

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**



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

Case number: 41304/2013

In the matter between:

HLALELE MATSHEDISO JUSTINA O.B.O

K..... H.....

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

Summary: Claim for loss of earning capacity and future loss of earnings – six year old child now twelve - akin to fortune telling where there is little or no factual information upon which to even guesstimate the future - one industrial psychologist relies upon 'family history' which is not inappropriate in the old South Africa where futures were determined by race, gender and class but is not always of assistance in a transforming society - possible that the accident and damages paid may advantage this boy and enable him to achieve great things. An award made of R 500 000 (five hundred thousand rand).

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. Plaintiff is the grandmother of a 6 year old boy ('K.....') who was injured in a road accident and now, on his behalf, sues the Road Accident Fund for damages in respect of injuries sustained. A curator *ad litem* was appointed in this matter but the grandmother still appears as plaintiff.
2. The parties have agreed on a number of issues:
 - a. Defendant is liable for 100% of K.....'s agreed or proven damages;
 - b. Defendant will deliver an undertaking in terms of section 17(4) of the Act to compensate in respect of all future treatment.
 - c. K..... has suffered general damages in an amount of R 500 000 (five hundred thousand rand).
 - d. K..... has sustained no damages in respect of past medical expenses or past loss of income.
3. The issue in dispute which this court is called up on to decide is that of loss of earning capacity and future loss of income. The parties are in agreement as to the contents of the joint minutes prepared by orthopaedic surgeons and occupational therapists. Each party has utilized the services of an industrial psychologist and it is the basis upon which each has calculated K.....'s future employment prospects and applied contingencies thereto that this court is to determine.

THE ACCIDENT AND INJURIES

4. K..... was a pedestrian when he was injured in a road accident on 17th March 2009. He was then six years old.
5. It is common cause that he sustained a "serious long term impairment" described as "a degloving injury and fractures of the tarsal bones on the right foot". There is now a "deformed right foot" (joint minute of orthopaedic surgeons Gantz and Heyns).

6. More specifically Dr Heyns detailed flexion in knee joints, extension of the toes, found “no movements of the lesser toes at all due to injury to the dorsal tendons” and that “the mid tarsal and subtalar joints are fixed” with “fixed supination of the right foot” and “fixed flexion contractures of the 3rd, 4th and 5th lesser toes”.¹ This was all occasioned by spontaneous fusions. Not only is there “severe disfigurement caused by scarring” but also pain and discomfort and severe impaired movements of the right foot and toes.
7. Dr Gantz also specified his findings as including “an altered gait on the right foot”, that the right leg is shorter by about 1cm on the medial side and that the right foot is held in marked supination.² There has been resulting mild atrophy of the right thigh muscles and wasting of the right calf muscles. He too, commented on the supination of the midtarsal joint and the lack of extension or flexion in the toes.
8. Kananelo was treated at public state hospitals.
9. He is an orphan and lives with grandparents and extended family which is either unemployed or underemployed. The family is poor and unskilled.

THE FUTURE

10. Notwithstanding that the future remains unpredictable, this court is still required to calculate and award compensation based on the unknown future –in respect of lives which may or may not be lived or in respect of disabilities which may or may not eventuate or persist or in respect of damages which may or may not eventuate. We do the best we can knowing that the future in the Republic of South Africa has not, in our lifetime, always been determined by the past and that change and transformation are all around us.
11. The injuries and future treatment being agreed, one can accept that the section 17(4) undertaking furnished to K..... will be a meaningless piece of paper unless he (or curator) pays for necessary treatment upfront and then attempts to recoup such healthcare costs from the RAF. Fortunately, K..... has the benefit of a sum awarded as ‘general damages’ which is not, of course, meant to be utilized for healthcare expenses but is the only source of funds which he may use to attain healthcare and treatment in the private sector. Daily we read that the state sector is more and more strained and less and less able to assist patients. If these funds are used to pay upfront for healthcare, K..... may be less disabled. If these funds are used to ensure an education for him, he may remain more disabled. That will be a decision for the curator or trustee.

¹ Plaintiff’s Expert Reports Bundle pg 6.

² Defendant’s Expert Reports Bundle pg 5.

12. The Industrial psychologists' reports were handed in to court. The essential dispute appears to be that each industrial psychologist lives in a different dreamland. A joint minute of their agreed and disagreed opinions was handed in.
13. The one anticipates that K..... would have (if the accident had not taken place) completed grade 12, been unemployed for 12 to 18 months, then would receive on the job training, and he would have progressed up to the B3/4 median level of employment. The other anticipates that (if the accident had not taken place) K..... would have matriculated, have had piece jobs for a number of years, worked as an unskilled employee for a number of years, progressing until he would qualify as a semi-skilled employee. Both are in agreement that retirement age would have been 65. The first industrial psychologist bases this prognosis on 'family history' whilst the second hoped for "perseverance" at school. (Joint Minute of Strydom and Kgosana).
14. Now that the accident has taken place, both industrial psychologists are somewhat at a loss. Neither have any pre-accident reports – after all why should they. Both refer to K.....'s failure of grade 5 but this indicates nothing more than lack of application. Neither refer to the current economy and its challenges. It is extremely difficult to know, what (if any) are the factors upon which this differently anticipated future is based.
15. Both acknowledge that k..... is a less competitive and more vulnerable jobseeker in the labour market as a result of the accident and that he is likely to suffer longer periods of unemployment than other more able- bodied workseekers. Neither refer to the current rate of unemployment amongst young black matriculants in South Africa or whether this is changing or may change. The relevant portion of their joint minute reads:

“AS: based on the expert opinions to hand, K..... is thus regarded a less competitive and vulnerable jobseeker in the open labour market and he is likely to suffer longer periods of unemployment in comparison with pre-morbidly. He would always have to analyse his future employment opportunities and as he is still young, there are no guarantees that he would be an ideal candidate for sedentary/administrative type of work. It is mostly found that people without tertiary education normally resorts in manual, physical and ambulatory type of work, which AS would have also expected in the case of K..... There are no guarantees that K..... would be permanently employed

and he may only secure ad hoc or contractual type of work. There are also no guarantees that he would be employed in the corporate sector and employment in the non-corporate or informal labour sector would become a reality.

In view of the earnings as set out in AS' report, and in absence of a head injury, we would still consider K..... to complete Grade 12 but AS indicated that his earnings, for working on an ad hoc basis or contractual basis, would probably range between R 18600 and R 53500 per annum. Given the current difficulties reported at school, AS cannot foresee K..... securing a sedentary/administrative position, and the chances of him securing same pre-morbidly, would have also seemed unlikely. K..... should thus be compensated for suffering the above losses. MK notes that there was no reported head injuries and the psychological effects of pain are colloquially treatable, making the limitations temporary.

MK: Considering the conclusions of the orthopaedic surgeons, K.....'s productivity in his future employment will be affected negatively by the injuries sustained during the accident".³

16. Regrettably, there is nothing substantial or factual in this minute or in either reports. K..... is now severely impaired which renders him more vulnerable in the workplace. This may have had little impact upon the earning capacity of a child whose family history and status in life may have exposed him or her to the possibility of training as a neurosurgeon or a commercial lawyer. However, it is presumed to be totally determinative of a child whose family history and status in life reveals no more opportunities than that of little education and manual labourer.
17. What is apparent to me is that the plaintiff sees financial advantage in claiming for a worse and less remunerative employment future by reason of the accident than does the RAF which sees financial advantage in claiming for a less deleterious prognosis because of the accident. Neither gives convincing or factual reasons for their prognosis prior to accident or post-accident. That is not really their fault – this is, after all, just guessing the future. And who would have thought that a herdboy would have become the first President of a democratic South Africa??
18. The difference between the parties is enormous: plaintiff claims R 2 122 022 (two million one hundred and twenty two thousand and twenty two rand) for loss of

³ Joint Minutes Bundle pg 8.

income and the defendant suggests R 282 981 (two hundred and eight two thousand and nine hundred and eighty one rand) for loss of earning capacity⁴.

19. Dr Geeta Prag is an educational psychologist who prepared a report at the instance of the RAF. She too, referred to the absence of information, which would enable an informed decision. However, her report does deal in some detail with the child himself. His level of intellectual functioning and his verbal IQ fell within a superior range whilst his performance IQ fell within an above average range.
20. What is apparent to me is: K..... comes from a disadvantaged family background; his grandparents have managed (against great odds) to retain employment and provide a family home for their family members; K..... has himself shown great perseverance and responsibility in continuing at school when he is less mobile than other children, not provided with any assistance to attend school by the RAF and has excuses which would enable him to have simply 'dropped' out. He is a commendable child.
21. K..... has continued at school. He failed grade 5 – which apparently had nothing to do with his mental ability or the accident and everything to do with high spirits and lack of application. But he continues. This is greatly to his credit. We can only hope that he continues to study, attains his matric and is then able to find employment as more than a manual labourer.
22. It is possible that K..... may study more than he plays - because of his disability; it is possible that K..... may obtain more successful matric results than if he had been able to play soccer and socialise with his peer group – because of his disability; it is possible that K..... may study beyond matric, that he may be offered financial assistance or use his general damages for this purpose But these "possibilities" are as dreamlike as anything else proposed by the Industrial Psychologists.
23. I accept that, by reason of the accident and injuries sustained and their long term effects, he is a more vulnerable workseeker in the laboring community. I hope that the damages which he is awarded can be utilized to give him advantages in life which are superior than those offered to his siblings and which will enable him to rise above the laboring future which might have been all that was available to him pre-accident.

⁴ The actuarial calculations can do no more than take the prognosis of the industrial psychologists and prepare the calculations.

24. Having regard to those other judgments which I have been able to find dealing with the difficulties of assessing damages in respect of loss of earning capacity and loss of earnings for a young child and the awards granted in those cases, I have decided to make an award of R 500 000 (five hundred thousand rand).
25. I propose to speak to the intended Trustee of the Trust to be created for the benefit of K..... or to the Curator or Curators Bonis who may be appointed. I wish to find out about the extent to which his financial affairs can be managed to his advantage – not only his benefit. Can he be furnished with a better education than the one currently on offer? Can he be given the opportunity to study further than matric should he reach that stage? It may be that the order which I propose making in respect control of his financial affairs will be amended.

ORDER

1. The Defendant is liable to the Plaintiff in the sum of:
 - 1.1. R 500 000 (five hundred thousand rand) as general damages; and
 - 1.2. R 500 000 (five hundred thousand rand) for loss of earning capacity and loss of income.
2. The Defendant is liable for 100% of the Plaintiff's agreed and proven damages.
3. The Defendant will deliver an undertaking to the Plaintiff in terms of Section 17(4) of the Act to compensate the Plaintiff in respect of 100% of the costs of all future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him due to his injuries sustained in the accident on 17 March 2009 and which shall include, but not be limited to , those treatments identified or anticipated in the various medico-legal reports, after such costs have been incurred an upon proof thereof.
4. The capital amount referred to in paragraph 1 above shall be paid into the trust account of the Plaintiff's attorney of record, who will hold the monies in an interest bearing trust account for the benefit of the minor child namely HLALELE PATRICK KANANELO pending the creation of a trust or the appointment of a Curator or Curators bonis as set out hereunder.
5. The Defendant undertakes to pay costs which shall include:
 - 5.1. Costs of junior counsel and costs of suit, such costs to include the preparation expenses of the Plaintiff's experts, Dr D. Heyns, Dr G. Van Heerden, Dr L.

Gordon, Ms T. Nape, Dr A. Strydom and Ivan Kramer, as may be agreed or allowed by the Taxing Master;

- 5.2. The reasonable costs of the creation of a Trust and the appointment of a trustee subject to the proviso that such costs do not exceed the reasonable costs of the appointment of a curator alternately the appointment of a Curator or Curators bonis.
- 5.3. The Defendant shall be liable for the costs of the trustee or the Curator(s) bonis in administering the minor's estate as determined by Section 84(1)(b) of the Administration of Estates Act 65 of 1965, as amended, according to the prescribed tariff applicable to curators.
6. The necessary steps shall be taken by the Plaintiff's attorney of record with a view to appointing a trustee and forming a trust or the appointment of a Curator or Curators bonis, to *inter alia*, administer and or manage the financial affairs of the minor child, within two (2) months of the date of this order. The aforesaid appointment and terms of appointment shall be subject to the approval of the above Honourable Court.
7. The trustee or Curator(s) to be appointed shall be required to furnish security to the satisfaction of the Master in terms of Section 6(2) of the Trust Property Control Act 57 of 1988, as amended, if so required.
8. The Defendant shall pay the Plaintiff's party and party costs on the High Court scale either as taxed or agreed to date hereof, including any costs attendant upon the obtaining of payment referred to in paragraph 1 above.
9. The Plaintiff's attorneys shall pay all monies held in trust by them for the benefit of the Plaintiff, to the Trust or to the Curator(s).
10. The trust instrument or the Curator(s) 's terms of reference contemplated in paragraph 5 above shall make provision for the following:
 - 10.1. That the minor child HLALELE PATRICK KANANELO is to be the sole beneficiary of the trust or the sole recipient of the funds administered by the Curator or Curators;
 - 10.2. That the trustee(s) or Curator(s) are or is to provide security to the satisfaction of the Master;

- 10.3. That the ownership of the trust property vest in the trustee(s) of the trust in their capacity as trustees or shall vest in the minor child subject to the control and determination of the Curator or curators.
- 10.4. Procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Honourable Court;
- 10.5. That the trustee(s) be authorized to recover the remuneration of, and costs incurred by the trustee(s), in administering the undertaking in terms of Section 17(4)(a) of Act 56 of 1996 in accordance with paragraph 3 above;
- 10.6. The exclusion of any community of property in the event of the minor's marriage;
- 10.7. The suspension of the Plaintiff's contingent rights in the event of cession, attachment or insolvency, prior to the distribution or payment thereof by the trustee(s) to the minor child;
- 10.8. That the amendment of the trust instrument or the terms of reference of the Curatorship be subject to the leave of this Honourable Court;
- 10.9. The termination of the trust or the curatorship upon the death of the minor child, in which event the trust assets shall pass to the estate of the minor child;
- 10.10. That the trust property and the administration thereof and the Curatorship be subject to an annual audit.
11. The Plaintiff's attorney shall render an attorney and own client statement of account to the trustee or Curator(s) aforesaid within one month of their appointment. The trustee or Curator shall be entitled to call for a taxation of the said account within one month of receipt of the account.
12. Upon finalization of the taxation, alternatively should no taxation be called for, the Plaintiff's attorneys of record shall be entitled to deduct all fees and disbursements from the proceeds referred to in paragraph 1 above, and the balance thereof, together with any costs recovered from the Defendant, shall be forwarded to the trustee or Curator(s) to be invested for the benefit of the Plaintiff's minor child or be utilized as the trustee or Curator(s) deems appropriate subject to the terms of the trust deed.

DATED AT JOHANNESBURG 26th MARCH 2015

SATCHWELL J

Counsel for Plaintiff: Adv I S Ngwetjana

Attorneys for Plaintiff: Mkwanazi Attorneys

Counsel for Defendant: Adv T Nyandeni

Attorneys for Defendant: Mohlala Attorneys

Dates of hearing: 13th and 17th March 2015

Date of judgment: 26th March 2015