



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 37405/2014

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |

18 MARCH 2022

Date

K. La M Manamela

In the matter between:

NOMGCIBELO IDAH METHULE obo MINOR

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **18 MARCH 2022**.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] This matter involves the injuries and their *sequelae* relating to a minor child (born on 19 June 2005) sustained in a motor vehicle accident which occurred on 11 January 2013 in Kabokweni, outside of Mbombela/Nelspruit. The minor was a cyclist (or in fact a passenger on a bicycle) and therefore not a passenger in either of the two motor vehicles involved in the accident. The injuries to the minor included those to his head; left and right eyebrows; right and left arms; right and left hands, and right knee. As a result of the accident and the injuries sustained the minor child suffered damages. Through his mother, the minor sued the Road Accident Fund, the defendant, for compensation relating to his damages under various heads of damages. But only the issues relating to general damages remain for determination. The other issues were finalised in terms of the order of this Court granted on 03 March 2020 by Potterill ADJP. Included in the order was the provision for the creation of a trust for purposes of protecting the funds received as compensation for the minor child until he turns 25 years of age.

[2] The matter came before me (through a virtual link or platform) on 19 November 2021 and Mr APJ Bouwer appeared for the plaintiff. There was no formal appearance for RAF, although it is worth mentioning that Ms BS Kgoebane did appear for RAF, but for what appears under the next paragraph her participation was somewhat constrained. I reserved this judgment after listening to counsel for the plaintiff.

[3] On 10 November 2021, Holland-Müter AJ, granted an order in terms of which RAF's defence was struck out. Therefore, this matter thenceforth proceeded in the form of proceedings aimed at obtaining a default judgment or relief on a default basis. But it appears that RAF has been taking part in the proceedings through the office of the State Attorney after parting ways with its previously appointed attorneys. Ms Kgoebane, who made an appearance at the trial on behalf of RAF, appears to have been involved on behalf of the State Attorney after coming on board, so to speak, on 26 October 2021 in substitution of RAF's erstwhile attorneys.

[4] Next, I deal with the evidence in the plaintiff's case and submissions made by Mr Bouwer on behalf of the plaintiff. I am grateful to Mr Bouwer for his written argument in this regard.

Evidence and submissions on behalf of the plaintiff

General

[5] The minor child was 7 years old at the time of the accident. This means he was 16 years old at the time of the trial on 19 November 2021. It is not clear to me why this matter has taken this long to finalise. A cursory look of the virtual file reveals that the matter came before the Court a number of times for purposes of relief on a number of aspects. Some of these could have been avoided though, but my attention is rather required elsewhere.

[6] As already mentioned, the trial dealt only with the issue of general damages, as this was the only outstanding issue with regard to the damages suffered by the minor child.¹

¹ See par 1 above.

Injuries sustained and initial treatment received:

[7] Due to the accident the minor sustained injuries to his right knee and multiple lacerations on his scalp. He was taken to Temba hospital where he received surgical and non-surgical treatment. The treatment included the suturing of his wounds, pain medication, anti-inflammatory drugs and neurological observations. He was admitted for neurological observation.

[8] The full details of the injuries directly resulting from the accident are as follows: minor concussive head injury; soft tissue injury to the right knee with internal derangement; multiple disfiguring lacerations and scarring to the right leg, left hand, right wrist, left and right eyebrows, as well as neuro-psychological *sequelae*.

Expert witnesses

[9] The plaintiff relied on the evidence of the following expert witnesses who have delivered reports and confirmed the contents of their reports or their opinions under oath for purposes of the trial: Dr LA Oelofse (orthopaedic surgeon); Dr JPM Pienaar (plastic and reconstructive Surgeon); Dr KD Rosman (neurologist); Mr L Roper (clinical psychologist); Ms S Van den Heever (educational psychologist), and Ms F du Toit (occupational therapist).

[10] It is submitted that as the expert reports were confirmed under oath, they ought to be admitted into evidence to support the plaintiff's submissions regarding the claim for general damages. The reports contain the investigations, factual allegations and opinions of the expert witnesses. I will, indeed, consider the contents of the reports (now under oath) as evidence towards the determination of the appropriate award for general damages suffered by the minor. I must also add that after what appears to be an eventful process the minor's injuries

were admitted or ruled serious injuries as contemplated Regulation 3 of the Road Accident Fund Regulations, 2008, read with section 17(1A)² of the Road Accident Fund Act 56 of 1996 (the RAF Act).

Physical sequelae

[11] Dr LA Oelofse, the orthopaedic surgeon, examined the minor child on 16 May 2015. He had a follow-up examination of the minor on 14 August 2019. He diagnosed the minor child with internal derangement of the right knee joint. He recommended, in the event of non-response to future conservative treatment, a right knee arthroscopy and debridement. He stated the possibility of this to be between 30% and 50%.

[12] Dr JPM Pienaar, the plastic and reconstructive surgeon, examined the minor child on 10 August 2016. He observed on local examination scarring on the following bodily parts of the minor: forehead (i.e. 2 scars of 1 cm and 1,5 cm); right eyebrow and right lateral upper eyelid (i.e. a large scar measuring 4 cm and is 2 cm broad). The latter scar is also hyperpigmented, irregular, very visible and is said to cause distortion and destruction of the minor's right lateral eyebrow, and distortion of his right upper eyelid. There is also scalp abrasions which have since healed without leaving serious scarring, save for over the right temporal scalp where there is a 1 cm x 1 cm scar visible close to the anterior hairline and is said to be very unsightly. Other scars are over the minor's right wrist (i.e. 2 hyperpigmented scars of 1,5 cm and 1 cm); left wrist and hand (i.e. hyperpigmented, irregular, visible and very unsightly 3 scars of 2 cm, 1,5 cm and 1 cm).

² Section 17(1A)(a) of the RAF Act provides: "[a]ssessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party. (b) The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act, 1974 (Act 56 of 1974)."

[13] According to Dr Pienaar, the minor would require, as future treatment, surgery for scar revision and he envisaged an improvement of 30%. He will need to wear sunblock and tissue oil for a period of two years. He notes that the minor will retain considerable scarring, which will not lend itself to any further surgical improvement. He should receive compensation in this regard.

[14] Dr Pienaar further noted that the accident has left the minor with serious permanent disfigurement and scarring. These will have a detrimental effect on his psychological development, and will affect his confidence and self-esteem. Also, it will affect his masculinity and his relationship with women. The minor will be shy and withdrawn and avoid social contacts as a result. It will have a negative effect on his earning capacity, employability and choice of employment. Overall, it will decrease his general enjoyment of life.

[15] Both Drs Pienaar and Oelofse qualified the minor's injuries as serious under paragraph 5.2 of the narrative test (i.e. permanent serious disfigurement). Dr Pienaar calculates a 10% whole person impairment or WPI for disfigurement, whereas Dr Oelofse calculated a combined 15% WPI, in respect of the disfigurement and orthopaedic injury.

[16] Dr KD Rosman (neurologist) examined the minor on 29 March 2016. He noted the following. The minor suffered lacerations on the head and above the right eye, which were stitched. He also had a bumped knee which is still symptomatic. And he suffered not more than a mild diffuse concussive head or brain injury. Dr Rosman notes that the minor reportedly suffers from headaches and he will require future treatment for the management of the headaches. Dr Rosman has a follow-up examination of the minor on 09 December 2019

and again compiled a report on his examination, which significantly mirrors his first one. He was told that there have not been any new significant health problems in the interim. The scars were still as previously discussed.

Psychological sequelae

[17] Mr L Roper (clinical psychologist) assessed the minor on 09 July 2019. He noted the following from his assessment. The minor, according to Mr Roper, suffered from symptoms of posttraumatic stress disorder, due to the accident and its aftermath. This is evidenced by intrusion symptoms and symptoms of hyper-arousal. Neuropsychological testing revealed the following deficits: attention and concentration deficits; slowed response speed abilities; poor rote verbal learning and narrative memory abilities; executive functioning difficulties, and verbal fluency deficits.

[18] Mr Roper's conclusions are that the accident has rendered the minor psychologically more vulnerable. Further, he notes that there are several factors which negatively impacted the enjoyment and quality of life of the minor, including his post-traumatic stress response and associated increased anxiety, his reported headaches, and experiences of pain and weakness in the right leg. According to Mr Roper there is a 5% WPI with regard to the minor in respect of mood and behavioural disorders. Mr Roper recommends psychotherapy sessions in future.

[19] Mr S van den Heever (educational psychologist) assessed the minor on 25 August 2017 and had a follow-up session on 02 October 2019. She reported the following findings from her assessment. The emotional profile of the minor lacks abstractability. It consists of predominantly concrete answers. The minor indicated to Ms Van den Heever that he always

worries of being teased and has significant trouble doing things. Also, he presented with feelings of anxiety, inadequacy and insecurity at times. Ms Van den Heever opined that, the minor seems prone to emotional vulnerability. Further, the minor expressed his enjoyment in playing football or soccer. He has been told he is talented but reported that he experiences pain when he plays.

[20] Ms Van den Heever opined as follows regarding the minor's post-morbid educability. She notes that the minor's profile shows that he has been rendered more vulnerable on a cognitive and emotional levels. He could have completed a Grade 12/NQF 4 qualification pre-morbid, but he is now struggling with mainstream education. She recommends that he rather be placed in a LSEN/Pre-Vocational School. In this stream, he will be able to complete an adapted special ED Grade 10 and attain practical skills for future employment. According to her, should the minor not be offered the opportunity of attending a prevocational school, he will probably quit school with a condoned Grade 10 (NQF 2).

[21] Ms F du Toit (occupational therapist) assessed the minor on 13 March 2018. She noted the following with regard to the minor. The minor reported experiencing pain in his right knee and stomach when he runs and plays soccer. According to his mother, the minor complains of headaches during hot weather conditions. Ms Du Toit opined that the minor will benefit from remedial input, including occupational therapy in order to improve his visual perceptual functioning. Also, physiotherapy for general strengthening of the right leg will benefit the minor. She also recommends psychotherapy for the minor to help him cope with his facial scarring.

Plaintiff's claim for general damages

[22] As indicated above, after some wrangling, so to speak, on the 28 November 2020 the Road Accident Fund Appeal Tribunal resolved that the minor's injuries qualify as serious injuries under the narrative test.

[23] Mr Bouwer for the plaintiff submitted that an amount of R600 000.00 will be a fair and reasonable, considering the minor child's deficits and circumstances. He referred me to the comparable decisions, referred to next.

[24] The matter of *Phasha v Road Accident Fund*³ is a decision of this Division. It concerned a 49- year-old male who had sustained head injuries with loss of consciousness and amnesia; lacerations of the head and abrasions on both hands. He had also sustained compound fractures of the left tibia and fibula, including scars, deformities and disfigurement. He developed non-union of fibula fracture with displacement of bone fragments which resulted in a 2 cm shortening of his left lower leg. As a result he could not walk or stand for a lengthy period of time and was unable to lift heavy objects without experiencing pain in his left ankle joint. Consequently, he was dependent on pain killers. He was awarded compensation for general damages equivalent in 2021 terms or value of R623 000.00.

[25] Counsel also referred the Court to the decision in *Jacobs v Chairman of the Governing Body of Rhodes High School and others*⁴ of the Western Cape, Cape Town Division. It concerned a 32 year old female teacher who was attacked with a hammer by a learner in her class. Her injuries consisted of blunt trauma to her head, wrist and knee. She sustained head wounds for which she required five stitches, two fractured bones in her wrist, a fractured bone between her wrist and elbow, as well as a swollen knee. She was admitted

³ *Phasha v Road Accident Fund* 2013 (6E4) QOD 21 (GNP).

⁴ *Jacobs v Chairman of the Governing Body of Rhodes High School and Others* 2012 (6D4) QOD 16 (WCC).

and spent three days in hospital. As a result of her attack and injuries therefrom she developed emotional and psychological *sequelae* consisting of post-traumatic stress disorder, major depressive disorder and panic disorder with agoraphobia. The ailments had a crippling effect on her functioning as a teacher and in the social environment. The opinion of the experts was unanimous that it would be highly improbable that she would return to work as a teacher. She was awarded general damages equating to R603 000.00 in 2021 terms or value.

[26] Another decision urged for consideration by counsel is that in *Radebe v Road Accident Fund*⁵ of this Division. It concerned a 26 year old female person injured in a motor vehicle accident. She had sustained a soft tissue injury to the right leg and lower back. After she was transported by ambulance to Jubilee hospital, she underwent her initial resuscitation. She also received medication for the right leg pain and discharged on the same day. She started experiencing lower back ache for which she consulted a general practitioner, the next day. The doctor gave her pain medication and referred her to a physiotherapist for rehabilitation. She was subsequently admitted at Louis Pasteur hospital for treatment with NSAIDS. The MRI scan showed disc changes at L5/S1. She continued receiving physiotherapy. The orthopaedic surgeon found that she sustained a lumbar disc prolapse with severe lower back pain. According to him no future surgical intervention was anticipated and the pain was more likely due to lumbar disc injury and degeneration at LS/ S1. The neurosurgeon opined, she suffered a grade 2 concussion, which is a subset of a mild head injury, evidenced by no history of loss of consciousness and chronic headache. This could result in prolonged neurocognitive impairments. The claimant is suffering from post-concussion headaches. The psychiatrist's opinion was that she presents with somatoform pain disorder, depression and post-traumatic stress disorder. Upon clinical psychologist's

⁵ *Radebe v Road Accident Fund* (14645/17) [2019] ZAGPPHC 475 (8 August 2019).

assessment it was confirmed that there is posttraumatic stress disorder, depression and anxiety symptoms that are severe in nature in respect of this claimant. Another neurosurgeon found that the claimant sustained a mild head injury and a soft tissue injury to the lower back which resulted in anxiety, memory impairment and posttraumatic stress. The injuries have been there for four years after the accident without any further deterioration. She has reached maximum medical improvement and has 3% future risk of seizures as a result of the head injury in comparison to the general population. She was awarded general damages equating to R500 000.00 in 2021 terms or value.

[27] During oral argument Mr Bouwer, appearing as counsel for the plaintiff, referred the Court to another comparable decision of this Division *per* Davis J in *Mashigo v Road Accident Fund*.⁶ A substantial portion of the damages of the claimant related to the scarring and disfigurement to her burn wounds. She had also endured for a while without receiving treatment or remedial medical intervention for her scarring, such as reconstructive surgery. This, the Court remarked, increased her pain and suffering and would lead to an increase in the award for general damages. The full extent of the injuries was: a soft tissue injury to the left wrist; a soft tissue injury of the left knee, and burn wounds to her arms and breasts. The wrist and knee injuries were relatively minor, when considered from an orthopaedic viewpoint, whereas the scarring, especially to her breasts was considered by the Court as the primary source of the damages claim. The scarring was as follows: a disfiguring scar of 180 mm x 20 mm on the anterior part of the left breast covering the lower medial and upper quadrants and extending onto the outer quadrant of the breast. This scar had a hypertrophic margin with its centre depigmented. Another scar measured 100mm x 25 mm and ran transversely across the surface of the right breast. The latter scar also has a hypertrophic

⁶ *Mashigo v Road Accident Fund* (2120/2014) [2018] ZAGPPHC 539 (13 June 2018).

margin with a depigmented centre. The Court described these scars as large and unsightly after viewing the photographs provided. The scars to the arms were 10 cm or longer each and hypertrophic or post abrasion in nature, but are hyperpigmented. On final evaluation the Court noted that the claimant's pain and suffering from the injuries, previously experienced still persisted albeit to a lesser degree. The claimant might remain with permanent scarring. She was unable to breastfeed her second child due to the pain in her breasts, which deprived her of the nurturing and bonding experience of motherhood. The minor orthopaedic injuries impacted negatively on her amenities of life. The Court awarded her an amount of R 450 000.00 for general damages. I am grateful to counsel for drawing this decision to my attention as the Honourable Davis J embarked therein on a comparative review of other cases before making the award he did. I will have this in mind when determining the outcome of this matter.

Conclusion

[28] I have considered the evidence in terms of the expert opinions expressed under oath and the submissions by counsel on behalf of the plaintiff, above. I have also compared the decisions gratefully referred to by counsel and beyond. I think the determination to be made in this matter is located between the decisions in *Phasha* and that in *Mashigo*. In *Phasha* the claimant has only soft tissue lacerations of the head and abrasions on both hands, but serious orthopaedic injuries (i.e. compound fractures of the left tibia and fibula) and *sequelae*. He also had sustained head injuries with loss of consciousness and amnesia. The claimant in *Phasha* also had a 2 cm shortening of the left lower leg which left him unable to walk or stand for a lengthy period of time and dependence on pain killers for relief. The minor child has unsightly scarring to his head and suffers from migraine-type headaches and still has a long way to go in terms of years enduring his deficits when compared with the claimant in

Phasha which concerned a very aged man. But I consider the effect of the orthopaedic injuries in *Phasha* to be a very significant factor. In *Mashigo* the Court dealt with equally unsightly scarring and disfigurement of the claimant's breasts, but again the age of the claimant is also decisive in favour of the minor child in this matter.

[29] Considering all of the above, I consider the amount of R600 000 urged upon by counsel to be on the high side. This is so even when comparison is made to the awards in other cases, including those referred to above. In my view the amount of R500 000 is fair, reasonable and appropriate in respect of the general damages claimed on behalf of the minor child in this matter. I will make an order for payment of that amount by RAF together with costs relating to this head of the plaintiff's claim.

Order

[30] In the premises, I make the following order, that:

- a) the defendant is ordered to pay to the plaintiff the amount of R500 000.00 (five hundred thousand rand) in respect of general damages in respect of the motor vehicle accident which occurred on 11 January 2013;
- b) the defendant should pay the amount in a) hereof into the account of the plaintiff's attorney, Frans Schutte & Mathews Phosa Inc, Standard Bank Trust Account number [...];

- c) the amount referred to in a) above, to the extent that it is legally justifiable, may after deduction of the legal costs and fees, be paid into the Zwelethu Winston Methule Trust IT000106/2021(T);
- d) the defendant is ordered to pay the plaintiff's taxed or agreed party and party costs, including the costs relating to the following:
- ii) the costs consequent upon the employment of counsel;
 - iii) medico-legal and addendum reports, joint and draft joint reports (if any) served on (including per email) the defendant, including costs of any special medical investigations (x-rays, MRI scans, blood tests etc) if any;
 - iv) the qualifying fees of the experts referred to above (if any), and
 - v) the reasonable costs consequent to attending the medico-legal examinations of both parties (if any).

Khashane La M. Manamela
Acting Judge of the High Court

DATE OF HEARING : 19 NOVEMBER 2021

DATE OF JUDGMENT : 18 MARCH 2022

Appearances:

For the Plaintiff : Mr APJ Bouwer

Instructed by : Frans Schutte & Mathews Phosa Inc
c/o Schutte De Jong Inc, Pretoria

For the Defendant : Ms BS Kgoebane (no formal appearance)
Instructed by : State Attorney, Pretoria