


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 33456/2012

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
18 October 2016	
DATE	SIGNATURE

19/10/2016

In the matter between

MOLEMONE VICTORIA obo ITUMELENG

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MADIMA, AJ

Introduction

1. The plaintiff sues the defendant in her personal capacity as well as in the stead of her son, Itumeleng ("the minor child"), born on 20 June 2003. The plaintiff is not married to the minor child's biological father. The plaintiff does not know his

whereabouts. The minor child is being looked after by his maternal grandparents in Tafelkop in Groblersdal while the plaintiff works in Johannesburg.

2. The minor child was hit by a motor vehicle as he was crossing Zambezi Drive on 3 July 2009, when only six years old.
3. In the particulars of claim, the plaintiff claims that the collision was caused solely by the negligent driving of one, E.T Mosweu, the insured driver of the vehicle bearing registration numbers and letters XHM 095 GP. The plaintiff alleges that the insured driver was negligent *inter alia* when he failed to keep a proper lookout, did not take adequate steps to avoid the accident when he could have done so, or failed to keep the vehicle under proper control, he did not apply the brakes timeously or give due regard to other road users.
4. It was further alleged that the minor child, as a result of the negligence of the insured driver, sustained severe head injuries which resulted *inter alia* in forgetfulness, poor school performance and severe headaches. The minor child has thereby suffered damages in respect of past hospital and medical expenses of R30 000.00. An estimate of future medical expenses in the order of R20 000.00 is also claimed on behalf of the minor child.
5. In addition to the above the amount of R70 000.00 is claimed for past and future loss of earnings, general damages of R200 000.00

6. The defendant filed a special plea which invoked the provisions of section 17(1) of the Road Accident Fund Act, Act No 56 of 1996, Regulation 3 and Regulation 3(3)(c), (d), 3(4) to (14). In its plea the defendant denied that there was a collision, alternatively that the insured driver was not negligent in any of the manner alleged. Instead the defendant alleged that it was the six-year-old who was negligent.
7. The issues around the merits of this matter, general damages and future medical expenses have become settled by the parties. This therefore means that I do not have to make any determination in that regard. What is before me is a narrow point regarding life expectancy of the minor child and therefore the loss of his future earning capacity.
8. It is common cause that the minor child was in Grade 1 at the time of the accident. There is however no record of the minor child's academic report before the accident. It is therefore not possible to can accurately determine what the premorbid academic potential of the minor child could have been.
9. The minor child was examined by two Educational Psychologists in order to determine the pre and post-accident educational potential. The experts do not agree regarding the pre-accident potential of the minor child. Dr L Kekana for the defendant testified that he personally visited the minor child's primary school in Groblersdal. He interviewed one Mrs. M.O Rachabane who was the minor child's Grade R educator in 2008, as well as Mrs. S.M Sono, the Grade 1 educator.

10. Mrs. M.O Rachabane's report stated that the minor child's "...school work was average and he had average intelligence". Mrs. Sono's assessment of the minor child was the same as that of Mrs. Rachabane. "...average and had average intelligence." It is perhaps important to state that Mrs. M.O Ratshabane assessed the minor child and reported that the minor child concentrated well when doing something that interested him. His school work was average. He was popular with peers. He learnt easily. He was very much the same as other pupils of the same age. He had an independent spirit. He was creative. He was also anxious.
11. Mrs. Sono as already stated above reported similar findings to those of Mrs. M.O Ratshabane. She added that the minor child was talkative.
12. Dr Kekana also interviewed the following educators, namely, Mrs. M.O Rachabane, the minor child's Grade R educator in 2008. Mrs. N.L Molapo, the minor child's Grade 1, English, Sepedi, Mathematics and Life Skills educator in 2009. Mrs. M.S Morare, Ms P.M Mohlala, Mr D.M Ntuli, Mrs. M.E Mashilo and Mr L.T Mabelane.
13. Mrs. M.S Morare was the minor child's Grade 3 Sepedi, Mathematics, English and Life Skills in 2011. Her report was that the minor child was *inter alia*, disorganized, easily distracted, poor attention, poor memory, performing below potential, has low intelligence, and importantly that the minor child might benefit from placement in a remedial school.
14. Dr Kekana conducted a psychometric test on the minor child using the Individual Scale for Northern Sotho speaking pupils. The minor child's mother tongue is Northern

Sotho. In his investigation Dr Kekana found that the minor child was being looked after by his grandparents at Tafelkop. His mother worked in Fourways, Johannesburg in Gauteng Province. His conclusion in this regard was that the minor child was not being assisted adequately with regard to his studies. This because of the lack of any academic qualifications of the grandparents. Dr Kekana also looked into the socio-economic circumstances of the grandparents which contributed to the minor child's learning difficulties.

15. Dr Kekana observed that the plaintiff expert used a Scale for Southern Sotho speaking pupils when the minor child was a Northern Sotho speaker. This Dr Kekana said attributed to the wrong assessment of the minor child.

16. Of further importance are the documents that Dr Kekana looked at and considered. These are reports by Dr Peter Kumbirai, an Orthopaedic Surgeon, Dr Ntlopi Mogoru, hospital records from the Steve Biko Academic Hospital and Dr B.A Okoli, a Neurosurgeon.

17. Dr Kekana concluded his evidence thus

"If his above average intellectual ability is taken into account as well as the performance of his parents at school and looking at various factors that might determine the child's educational potential, including family members (both maternal and paternal) backgrounds, environmental, socio-economic factors of the family, it is likely that before the accident, Itumeleng could probably pass Grade 12 and obtain an ordinary Grade 12 pass and not admission to a higher certificate. The trend now lately is that children often achieve more than their parent academically and

vocationally. The education landscape has since changed to support learners so that most are able to complete high school education."

18. Mrs. Sepenyane testified on behalf of the plaintiff. She readily admitted that she did not personally visit the minor child's school. She also admitted that she did not have a face to face consultation with the educators. Instead her evidence was that she relied on a questionnaire that she had sent to the educators at the minor child's school. Mrs. Sepenyane admitted that she used a Scale for Southern Sotho speaking pupils with respect to the minor child despite the fact that the minor child was a Sepedi speaker. She testified that there was no difference between the two languages.

19. The response to one of the questions on the questionnaire referred to above was that "comments on the learners scholastic progress from the time he/she was admitted to your school to present grade" was the "...he was not performing well". I bear in mind that this response was not with regard to the pre accident situation but post morbid. The experts have already admitted that there were no scholastic records of the minor child before the accident. The educators could not explain to the experts why this was so.

20. I am afraid that the plaintiff's expert's testimony was not very helpful. Most of the evidence was hearsay as she did not personally interview the educators. Not only that, Mrs. Sepenyane utilized what Dr Kekana described as the wrong Scale language in the intellectual assessment test of the minor child. Dr Kekana testified that the appropriate Scale ought to have been one in the Northern Sotho language, and not Southern Sotho.

21. In her report Mrs. Sepenyane stated that "...he started Grade 1 at the age of 4 years and 6 months, which is two years younger than the norm." The minor child was retained in the same class for a further year, and was still younger than his peers. Mrs. Sepenyane conceded that the pre-existing conditions could have contributed to his poor performance. The accident just added to the worsening condition.
22. Despite all of her findings in this regard Mrs. Sepenyane maintained that the minor child, but for the accident, would still have completed Grade 12 and proceeded to tertiary studies, either a Technikon or Technical College.
23. The plaintiff's legal representative pointed me in the direction of an almost similar matter where Dr Kekana was also an expert witness for the defendant, the case of M V Road Accident Fund (5617/11) (2014) ZAGPPHC 414. In this case another minor of Itumeleng's age suffered a serious brain injury with *sequelae* identical to those of the minor child.
24. The minor child (M) failed grade 1 in 2007 pre-accident. Dr. Kekana's assessment was that the child was of average intellectual capacity post-accident and had the accident not have occurred, the minor child would have proceeded to obtain a Grade 12 qualification, or a certificate and attend College thereafter.
25. In the instant matter Dr. Kekana has found that the minor child would pass Matric but not qualify for College. He testified that this is based on his findings of the Individual Scale for Northern Sotho speaking pupils where the minor child obtained a

global IQ of 110, a verbal IQ of 103 and Performance IQ of 114. The minor child is of average intelligence according to the IQ tests.

26. Mrs. Sepenyane's findings are that the minor child would pass Matric and go to college. However, Mrs. Sepenyane does not offer any scientific evidence to back up her conclusions.

27. The only question I need to answer given the evidence of the two experts and their respective reports is whether or not the minor child would make Matric with or without College.

28. The two experts agree that the minor child would make Matric.

29. The plaintiff calculates the minor child's future loss of earnings as depicted in the Table below:

Details	Pre-Accident	Post- Accident	Total
Gross Loss	R6 127 100	R424 600	
Contingency	R1 531 775(25%)	R169 840.00(40%)	
Subtotal	R4 595 325.00	R254 760.00	
Total loss	R4 340 565.00		

30. I must state that Dr Kekana is a credible witness. I say this because he personally visited the minor child's school. He consulted with the educators. With regard to Mrs. Sephenyane the obverse is true. She did not visit the school or educators. She relied

on a questionnaire. The answers emanating therefrom are not very helpful. I however am not saying that they are totally without merit. There is some value to her evidence.

31. The Industrial Psychologists secured by the plaintiff and defendant differ in their findings as well. The expert for the plaintiff opines that the career ceiling of the minor child would be at Paterson Level C1 (R285 000.00 per annum). The defendant's expert states that the minor child would only achieve a Paterson Level B3 and B4 (R162 000.00 per annum to R183 000.00 per annum).

32. In Bailey v. Southern Insurance 1984 (1) SA 98 (A) the Court applied a 25% contingency for the claim. The defendant accepts a contingency of 20% for the pre-morbid income and 25% for the post-morbid. The total payable to the plaintiff acceptable to the defendant is no more than R1 884 910.40 if one accepts the defendant's pre and post-morbid contingencies.

33. Dr Kekana concluded further that the minor child is being looked after by his maternal grandparents. Because they did not go far academically, it seems that the minor child is not being assisted with his schooling. This accounts for his poor scholastic performance.

34. Dr Kekana states further in his report that the minor child would require ongoing psychotherapy for a period of two years from a psychologist to address his emotional trauma arising from the accident. He should also be referred to an Educational Psychologist, and remedial Therapist to assist with language and mathematical skills so as to be able to cope with post Matric college studies.

35. There is little doubt that the minor child's life has been affected adversely because of the accident. I have already stated above that because of a lack of scholastic records pre accident, it is impossible to can accurately determine the minor child's academic potential going forward.

36. Equally is the fact that had the accident not happened, the minor child stood a chance to make something of his life. I do not subscribe to the notion that the minor child would not have gone to college because his parents did not go beyond Matric. Dr Kekana agrees that it is indeed quiet common that children surpass the educational levels of their parents.

37. I therefore proceed on the assumption that the minor child would have matriculated and entered the open labour market in 2023 and earned a basic salary in the median quartile between the Paterson levels A3 and B1. This translates to about R104 000.00 per annum to R112 000.00. the minor child would have reached his career ceiling at the age of 43 earning a total package salary of R162 000.00 per annum to R183 000.00. He would retire at age 65.

38. The other evidence in this regard puts the minor child in the R285 000.00 per annum bracket using the same salary scales. Like I stated earlier, it is not possible to with precision determine the exact extent of what could have been.

39. The total full and final amount that the defendant is amenable to compensating the minor child is therefore in the amount of R1 884 910.40. This is calculated and depicted as per the Table below.

	Past Loss	Future Loss	Total
Uninjured income 20%	R0.00	R2 594 009.33	R2 594 009.33
Injured income	R0.00	R253 729.42	R253 729.42
Loss	R0.00	R2 340 279.91	R2 340 279.91
Impact of contingency	R0.00	-R455 369.51	-R455 369.51
Loss net of contingencies	R0.00	R1 884 910.40	R1 884 910.40
Impact of cap	R0.00	R0.00	R0.00
Loss net of cap	R0.00	R1 884 910.40	R1 884 910.40


40. I accept the defendant's calculation of what, in its view is a fair tender. This therefore means that my starting point in the determination of a fair compensation for the minor child's troubles is as tendered by the defendant in the amount of R1 884 910.40.

41. The plaintiff's computation of R4 340 565.00 appears to be a lot more on the high side. I am more inclined to award damages somewhere between. I have stated above that the lack of pre-morbid scholastic records of the minor child makes it difficult to determine future academic potential, and thereby his earning potential. I have taken into account what the two experts for the plaintiff and the defendant have tendered as their evidence. Both experts were very helpful to the court. I am very indebted to them for their professionalism and dignified manner in which they conducted themselves.

42. No amount of money will unring the bell for the minor child. The life he would have had, can never be.

43. Accordingly, I make the following order:

- (i) The defendant shall pay the plaintiff the sum of R2,600 000.00.
- (ii) The defendant shall pay interest on the above amount at 9.25% from a date fourteen (14) days after judgment to the date of final payment.
- (iii) The defendant shall pay the plaintiff the taxed or agreed party and party costs including the costs of the expert(s).



TS MADIMA: AJ

ACTING JUDGE OF THE HIGH COURT

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Dates of Hearing: 24 May 2016 and 19 July 2016
Date of Judgment: ¹⁹~~18~~ October 2016