocations present...” Dr Mafeelane concluded that the x-rays were “normal.”

- 9 Dr Amanda Peta, a clinical psychologist, assessed the child on 25 June 2018 and reassessed the child on 17 January 2024. The child was 6 years old and in grade R when assessed on 25 June 2018. The child was reported to reside with both parents. The father was a driver, with a grade 12 educational background. The mother was unemployed, with a grade 11 educational background.
- 10 The clinical psychologist referred to a report by Drs Mkhabele & Indunah, diagnostic radiologists, regarding an x-ray of the child’s left clavicle. The x-ray showed an old fracture of the left clavicle with superior angulation of 16°. The clinical psychologist reported “current symptoms” to include reduced hearing on the left ear, forgetfulness, irritability, pain in the left clavicle, and occasional headaches.
- 11 Dr Peta stated that the child had no significant physical hearing problems. She found the child “very strong-willed/stubborn...” in relation to the “personal – social subscale”. She stated, in the summary, that the child “... suffered from an early childhood concussive head injury of moderate category, which has produced neurocognitive deficits.” She continued that, as regards current cognitive and executive functioning, the results were low for a 6-year-old, in relation to the level of numeracy and basic letter concept. The child also had a low general verbal functioning.

- 12 The child was found to be precise in her approach on being assessed for “current emotional and behavioural functions.” The child was unlikely to have developmental delays in relation to the effect on future educational and occupational functions. Dr Peta pointed out that the child was in Grade R and that there was no feedback from the school regarding the child’s performance. She concluded that the identified cognitive problems did not have a serious effect on the child’s psychological functioning now, but that it was probable that they would have a serious effect in the future.
- 13 Dr Peta reassessed the child on 17 January 2024 when the child was 11 years old. She commented on the child’s performance at school from grade 1 to the child’s present grade, namely grade 5. Dr Peta remarked that the child passed all grades but grade 3, which the child repeated. Dr Peta maintained the findings and conclusions in her original report, which she determined had not changed.
- 14 Dr MG Beke, a psychiatrist, assessed the child on 28 June 2018 when the child was 5 years old and in grade R. He reassessed the child on 19 January 2024. He concluded, in his first report, that the child had a psychiatric and neurological impairment. He also concluded that the child had moderate to severe PTSD, with potential for a full recovery. In relation to the later reassessment, Dr Beke wrote that teachers at the school reported that the child was quiet. He concluded in the reassessment that the child had a major neurocognitive disorder that was causally linked to the accident but that the prognosis was good in the long term.

- 15 Ms. Yvonne Segabutle, an educational psychologist, assessed the child on 17 January 2024 when the child was in grade 5. She relied on several documents for her views including documentation by a Mr. Matome W Khumalo, an educational psychologist, “dated 27 June 2018.”
- 16 Ms. Segabutle reported that the child’s IQ score was within the borderline range of mental functioning. She expressed the view that, before the incident, the child had potential to complete grade 12 with a diploma and would be able to pursue tertiary studies. She referred to the views by Mr. Khumalo regarding events following the incident. She concluded that the child’s future learning potential was affected; more so because the child complained of reduced hearing. She recommended that the child be routed to a special class.
- 17 Mr. J L Temane, an audiologist, assessed the child on 8 February 2023 when the child was 11 years old. The complaints notified to him were that the child could not concentrate in a quiet environment because of the ringing in the left ear and because of headaches. Mr. Temane recommended that an ear, nose and throat (“ENT”) specialist carry out a further investigation of tinnitus “in the right ear” and for the loss of hearing “in the left ear.” He also stated that the ENT was to investigate and suggest possible treatment of the tinnitus “in the left ear.”
- 18 Dr. MJ Sekole, an ENT specialist, assessed the child on 8 February 2023 when the child was 10 years old. He stated that the child had no history of hearing loss before the incident and that the loss was gradual. The child developed tinnitus in the left ear after the accident. He referred to Mr.

Temane's finding that the child had normal hearing in the right ear and a total loss of hearing in the left ear. Dr. Sekole concluded that the child's "ENT injuries" were tinnitus in the right ear and a total loss of hearing in the left ear. The tinnitus was chronic with no cure. He suggested the use of a masking device. Dr. Sekole stated that the tinnitus affected the child's mood and ability to sleep; it would not affect the child's life expectancy but would impact on her quality of life.

19 Ms. K L Montwedi, an occupational therapist, assessed the child on 8 February 2023, when the child was 10 years and 7 months old. The child was in grade 4 at that time. Ms. Montwedi remarked that there were no complaints concerning the child from the pre-school preceding the accident. The mother reported that, following the incident, the complaints from the school were that the child was forgetful and that the teachers had to speak louder because the child could not hear well. The child was not taking any medication at the time of the assessment.

20 The occupational therapist registered the following "physical complaints" concerning the child: hearing problems and occasional pain in the left ear; recurrent headaches, and difficulties in speaking. The following were registered as "psychological and cognitive complaints": the child reported that she was forgetful. She was also fearful and had flashbacks of the accident.

21 The occupational therapist remarked as follows regarding "activities of daily living" concerning the child: The child had no problems with sleeping

before and after the accident; was forgetful, after the accident, in relation to being sent to the shops. That was not the case before the accident.

- 22 Ms. Montwedi concluded as follows regarding “physical” aspects pertaining to the child: the child did not experience physical pain; she presented with adequate high agility, dynamic and general mobility skills “for his age” and that “her physical capacity was likely to improve as she grows,” that “The Audiologist and Speech Therapist indicated that R[...] presented with normal hearing bilaterally.” The following were conclusions regarding observations pertaining to the child’s cognitive-perceptual considerations: she had “some below average visual perceptual skills,” there was a clinically significant discrepancy between general verbal and non-verbal functioning.
- 23 The occupational therapist made several remarks about the child’s work capacity. These included that the child was likely to have “challenges with heavy tasks in future...” because of the likely strain to the angulated left clavicle. This comment was informed by the remarks of the orthopaedic surgeon concerning a palpable bony mass on the clavicle shaft. The reported headaches, if they persist in the future, would present difficulties in occupations that require work under direct sunlight, work in hot or in noisy environments.
- 24 The child was found to have some cognitive-perceptual problems with visual perception, which may affect her academic abilities and opportunities because she was likely to struggle with subjects requiring high mental exertion like mathematics and physical sciences. She was said

to be unlikely to cope with jobs requiring supervisory, administrative, and managerial roles. The child was described as a vulnerable job-seeker should her psycho-emotional challenges worsen.

25 Ms. Koketso Rakgokong, the industrial psychologist, assessed the child on 8 February 2024 when the child was 11 years and 7 months old. She concluded that the child, given the incident, had a bleak future. To this end: the child was unlikely to follow a similar career as before the accident; would struggle to pass grade 10, was a candidate for unskilled occupations and would struggle to enter the labour market "... due to her physical residual challenges," the child would struggle to find an employer willing to accommodate the child's physical challenges, which were compounded by the child's hearing and psychological deficits. The industrial psychologist expressed the view that the child will remain unemployed for the rest of her life after leaving school and that the child had suffered a total loss of future earnings.

26 The actuary prepared an estimate of the present value of the loss of income suffered by the child based on the report by the industrial psychologist. The pre-morbid loss was premised on the child having completed grade 12 on 31 December 2030 and having obtained a three-year diploma on 31 December 2033. The further assumption was that the child's salary would be R934 000,00 per annum at age 45, and then increase per inflation until retirement at age 62.5. The computation assumed that the child would have no earnings post-morbid.

- 27 The actuary took the “RAF cap” into account. They did not consider contingencies. The actuary, ultimately, determined that the child suffered a capped loss in the amount of R9 482 076.00.
- 28 The plaintiff is required to prove that she suffered a loss because of the accident.² I am not persuaded that there is evidence upon which a finding could be made that the plaintiff suffered damages as contended for in the evidence.
- 29 The contention that the child is completely unemployable has no proper support in the evidence. I am not persuaded that the child’s “physical limitations,” as expressed in the opinion by the industrial psychologist, showed that the child would have no residual working capacity after the child completed grade 9.
- 30 The evidence regarding the injuries to the shoulder is contradictory. The industrial psychologist took those injuries into account as part of the bases to her conclusions. The plaintiff presented evidence by two radiologists. The evidence contradicted each other. The radiologist referenced by the orthopaedic surgeon showed a normal left shoulder clavicle. The radiologist referenced by the clinical psychologist showed an old fracture of the left clavicle with superior angulation. The industrial psychologist did not comment on this discrepancy in relation to her conclusion that the child had physical limitations that render the child unemployable.

² *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) at para [11]

- 31 The occupational therapist does not suggest that the child would have long-term physical disabilities and presented with adequate high agility, dynamic and general mobility skills. She further concluded that the child's physical capacity was likely to improve as the child grew. The industrial psychologist did not consider these findings in her assessment that the child had "physical limitations."
- 32 The child was hospitalized and discharged the following day. She returned to creche two weeks later. There was no evidence that the child experienced difficulties on her return to creche. There was no collateral information on this aspect.
- 33 The child started formal schooling. She passed grades 1 and 2, seemingly without concerns being raised about her ability or otherwise to engage in her studies. She repeated grade 3. There was no evidence that she repeated the grade because of her injuries or related sequelae. Her performance in later grades fluctuated. There was no evidence that the fluctuation was due to her injuries or related sequelae. There was no collateral information from the school that the child, unlike her peers, was experiencing difficulties in her studies.
- 34 It is equally likely that the child's poor verbal performance could be a function of the absence of appropriate stimulation both at home and at the school. The child's father completed schooling in grade 12. The father was employed as a driver. The mother finished schooling in grade 11 and was unemployed. There was no evidence about the type of school which the child attends. Both the home environment and the quality or otherwise of

teaching at the school would be expected to have an effect on a child acquiring verbal and other skills as tested for by the educational psychologist.

35 I am not persuaded that a proper case was made that the child has been rendered wholly unemployable as contended for by the industrial psychologist. I cannot conclude, on the evidence, that the plaintiff suffered a loss of earnings. The loss is the difference between what the plaintiff would have earned absent the accident in relation to earnings given the accident. I am therefore not persuaded that the plaintiff had no earning capacity following the accident.

36 I am obliged to comment on the evidence by some of the witnesses for the plaintiff. My impression is that some of their evidence was not well-considered.

37 I have already remarked about the industrial psychologist. The evidence on the injury suffered by the child was contradictory. There is no explanation for two wholly incompatible radiology reports on the same part of the body of the same person. The occupational therapist stated that the child was forgetful. Her report, on this issue, references the child being forgetful when sent to the shops, comparing events before and after the accident. The occupational therapist does not say how a four-year old is sent to the shops – that was the child's age at the time of the accident. Similarly, the occupational therapist also concluded that the child would require assistance with gardening. There was no explanation why that might be. This is more so because the occupational therapist's report records that

there was no garden; as detailed in the section of the report on “living arrangement.” The occupational therapist found that the child had no difficulties sleeping, both before and after the accident. This contradicted the ENT specialist, who stated that the ringing in the ears made it difficult for the child to sleep. The educational psychologist’s view was informed, in part by the views of a different educational psychologist, whose report does not form part of the record. The audiologist and the ENT gave contradictory findings in their reports, saying that the tinnitus was in the right ear, only to say, elsewhere, that the tinnitus was in the left ear.

38 I intend to grant absolution from the instance. “The test to be applied is not whether the evidence led by the Plaintiff establishes what would finally be required or to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should nor ought to) find for the Plaintiff...”³

39 An order for absolution from the instance gives the plaintiff an opportunity to return to court with better evidence, if such evidence is available.⁴

40 I make the following order:

40.1 Absolution from the Instance is granted in respect of the plaintiff’s claim for loss of earnings;

40.2 The claim for general damages is stayed pending determination of whether the plaintiff suffered a serious injury, as required by law;

³ *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 at 409G-H

⁴ See *Nelson v Road Accident Fund* (3742/2016) [2023] ZAFSHC 147 (5 May 2023), para 22

40.3 Each party shall pay its own costs.

Omphemetse Mooki

Judge of the High Court

Heard: 20 February 2024

Decided: 12 April 2024

For the plaintiff: P Tshavhungwe

Instructed by: Ngobeni M Attorneys

For the defendant: no appearance