

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 48158/2009

DATE: 11 APRIL 2014

In the matter between:

S[...] D[...] S[...]

Plaintiff

obo

S[...] A[...] L[...]

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

TEFFO, J:

Introduction:

1] The plaintiff, Mrs D[...] S[...] S[...], instituted a claim for damages in terms of Road Accident Fund Act 56 of 1996 ('the Act') against the defendant on behalf of Mr A[...] L[...] S[...] ("the injured") born on [...] in her capacity as mother and natural guardian. This claim arises from the injuries sustained by the injured in a motor vehicle collision which occurred on 2 July 2006 in Soshanguve when the motor vehicle with registration letters and numbers C[...] there and then driven by Mr Manzini ("the insured vehicle") collided with the injured who was a pedestrian at the time.

2] The defendant conceded the merits at 90/10% in favour of the plaintiff. It is therefore liable to pay 90% of the plaintiffs proven or agreed damages. The parties have agreed that the defendant will pay the plaintiff an amount of R120 000,00 less 10% for general damages. The defendant has tendered a section 17 (4) (a) of the Act undertaking which is limited to 90% in respect of future hospital, medical and ancillary expenses which the plaintiff has accepted. No claim for past loss of earnings was made. The head of damages that remain for determination is the claim for future loss of earnings or loss of earning capacity.

3] Medico legal reports by experts on behalf of both parties were filed and admitted by consent into the record as evidence.

4] Joint minutes by the Educational Psychologists of both parties namely Mrs Rencken Wentzel for the plaintiff and Dr J C Rossi for the defendant, were admitted into evidence by consent. This includes the joint minutes of the Industrial Psychologists, Ms N Kotze for the plaintiff and Dr L Fourie for the defendant.

5] The parties agreed to argue the case for the disputed head of damages as a stated case on the basis of the

admitted facts, medico legal evidence and opinions. Accordingly no *viva voce* evidence was led by the parties.

6] The injuries sustained by the injured in the aforesaid accident are summarised as follows: a severe injury to the head described as swollen lower lip, laceration gum and dental alveolar injury, soft tissue injuries to the mouth and gum, loose teeth of which 4 (four) eventually fell off. He was hospitalized for 3 (three) days and discharged home.

7] The injured was 8 (eight) years old and in grade 2(two) when he was involved in an accident. He returned to school 3 (three) days after the accident. He passed grade 2 (two) and proceeded to grade 3 which he failed and repeated. From there he proceeded to other grades which he passed and he is currently in high school.

Future loss of earnings and loss of earning capacity

8] According to para 7 of the plaintiff's particulars of claim, it is alleged that at the time of the accident, the injured was a normal, and healthy child who performed average to above at school and had the prospects of a person of his age and status. As a result of the accident and the injuries sustained, the injured has suffered a dimension of his physical abilities, has difficulty in concentrating during class sessions and is always sleepy. He developed behavioural changes resulting in aggressiveness. He suffers from headaches at least twice a week. He suffered lowered academic progress and failed 1 (one) year of schooling which will result in him entering the labour market 1 (one) year later.

9] The Educational Psychologists Ms Rencken Wentzel and Dr J C Rossi, in their joint minute agree that the injured did not sustain a head injury but dental and gum injuries. Both of them found some educational, neuropsychological and emotional difficulties when they assessed the injured. They agree that the injured had behavioural and psychological difficulties probably as a result of family problems. As regards his future education and training, they agreed that there was no difference from pre to post morbid levels although they differed with regard to the exact levels of educational achievements. They both believe that his achieving depends on remedial assistance and counselling as there is a chance that he will drop out owing to his emotional problems. According to them the injured will benefit from psychotherapy/counselling and remedial problems.

10] With regard to the injured's pre morbid functioning Ms Rencken Wentzen opined that his scholastic functioning at school entry is poor. He has not repeated a year but his results ranged from 'incompetent' to 'partially achieved'. Her view is that he would have followed in the steps of his family members even though it is commonly accepted that children achieve better than their parents. Post morbid scholastic problems were noted that could be a result of the injury if a neurologist confirms that there are signs of an injury that impacts on functioning. According to her with his current scholastic status, without the privilege of recent school reports, taking the opinions of his class teacher of 2007 and his current teacher, Mr M[...], into consideration, the injured will in all likelihood repeat a number of years, but will progress at a slow rate and in the current educational climate obtain a Grade 10 qualification.

11] Dr J C Rossi believes that pre-morbidly, the injured would have been able to pass grade 12 and proceed to a Technikon. Results in the assessment indicate that he would still be able to achieve a mainstream senior certificate and be able to enroll at a Technikon if his emotional difficulties do not worsen and he can achieve remedial assistance. She opined that he will not be able to cope at University. According to her there is a likelihood that he will repeat a grade in his effort to obtain matric. She is of the view that there is a chance that he will drop as he is immature and inclined not to co-operate. Dr Rossi also noted pre-existing development difficulties, a problematic family background, and opined that his poor motivation and lack of cooperation complicate the picture.

12] In their joint minute, the Industrial Psychologists, Ms Kotze for the plaintiff and Dr L Fourie agree that should there be a nexus between the injuries sustained and the injured repeating grade 3 (three) post morbid,

he would enter the open labour market one year later than expected, but for the accident. They also noted the view of Ms Painter who opined that regarding the accident it seems reasonable to accept that it is highly likely that the injured repeated a year and is hampered academically by the same accident related sequelae. Dr Fourie noted Dr Okoli (the neurosurgeon)'s opinion that there is no evidence of an alteration in his mental status and that the injuries sustained did not affect his scholastic performance. They agree that based on the opinion of Ms Painter, the injured may still reach grade 11 although at a slower pace of progress and be trained by his father and possibly proceed to college at a later stage. Relying on Ms Wentzen's opinion that the injured will in all likelihood repeat a number of years based on his pre-morbid performance and that he will progress at a slow rate and obtain a grade 10 qualification, she accepts that the injured could fail more standards before completion of his schooling. This implies that his entry in the labour market would be delayed even further. Dr Fourie's opinion is that although it is acknowledged that the injured may from time to time experience physical pain and discomfort, having to apply added effort, it is not envisaged that he may have a truncation in his future career path; progression and likely earnings, until retirement age. Ms Kotze opined that based on the reports available to her, it seems that he may have sustained a moderate concussive head injury although deference is given to medical opinion in this regard. She is of the view that if it is accepted that he did not sustain a head injury and would still be able to complete Grade 11, he would theoretically speaking still be able to earn the salaries as per the pre- accident scenario. However should there be any residual neuropsychological difficulties or reported difficulties of aggressiveness and tiredness continues, this could affect his work performance, resulting in him not being able to perform optimally and thus outperforming his uninjured counterparts. She further opined that taking cognizance of the aforesaid, one has to accept that the injured would then in all probability earn on a lower level as he would not be able to progress at the same rate than anticipated in the "but for scenario". He could then also even plateau on a lower level. According to her depending on the severity of his residual difficulties at that stage, it could even affect his ability to sustain employment. She opined that same would best be addressed by means of a higher post morbid contingency deduction.

14] According to Ms A Painter (a psychologist for the plaintiff specializing in neuropsychology) physically the injured would have been of similar appearance but most probably not the dental ailments now observable to the father. She further opined that neuropsychologically measured left hemisphere verbal weaknesses may have existed or may have been caused by a more significant brain injury if shown to exist. Unless shown to emanate from unrelated family circumstances, whether of organic or non-organic origin, the fact that he failed his 2007 year does seem to relate to the accident as with average intellect, he should have passed. Her view is that psychologically aggression may relate to unfortunate family circumstances or may also relate to a more significant brain injury if shown to exist. She opined that bearing in mind mouth injuries it seems highly likely that current dental ailments emanated from the accident and together with fatigue caused by chronic infection, this may even lower academic achievement.

15] She is of the view that it is unlikely that the injured would have passed grade 12 pre accident. According to her he may have progressed to grade 11 without failing the year after the accident. His father may have trained him successfully in the field of motor mechanics and once he had mastered this skill and secured some work with income, as an academically motivated child he may have attained proper college training in this field. Her opinion is that post accident he may still reach grade 11 at a slower pace of progress and be trained by his father and later proceed to college given the fact that it is highly likely that he is hampered academically by some accident related sequelae, if not of organic or non-organic origin such as problems with dental health but also headaches.

16] According to Dr B.A Okoli (the neurosurgeon) who saw the injured on 13 February 2013, the injured did not sustain a concussive head injury. He states in his report that the hospital records at George Mukhari Hospital do not contain any information on a possible head injury or alteration in his mental status. He opined that the injuries sustained should not affect the injured's scholastic performance.

Counsels' submissions

17] Mr Schreuder on behalf of the plaintiff submitted relying on Ms Painter's report that the injured should have passed grade 3 in 2007 (post-accident) head injury or no head injury. He submitted that the failure of the injured of grade 3(three) relates to the accident and that even if the injured did not sustain a head injury there were other injuries that affected him. He also submitted that Ms Painter confirms in her report that the injured will progress slower after the accident.

18] Mr Schreuder further submitted that even in the Clinical Psychologist's report compiled at George Mukhari hospital it was reported that the injured was referred to the hospital as after the accident he presented with behavioural changes, viz, he screamed for no apparent reason, has a blank stare, often looks tired, jumps, plays and dances during lessons. Further that he is progressing slowly and his performance is not satisfactory. He also referred to what the plaintiff reported to the Clinical Psychologist that the injured started to experience difficulties after the accident, that he is not performing well at school, he is aggressive towards others and himself, and does not listen to authority.

19] To support his submission he also referred to Dr Rossi's opinion that pre and post morbidly the injured would have been able and will be able to pass Grade 12 mainstream and proceed to a Technikon. Further that chances are likely that he will need to repeat another grade and that his achieving this level is dependent on remedial assistance and counselling.

20] He submitted that according to plaintiffs experts the injured would have reached grade 11 pre-accident while the defendant's experts are of the view that he would attain a grade 12 but the question is after failing grade 3 post-accident whether or not he will enter the labour market one year later. He argued that the injured will have problems when he enters the labour market as it cannot be said what he will earn in 20 years' time. He prayed that the court should apply its mind and award the amount that is reasonable in the circumstances.

21] Mr P N Mahlangu for the defendant submitted that the basis of the defendant's case rests on the neurosurgeon's report and the joint minute of the Educational Psychologists. Having submitted that it is common cause that the injured sustained soft tissue injuries on the mouth and gums, he argued that all along it was suspected that he had sustained a head injury until a neurosurgeon, Dr Okoli, was appointed. According to Dr Okoli the injuries sustained did not diminish the scholastic performance of the injured. He submitted that based on Dr Okoli's opinion the fact that the injured failed grade 3 (three) in 2007 cannot be linked to the injuries sustained in the accident. He also submitted that Dr Okoli opined that there was no evidence of an alteration of his mental status. Further that he was unable to associate any scholastic problem with the injuries sustained. Counsel for the defendant also submitted that in their joint minute the Educational Psychologists agree that the injured has behavioural and psychological difficulties probably as a result of family problems. They also agree that there was no difference between the pre and post morbid levels of the injured. He therefore submitted that no loss has been and can be attributed to the plaintiffs injuries.

22] Rumpff JA in *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (C) at 917 B-C said the following with regard to a claim for loss of earning capacity:

"In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and value it would have had if the delict has not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate".

23] In *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) the appellant, a mohair and game farmer and professional hunter, sustained serious bodily injuries in a motor vehicle accident as a result of which he was never again able to hunt or resume with the same vigour the role of hands-on manager of various farms. The farming and hunting business was done through a 'family' company behind which the appellant was the driving force. The appellant claimed damages for, among others loss of earning capacity, for which the respondent denied liability. The trial court dismissed the claim on the ground that, although the appellant had proved disabilities which, potentially at any rate, could give rise to a reduction in his earning capacity, he had

failed to prove that this had resulted in patrimonial loss since the loss of earnings and earning capacity he had suffered was a loss to the company and not to his private estate. The appellant's appeal to the Supreme Court of Appeal was dismissed. At para 11 of SCA judgment the following was said:

" In his (trial court's) view, Rudman's disability giving rise to a diminished earning incapacity was proved, but the evidence did not go further and prove that his incapacity constituted a loss which diminished his estate. I believe that this conclusion is correct The fallacy in Mr Eksteen's criticism is that it assumes that Rudman suffers loss once he proves that his physical disabilities bring about a reduction in his earning capacity; thereafter all that remains is to quantify the loss. This assumption cannot be made. A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of a person injured. It may in some cases follow quite readily that it does, but not on the facts of this case. There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss.

24] In *Prinsloo v Road Accident Fund* 2009 (5) SA 406 (SE) Prinsloo, a white female inspector in the South African Police Service (SAPS) had suffered a soft tissue injury of the lumbar spine. The accident rendered her unsuitable to continue in her physically demanding situation in the SAPS. A sedentary type of work was recommended. The expert opinion was that, notwithstanding her placement in a sedentary position, whatever the prospects she might have enjoyed for promotion were substantially reduced, if not entirely negated. That conclusion was based on the type of work the plaintiff did, compared to the sedentary role recommended by medical experts. Her medical expert testified that in her post accident condition, she was likely to advance beyond the level of inspector within the SAPS. The court rejected that supposition. The court reasoned that, if relevant factors such as race, equity and structural requirements were taken into account, the plaintiff's prospects for promotion, as a white woman, were negligible even pre-accident, as the evidence by the SAPS had established. The court therefore concluded that the claimant had failed to discharge the onus of proving that she suffered a loss or reduction of earning capacity as her pre and post-accident promotion prospects were the same. At paras 5 and 6 the following was stated:

" A person's all round capacity to earn money consists, inter alia, of an individual's talent, skill, including his/her present position and plans for the future, and, of course, external factors over which a person has no control, for instance, in casu, consideration of equity. A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on which he/she sustained the injury. In casu, the court must calculate, on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss. That loss is, as adumbrated herein before, calculated by the actuary on scenarios postulated by Dr Holmes. At the same time the evidence may have no appreciable effect on earning capacity, in which event that damage under this head would be nil".

25] It is common cause between the parties that the injured repeated grade 3 post accident. Pre accident the injured never repeated any grade. Looking at the injured's school reports pre- accident and taking the opinion of Ms Wentzel which describes the injured's performance pre-accident as ranging from incompetent to partially achieved, his scholastic functioning at school entry having been regarded as poor, it cannot be said that the injured's performance pre-accident ranged from average to above average as alleged in para 7 of the plaintiffs particulars of claim. It is correct that most of the experts used by the parties to assess the injured suspected a head injury until Dr Okoli medico-legally examined him and concluded that he sustained dental and gum injuries which injuries did not alter his mental status and should not affect his scholastic performance. It was submitted on behalf of the plaintiff that according to Ms Painter the injured sustained other injuries, viz, neuropsychological related sequelae which will affect him in the future resulting in him progressing slowly post-accident. It was also submitted that the failure of grade 3 by the injured is accident related whether he sustained a head injury or not. If one takes into account the injured's family background

and history, in particular, the level of education of his parents and the fact that his brother has failed a number of grades at school, it cannot be concluded that pre accident the injured could have progressed smoothly at school without failing. There is evidence from his family and from his own performance pre-accident that he was not a good scholar at all pre-accident.

26] It is not in dispute from the expert reports that the injured will progress at a slow pace to finish school. This according to Ms Wentzel is based on his pre-morbid performance at school which opinion I find realistic and making sense given the evidence. That is the reason why the Educational Psychologists recommended that he should get remedial assistance and counselling. Although the Educational Psychologists found some educational, neuropsychological and emotional difficulties when they assessed the injured, they agree that he has behavioural and psychological difficulties which could probably be as a result of family problems. While Ms Wentzel's view is that the injured could obtain a grade 10 pre morbid and post morbid although at a slow pace, Dr Rossi believes that he would be able to pass grade 12 and enrol at a technikon pre and post morbid although post morbid there is a likelihood that he will repeat a grade in his effort to obtain matric. The Educational Psychologists agree that there was no difference from pre to post morbid levels of injured.

27] Dr Rossi who is a Neuro and Educational Psychologist noted pre-existing developmental difficulties, a problematic family background, poor motivation and lack of cooperation on the injured and opined that all these complicate his situation. She opined that there is a chance that he will drop as he is immature and is inclined not to cooperate. Ms Painter opined that aggression may relate to unfortunate family circumstances or to a more significant brain injury if shown to exist. According to her bearing in mind mouth injuries it seems highly likely that current dental ailments emanate from the accident and together with fatigue caused by chronic infection, this may lower academic achievement. The head and/ or brain injury is not confirmed by Dr Okoli, the Neurosurgeon, and according to him the injuries sustained should not affect the injured's scholastic performance.

28] It is clear from the reports that the injured had pre-existing developmental difficulties, behavioural and psychological problems which could be as a result of the family problems. Ms Painter concedes that aggression may relate to the injured's unfortunate family circumstances. Taking all this evidence into account it is my view that Ms Painter's opinion that it is highly likely that the injured's mouth and dental ailments together with fatigue caused by chronic infection may lower his academic achievement is not supported by any evidence.

29] It must be accepted that apart from the accident the injured has lots of problems as discussed above. He is not a gifted child academically. There are problems in his family which also affect his performance at school. His aggressiveness could relate to his family circumstances and his emotional difficulties.

30] Although Ms Kotze is of the view that if it is accepted that the injured did not sustain a head injury and would still be able to complete grade 11, he would theoretically speaking still be able to earn the salaries as per the pre-accident scenario, she further opined that should there be any residual neuropsychological difficulties or reported difficulties of aggressiveness and tiredness continues, this could affect the injured's work performance resulting in mind not being able to perform optimally and thus outperforming his uninjured counterparts. I find this opinion unrealistic taking into account that Ms Kotze only relied on the opinion of Ms Wentzel and did not look at the reports of Dr Rossi and Dr Okoli. I accept the opinion of Dr Fourie as realistic because he took all the reports into account when he concluded that it is not envisaged that the injured may have a truncation in his future career path progression and likely earnings, until retirement age. His opinion accounts for all the evidence tendered.

31] It is therefore my view that the failure of grade 3 by the injured in 2007 post accident was not accident related. The injuries sustained in the accident were just physical injuries which did not affect his scholastic performance. Given his performance at school pre-accident and taking into account that in the year of the accident, he managed to pass the grade he was in, I find that his school performance was not changed by the

accident and that the problems that are discussed supra which he is now having, existed pre accident.

32] The plaintiff has therefore failed to discharge her onus of proving that the injured suffered a loss or reduction of earning capacity as her pre and post-accident situation has been the same.

33] The injured has therefore suffered no loss of earning capacity or loss of earnings.

34] In the result I make the following order:

34.1 The defendant is ordered to pay the plaintiff an amount of R108 00,00 in full and final settlement within 14 days of this order, directly into the trust account of the plaintiff's attorneys;

34.2 The defendant will provide the plaintiff with an undertaking in terms of section 17 (4) (a) in respect of future accommodation of Aaron Lindokuhle Sibeko in a hospital or nursing home for treatment of or rendering of a service or supplying of goods to him to compensate the plaintiff in respect of the said costs after costs have been incurred and on tendering of proof thereof limited to 90%.

34.3 The defendant will pay the plaintiff's taxed or agreed party and party costs, which will include costs in obtaining the medico legal reports as well as the reservation and qualifying fees of the following experts:

34.3.1 Anita Painter (psychologist);

34.3.2 Anne-Marie Wentzel (Educational Psychologist);

34.3.3 Ben Moodie (Industrial Psychologist);

34.3.4 GRS Actuarial consulting (Actuary);

34.3.5 Dr. Odendaal (Eye Surgeon);

34.3.6 M Manonyane (Clinical Psychologist);

34.3.7 M Mabongo (Maxilofacial & Oral Surgeon)

34.3.8 Costs of counsel and the attendance of the pre-trial conference by counsel.

34.4 The amounts stipulated in paragraph 1, shall be paid into the trust account of the plaintiff's attorney, the details of which are; Jacobus Attorneys Trust, Account Number[...], Standard Bank, Pretoria Branch code:010045, reference: AS0707.

M J TEFFO

JUDGE OF THE HIGH COURT, NORTH

GAUTENG

Counsel for the plaintiff : L Schreuder

Instructed by : Jacobus Attorneys

Counsel for the defendant : PN Mahlangu

Instructed by : Fourie Fisser Inc

Date of Hearing : 15 April 2013

Date of Judgment : 11 April 2013