

REPUBLIC OF SOUTH AFRICA

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REPUBLIC OF SOUTH AFRICA
THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
Case No. 65063/12
DATE: 12 MAY 2016
In the matter between:
V, N L obo

V, L P

Plaintiff

And

ROAD ACCIDENT FUND
J U D G M E N T
MNGQIBISA-THUSI J:

Defendant

[1]The plaintiff, in her capacity as curator ad litem, acts on behalf of L Prudence V ("L"),
a minor. Plaintiff instituted

a claim for damages against the defendant for loss of earning capacity and general damages against the defendant ("the RAF").

[2]The claim arises from injuries L sustained on 21 May 2012 at or near Temba, when as a pedestrian, she was knocked down by a motor vehicle whose registration number is unknown to the plaintiff. As a result of the collision, L sustained a fractured fibula. L was taken by ambulance to Jubilee Hospital for treatment. She was discharged on the same day.

[3]In the particulars of claim, the plaintiff seeks the following as damages:

- 3.1 past medical expenses - R 1000.00
- 3.2 future medical expenses - R 200 000.00
- 3.3 future loss of earnings - R 600 000.00
- 3.4 general damages - R 400 000.00

[4]In its plea the defendant , inter alia, denies that L suffered a serious injury as contemplated in section 17(1A) of the Road Accident Fund Act¹ ("the Act") and that she is entitled to be compensated for non-pecuniary loss in the form of general damages.

[5]On 29 November 2013, the parties reached a settlement with regard to the merits on a 75%/25% basis in favour of the plaintiff. For future medical expenses, the defendant will furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Act.

[6]The parties also agreed that due to the findings of the defendant's panel that L did not pass the 30% threshold of the narrative test and the determination that she has not sustained a serious injury qualifying her for general damages, the issue of general damages should be postponed sine die. The plaintiff intends appealing the panel's finding at the Appeal Tribunal.

[7]Furthermore, the parties agreed that the plaintiff's discovered documents will, without further proof, serve as evidence of what they purport to be subject thereto that only document(s) discovered that were identified and referred to in evidence by a witness may be used in argument.

¹ Act.56 of 1996.

[8]The defendant had no overlapping expert reports except that of an orthopaedic surgeon, Dr Van den Bout, and admitted the plaintiff's expert reports.

[9]The only issue to be determined is L's future loss of earning capacity due to the injuries sustained.

[10] At the time of the collision, L was 14 years old and in grade 8.

[11] Ms Tabisa Caga, an occupational therapist, consulted with L on 18 June 2014.

Her assessment was that L suffered no major cognitive problems as a result of the collision except for decreased numerical skill. Ms Caga testified that due to the injuries sustained, L would in future not cope with manual activities in that she will not be able to stand for long periods due to the pain experienced in her right knee and ankle and potential further pain if she develops osteoarthritis. Ms Caga is of the opinion that L was best suited for sedentary and light work. Ms Caga further testified that if L, who is currently in grade 11, does not pass grade 12, her employment options will be limited.

[12] The next witness called by the plaintiff was Dr Imran Khan, an orthopaedic surgeon who consulted with L on 03 May 2013. Dr Khan testified that L sustained a fracture to her right ankle involving both malleoli. A plaster cast was applied to her right leg. Dr Khan testified that L complained about pain in her right knee, which becomes painful when she walks long distances or stands for a long period. L also complained that her right ankle is occasionally painful. Dr Khan further testified that L's x-rays indicate that her right ankle has an old fracture to the medial malleolus that has not united. That the right ankle displays a slight deformity. He testified that in his opinion, the type of injury sustained by L, would not re-model even though L was still a child. Further, in Dr Khan's opinion, as a result of the injury sustained, L will develop osteoarthritis of the right ankle and will suffer pain. In Dr Khan's opinion, as a result of her injury, L has a 10% whole person impairment.

[13] The next witness called by the plaintiff was Ms Esther Sempane, an industrial psychologist, who consulted with L on 09 September 2009. She testified that L has a residual working capacity deficiency and will in future have problems with selection of employment. Ms Sempane was of the opinion that without her injuries, L would

have entered the job market with a matric, at a minimum wage of R3 500 to R4 000 per month. In Ms Sempane's opinion, with a matric L could eventually have reached career ceiling B3/B4 on the Paterson scale in the formal sector. Ms Sempane testified that, with her injuries, L would struggle getting a job even if she attained grade 12 in that she would be competing with physically able-bodied persons as a result of the pain in her knee and ankle.

[14] The defendant closed its case without leading any evidence.

[15] With regard to L's future loss of earning capacity, the uncontroverted evidence of the occupational therapist, the orthopaedic surgeon and the industrial psychologist is that L, as a result of the injury sustained, has suffered loss of earning capacity. Dr Khan and Ms Caga are in agreement that, with the sequelae of her injury, L will not be able to cope with work of a physical nature in that she cannot walk long distances and cannot stand for long periods.

[16] The following facts are common cause:

16.1 that collision occurred on 21 May 2012.

16.2 that the injuries L sustained in the collision were treated in hospital and she was discharged on the same day.

16.3 that L sustained a fracture to the fibula.

16.4 That as result of the injury sustained, L has problems standing for long periods and that, as per the occupational therapist's opinion, L will be best suited to a sedentary type of job. However, there was agreement between the experts that if L does not pass her matric, she would find it difficult to find employment in the formal sector.

[17] An actuarial report of Mr Gerard Jacobson, dated 22 June 2015 was, by agreement, handed in. In the report, a contingency deduction of 15% in respect of the pre-morbid and 25% in respect of post morbid scenarios was made. The resultant calculation of loss of income was R279 130.00. The calculation was based on the supposition made by the industrial psychologist that L's entry level income

into the job market would have been R4 000.00 per month with L reaching a career ceiling at 45 years of age at the B3/B4 Patterson level.

[18] There is no mathematical process of determining what is an appropriate contingency percentage to be employed at any given instant. It depends on the individual circumstances of each case².

[19] I have taken into account the fact that L, in spite of her injury, will be able to work until retirement at the age of 65. I am of the view, having regard to L's age and the limited options she would have in the job market if she does not pass grade 12, and despite Mr Badenhorst's suggestion that a higher contingency differential should be applied, that the contingency deductions employed by Mr Jacobson are fair and reasonable. I am therefore of the view that the calculated amount for future loss of income of R279 130.00 is fair and reasonable.

[20] Costs must follow the event. The plaintiff is also entitled to the costs of employing counsel and to recover the costs attendant to the reports, the preparation and reservation fees, if any, of the following experts: Dr Imran Khan; Ms Tabisa Caga; and Ms Esther Sempane.

²*De Jongh v Du Pisanie N. 0 2005 (5) SA 457 (SCA) at 472.*

[21] Accordingly the following order is made:

1. That the defendant is to pay the plaintiff an amount of R279 130.00 as future loss of income.
2. That the defendant pays interest at 15.5% per annum on the amount of R279 130.00 from the date of this order.
3. That the defendant is directed to furnish an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996.
4. That the defendant to pay the plaintiff's costs as well as costs incurred to obtain the report and preparation and attendance in court (where indicated) of the following experts:

- 4.1 Dr Imran Khan;
- 4.2 Ms Tabisa Caga; and
- 4.3 Ms Esther Sempene.

NP MN&QIBISA-THUSI Judge of the High Court

Appearances:

For the Plaintiff: Adv Badenhorst

Instructed by: Lekalakala Attorneys

For the Defendant: Adv Sokhulu

Instructed by: Dyason Incorporated