

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

CASE NO: 8204/2014

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
Date: 28 April 2022

In the matter between:

B[....] M M[....]

Plaintiff

o.b.o. **D[....] M[....]**

(previously cited as **D T[....]** o.b.o. **D T[....]**)

And

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 **28 APRIL 2022**.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] The late Ms D[....] T[....], (the Plaintiff), acting as the mother and natural guardian of the minor child D[....] T[....](the minor child or minor), born on 13 July 2009,

caused summons to be issued against the Road Accident Fund (RAF) on 4 February 2014 in terms of the provisions of the Road Accident Fund Act 56 of 1996 (the RAF Act). The summons by the Plaintiff followed the accident on 24 December 2011 in which her minor child, on foot and on her way to church with her grandmother, was hit and injured by a motor vehicle on an unknown road in Upper Majeakgoro Village, near Pampierstad, Northern Cape. The motor vehicle was driven by one RR Matlhola (the insured driver) at the time of the accident. The Plaintiff blamed the accident on the sole negligence of the insured driver. Her minor child sustained injuries, among others, the following: laceration of the right ear; skull fracture, and left cerebral tent bleeding. The Plaintiff claimed on behalf of the minor child the amount of R2 million in respect of future medical expenses, future loss of income and general damages suffered by the minor due to the injuries sustained from the accident and their *sequelae*.

[2] RAF defended the action and denied liability. But in the course of time RAF fully conceded the merits or liability in favour of the minor child or the Plaintiff. On 7 March 2018 in terms of the order granted by Ledwaba, DJP, the issues relating to the general damages were separated from those relating to the loss of income, with the latter issues postponed *sine die*. In the same court order the Plaintiff was awarded the amount of R700 000 in respect of what appears to be general damages and RAF was also compelled to furnish the Plaintiff or the minor with an undertaking for future medical treatment and expenses in terms of section 17(4)(a)¹ of RAF Act. On 19 November 2021, Motha, AJ, granted an order in terms of which RAF's plea and defence of the Plaintiff's claim was struck out. Therefore, this matter thenceforth proceeded towards the attainment of a default judgment. The amounts in respect of the future medical

¹ Section 17(4)(a) of the RAF Act reads as follows: "(4) Where a claim for compensation under subsection (1)(a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate (i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or (ii) the provider of such service or treatment directly, notwithstanding section 19 (c) or (d), in accordance with the tariff contemplated in subsection (4B)".

expenses and future loss of income where significantly increased in terms of an amendment finalised shortly before the trial.

[3] On 26 November 2021, the matter came virtually before me as a trial. Mr A Nell appeared as counsel for the Plaintiff. There was no appearance for the RAF, as RAF appears to have withdrawn the mandate of its attorneys and, thereafter, participated in the matter without legal representation. But in any way no purpose would have been served by an appearance made on behalf of RAF, due to the striking-out order, referred to above. I reserved this judgment after listening to brief oral submissions by Mr Nell for the Plaintiff. Counsel has also filed written heads of argument or submissions, for which I am grateful.

[4] I have noted that the Plaintiff, namely Ms D[....] T[...], the biological mother and natural guardian of the minor was replaced by Mr B[....] M[....] M[....] (henceforth referred to as the Plaintiff), the biological father of the minor. The late Ms [....] (henceforth the replaced Plaintiff) has passed away on 4 June 2021. The change in parties, appears to have been effected, through a notice of substitution filed by the Plaintiff's Attorneys in August 2021. The minor was 12 years old at the time of trial. Although, I am not certain as to whether this approach was proper, due to the fact that the matter appeared to have already served before the court with an order, reflecting the new citation granted, I will accept the conformity of the substitution or the change in citation with the rules and practice of this Court, lest the immediate previous order gets unravelled, so to speak. I have already reflected the changed citation above.

Evidence and submissions on behalf of the Plaintiff

[5] As stated above, the issues remaining for determination in this matter are those relating to the future medical expenses and future loss of income. The other issues have been finalised as stated above. But, in the heads of argument filed by Mr Nell, he submitted that there are no past medical expenses and therefore this head of claim is no longer pursued by the Plaintiff.

[6] The evidence in the trial was by way of the reports or medico-legal reports furnished by the experts employed on behalf of the Plaintiff. The experts had confirmed under oath the

contents of their reports or their opinions therein. This was in terms of the affidavits filed before the trial. Next, I deal with the pertinent parts of the reports, guided by counsel's submissions.

Ms Vanessa Gaydon (educational psychologist)

[7] Ms Vanessa Gaydon, an educational psychologist, assessed the minor on 8 July 2016. This was about five and half years after the occurrence of the accident in which the minor was injured on 24 December 2011. The minor was six years and 11 months old at the time as she was born on 13 July 2009. The minor was then in grade 2. Ms Gaydon assessed the minor again on 21 August 2020, when he was repeating grade 4 for the second time.

[8] Ms Gaydon noted that the minor was admitted at the Pampierstad clinic after the accident. She was reportedly unconscious. Thereafter she was transferred by ambulance to Hartswater Hospital where she reportedly regained consciousness. She was further transferred by ambulance to Kimberley hospital where her injured ear, partially degloving, was sutured back. At the time of the accident the minor was two years and four months' old, and still attending preschool or creche.

[9] The educational psychologist reported that, among others, the minor's Glasgow Coma Scale or GCS was recorded at 14/15 when she was admitted at the Kimberley hospital. She was described as uncoordinated and sleepy. The minor was treated conservatively and discharged on 28 December 2011. She was referred back to the Pampierstad clinic.

[10] Ms Gaydon opined that, although there is no pre-morbid measure of early educational functioning and, therefore, it being difficult to predict future potential, the minor's early development and the fact that her mother managed to achieve a matric qualification and have further upgraded her skills with very little resources and education, the minor is likely to have been able to achieve at least a matric without the accident.

[11] The minor's mother, reported, among others, the following to the educational psychologist. Since the accident the minor had a poor and selective appetite, and suffered from headaches and nosebleeds. Further, the minor is said to have had difficulty with her vision at school and struggled to sleep, apart from having nightmares and nocturnal enuresis

of about twice a month. And the minor had underwent an appendectomy in 2014 and hospitalised for just over a week, but there were no reported problems or complications.

[12] Further, Ms Gaydon reported that, following the accident, the minor returned to creche and there were no complaints regarding a change in her behaviour. The minor, reportedly, had difficulties in reading and writing since entering formal schooling in grade R which persisted despite her change of schools in grade 1. At the time of the interview, she had been moved to do a grade 2 at a new school at the beginning of the year. She had reportedly settled well socially at the new school, but the teachers expressed concern about the fact that she struggled with writing and refused to write. Ms Gaydon - upon review of the minor's grade 2 report for the first and second terms of 2016 - opined that the results suggested that the minor "may struggle with learning as she progresses to higher grades at school".

[13] After conducting the relevant tests, the educational psychologist, among others, expressed the following opinions. Post-accident, the minor's overall performance upon the cognitive assessment, indicated that she was functioning between borderline to below average range of cognitive ability for her age level. Ms Gaydon also found a strong suggestion of neurological difficulties, due to possible traumatic brain injury. The minor's profile indicates that she had the risk of developing specific learning difficulties, the educational psychologist further opined.

[14] Ms Gaydon made, among others, the following recommendations. The minor should be placed in a specialised schooling environment where she could be provided with necessary specialised education in order to address her areas of cognitive deficits. The reason for this according to the educational psychologist is that the minor presented with behavioural changes and cognitive deficits which placed her at risk, educationally. She said further that the minor had the risk of developing specific learning difficulties and is unlikely to achieve her pre- morbid potential without specialised support. Further, the educational psychologist considered that due to the age of the minor it is difficult to predict the extent of the risk but research indicated that any intervention mitigates best against the long-term effects of TBI. She also suggested the protection and management of the funds awarded to the minor due

to her age. Ms Gaydon delivered an *addendum* report in 2020.

Ms Anne Hofmeyer (educational psychologist, with neuropsychology special interest)

[15] Ms Anne Hofmeyer, an educational psychologist (with special interest in neuropsychology) assessed the minor in November 2017 and again on 25 August 2020. Ms Hofmeyer, among others, noted that the minor was admitted to the Kimberley hospital where she was diagnosed after a CT scan with skull fracture and left cerebellar tent bleed, apart from the other injuries noted in the report by Ms Gaydon, above.

[16] Ms Hofmeyer, among others, further noted that the minor's father has a grade 5 education, but he is now gainfully employed as an electrician, and the mother had a grade 12 and post-matric (i.e. diploma) qualification. She concluded that given the minor's family education and background, taking into consideration the fact that finances were poorly available to some members of the family to complete their education, the aforementioned is suggestive of the minor's likely average range level of premorbid cognitive functioning.

[17] Further, Ms Hofmeyer concluded against available information as follows: "it can be concluded that [the minor's] involvement in the accident has brought about long-term neuro-cognitive, neuro-behavioural and neuro-psychiatric difficulties and there is evidence available to suggest occupational choices in future earning capacity have been impacted by her involvement in the accident".

Ms Narishca Doorasamy Thandrand and Ms Jolene Allkins (occupational therapists)

[18] Ms Narishca Doorasamy and Ms Jolene Allkins, occupational therapists, assessed the minor on 24 November 2017. Ms Doorasamy re-assessed the minor on 26 August 2020. In their initial the expert witness reported that they noted that the highest educational level of the minor's mother was a post-matric "pre-nursing course" and not a "diploma" as referred to by Ms Hofmeyer, the educational psychologist, above.² As with the educational psychologist, these occupational therapists were informed that the minor was of good health prior to the

² See par 16 above.

accident in 2011.

[19] Under the heading “Residual School Capacity”, Ms Doorasamy and Ms Allkins made the following observations. Regarding physical assessment the results indicated that the minor displays some “deficits which impact on her gross and fine motor abilities”. Further, that “[f]rom a physical point of view she will be able to engage in sedentary, light and medium physical demand work in the future”. She “has retained the physical abilities to progress as a scholar”. These expert witnesses went further and stated that cognitively the minor presented with moderate limitations and “demonstrated deficits in attention and concentration”. They recommended that the minor be accommodated in a remedial school environment to continue with the educational development. This was made against a consideration of the minor’s age, education and background. The experts opined that the minor is not coping well academically in mainstream schooling with the potential to fail her current grade. They are of the opinion that the minor’s placement in a remedial school will benefit her with the regular assessment to identify difficulties she may experience academically and ensure that she is coping with the demands of schooling specially as she progresses to higher grades. She would also be suited to attend an FET or technical school to accommodate her learning impairments.

[20] Ms Doorasamy reassessed the minor on 26 August 2020. She noted that the minor has repeated grade 4 twice, which she opined is an indication that the minor continued to struggle with basic literacy and numeracy. She concluded that the minor - given her aforementioned challenges and deficits - will not progress further within the mainstream school environment and that she is “unlikely to benefit from specialized education and will be limited to more practical training to assist her to develop some basic practical skills”. Further, that with individual support, the minor may achieve a practical qualification equivalent to an NQF level 2-3.

Ms Meryll Shein (industrial psychologist)

[21] Ms Meryll Shein, an industrial psychologist, assessed the minor on 24 November 2017 and compiled her report on 1 March 2018. The minor was in grade 3 in 2018, the industrial psychologist noted. Ms Shein noted the complaints of the minor as follows: headaches twice

weekly; memory and concentration; aggressive, fights with siblings; sometimes loses balance and falls over; nosebleeds and moody. She compiled an *addendum* report dated 5 October 2020.

[22] Ms Shein expressed the following opinions (against the background of the given available information regarding the pre-accident potential of the minor): “with at least an average cognitive level, it is likely that [the minor] would have been able to complete matric and with a mother who has completed post-matric training and a father employed as a technician, she would have been able to complete some form of a post-matric certification, if opportunity and motivation allowed”. The minor would, then, have been able to enter the open labour market in her field of choice. Ms Shein, further opined, that the minor “most probably would have went until reaching the retirement age of 60 – 65 years depending on a variety of factors such as her health status, personal circumstances and conditions of employment, etc”.

[23] The industrial psychologist further expressed the following opinion regarding the minor’s post-accident potential: “based on the above reports that [the minor’s] scholastic abilities have been compromised, and she will not be able to achieve the same level of educational qualifications as she would have, had the accident not occurred”. Also, that the minor had deteriorated in her pre-morbid capacity to pursue her education and any future occupation she might have wanted to pursue had the accident not occurred, may no longer be within reach. Ms Shein further stated that realistically the minor’s “limited reasoning skills, erratic attention and difficulty with memory will most probably prevent her from achieving her Grade 12”. The same difficulties are likely to affect the minor’s ability to learn and would furthermore hamper occupational performance and progression, the industrial psychologist continued. The minor would be regarded as a less competitive and vulnerable employee when she has to secure and maintain suitable employment, the opinion continued.

[24] Ms Shein postulated the minor’s loss of earnings in two scenarios: a pre-accident scenario and a post-accident scenario. The pre-accident scenario is to the effect that had the accident not happened the minor would have obtained a grade 12 pass and been able to move on to some form of tertiary qualification certification. Further, that when in possession

of a matric qualification, as a bare minimum, the minor would have entered the labour market at B2 Paterson (basic salary) salary scheme level. Her earnings with inflationary increases and career progression would have steadily and at a fair rate progressed to C1/C2 (total package) by the time the minor reached her career peak at the age of 40 to 45 years, and she would have received inflationary increases thereafter. Thereafter, the minor would have been able to work until normal retirement age of 63 - 65 years depending on a variety of factors, such as a health status, personal circumstances and conditions of employment.

[25] Under the post-accident scenario, the industrial psychologist is of the opinion that even with placement in a remedial school and the recommended treatment, the minor is unlikely to achieve her matric due to neurocognitive and neuropsychological *sequelae*. Due to these deficits the minor is suited to an employment environment that offers support, external monitoring and supervision based on a below average learning abilities and difficulties with executive functions. Without a grade 12 level of education the minor will only be eligible for semi-skilled or unskilled work. The industrial psychologist further opined that as an unskilled worker with lower level of education the minor would most probably have been unemployed for approximately 3 to 5 years post-school. After finding employment in the informal sector as an unskilled worker she would have initially earned between the lower quartile and median of the informal sector earnings for unskilled workers, progressed into earnings between the median and the upper quartile within 2 to 3 years. She would have remained at this level earning inflation-related increases until she retired.

[26] In her *addendum* report (dated 5 October 2020), Ms Shein, among others, noted as follows. The minor repeated grade 4 in 2019 and 2020. The teachers have expressed concern about her difficulties with concentration and grasping concepts in class. Ms Shein, significantly, repeated her findings and recommendations in her earlier report.

Mr Namir Waisberg (actuary)

[27] Mr Namir Waisberg, an actuary, provided a revised actuarial certificate dated 6 October 2020 along the scenarios postulated by Ms Shein, as follows:

(please refer to pdf for table)

Submissions on behalf of the Plaintiff

[28] As stated above, Mr Nell appeared at the trial for the Plaintiff and apart from his oral submissions, he had gratefully filed written submissions. Part of his submissions are incorporated in the evidence from expert witnesses, above. At the risk of being repetitive, I reflect the submissions by Mr Nell, below.

[29] Mr Nell submitted that the matter was originally set down for trial on 23 August 2021, but due to an error by the Registrar it was not placed on the roll. A new date for 26 November 2021 was given to the Plaintiff for finalisation of the claim.

[30] Counsel further submitted that on the clinical notes and medico-legal reports at hand, the minor sustained the following injuries: moderate/severe traumatic head injury; skull fracture with subarachnoid haemorrhage and intracerebral bleed; severe laceration/partial degloving to the right ear; lacerations to the right forehead, and abrasions to the right leg. And the minor's highest level of education is a grade 3. Also, that the aforementioned injuries have had a detrimental impact on the minor's future academic prospects, as well as her employment capacity. Ms Gaydon, the educational psychologist, counsel submitted, is of the opinion that the minor had the potential to possibly achieve at least a matric prior to the accident.

[31] Ms Gaydon, according to counsel, post-accident, remained of the opinion that the minor was likely of average cognitive ability pre-morbidly and had the potential to achieve at least a matric and possibly some form of tertiary education, finances permitting, a NQF level 5-6.

[32] Counsel, while continuing to rely on views by the educational psychologist, highlighted that the minor's current performance on the cognitive assessments indicated that she continued to function significantly below the average for her age and cultural group, and that her functioning has deteriorated in several areas to the extent that she currently functions within the impaired range in some areas. This decline is consistent with a traumatic brain injury and likely to only get worse over time. Her deficits are consistent with a diffuse traumatic injury. Considering the extent of her deficits, along with the decline in her functioning, the brain injury is likely to have been at least moderate, but most possibly severe in nature

[33] Regarding the actuarial calculations based on the postulation by expert witnesses, particularly the industrial psychologist, counsel made submissions including the following;

[33.1] for future uninjured loss, a slightly contingency deduction of 20% is proposed, due to the minor's young age, and

[33.2] for future injured earnings, due to the difficulties faced by the minor as discussed above, a higher contingency of 30% is proposed.

[34] The contingencies suggested or proposed by counsel – after he labelled them fair and reasonable – are to the following effect: a total of R5 437 052.80, as the statutory cap, according to counsel, is not applicable to this claim.

Conclusion

[35] I have noted the opinions of the various experts as contained in the relevant reports, some of which are reflected above. Counsel's submissions also have been helpful, I should also gratefully add. I also noted the view by the educational psychologists that the minor may – in the long term – benefit from remedial school education. This view appears to have been somewhat jettisoned or downgraded, I think particularly because the minor was repeating grade 4 for the second time when she was reassessed in 2020. But the remedial intervention is significant and ought to be given a reasonable opportunity, at least, to gain ground, so to speak. Also, I doubt that it is of no significance that the minor has been moving from school to school, even after the accident, and in some instances from province to province.

[36] Therefore, whilst appreciating that the injuries from the accident or their *sequelae* had left the minor with long-term physical and neurocognitive impairments, I would apply different contingencies from those suggested by the actuary or counsel, as reflected in the table

below:

(please refer to the PDF for table)

[37] On the basis of the above tabulated calculations, I will make an award in the amount of R4 737 317 in respect of the estimated loss of income or earning capacity of the minor. To the extent that the contingencies I applied or the way I applied them (i.e. the form or substance), for whatever reason, do not seem conventional, scientific or arithmetically accurate, I point out that I consider the amount of R4 737 317, in and of itself, a fair and adequate compensation for the loss of income or earning capacity suffered by the minor, given the peculiar circumstances of this matter.

[38] I will also direct that RAF furnish the Plaintiff or the minor with an undertaking for future medical treatment, care and expenses in terms of section 17(4)(a) the RAF Act.

[39] Costs would follow the result, as further expanded in the order appearing below. But I should mention that I have noted that the Plaintiff obtained reports from a number of experts in 2015, but, for reasons I do not find rational, switched for others most of these experts later. In some areas more than two experts were instructed on behalf of the Plaintiff. I must not be understood to mean that a party, such as the Plaintiff is constrained from exercising his or her discretion in instructing experts of own choice. But such discretion would indeed – and it ought to be – fettered when it comes to the recovery of costs incurred in the instruction of the jettisoned experts from the opposing party. I would have disallowed all costs relating to the 2015 experts and any other expert which has been duplicated, but I noted that in most instances there is cross-referencing to the earlier reports by the later experts. Therefore, the contents of the earlier reports have not completely gone to waste, so to speak. But this does not apply to the industrial psychologists. Therefore, I will not allow the costs relating to P Brits, the industrial psychologist, whose report did not influence the actuarial calculation or the outcome of this matter, in my respectful view.

[40] Before I conclude with the order, I must say that I have noted that Ms Gaydon, the educational psychologist, suggested the protection and management of the funds awarded to

the minor, due to her age. But the suggestion appears not to have been considered by the Plaintiff's attorneys or counsel in the submissions or draft order proposed for this matter. I would, nevertheless, insert, in permissive terms of course, a term in the order below to the effect of catering for the possibility of a reconsideration by the Plaintiff, as he is minded or advised.

Order

[41] In the premises, I make the order, that:

- a) the Defendant shall pay to the Plaintiff, in his representative capacity as the biological father and natural guardian to Ms D[....] M[....] (previously D[....] T[....]) (the minor child), the capital sum of R4 737 317 (four million seven hundred and thirty-seven thousand three hundred and seventeen rand) in respect of the future loss of income or earning capacity of the minor child due to the motor vehicle accident on 24 December 2011;
- b) in the event of the amount(s) in a), and/or e) hereof not being paid timeously, the Defendant shall be liable for interest on the amount(s) at the rate, as prescribed by the government gazette, calculated from 180 calendar days after the date of the order, *allocatur* or agreement to the date of final payment;
- c) the payment in a) hereof shall be made into the trust account of the Plaintiff's attorneys of record, with the following account details:

Name of account holder: Moss and Associates

Bank Name: First National Bank

Branch Name: RMB Private Bank

Account number: [....]

Branch Code: 250 655

Type of Account: TRUST ACCOUNT

Ref: JT599

- d) the Defendant shall furnish the minor child or the Plaintiff in his representative capacity as the biological father and natural guardian of the minor child with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for 100% of the costs of the minor child's future accommodation in a hospital or nursing home or treatment or rendering of a service or supplying of goods to the minor child or related expenses arising out of the injuries sustained by the minor child in the motor vehicle accident on 24 December 2011 after such costs have been incurred and upon proof thereof;
- e) the Defendant shall make payment of the Plaintiff's agreed or taxed party and party High Court costs of the action to date of this order, including the reasonable costs of counsel on 23 August 2021 and 26 November 2021; the reasonable traveling and accommodation costs incurred to ensure the minor child's attendance to all medico- legal appointments and court; the reasonable costs of obtaining capital payment referred to in a) hereof, and the qualifying, reservation and/or preparation fees, if any, of the following experts:
- i. Dr T.O Kommal (independent medical examiner);
 - ii. Dr. J. Scheltema (neurosurgeon);
 - iii. Dr M. Pillay (neurologist);
 - iv. Dr B.K Cheyip (neurologist);
 - v. Dr S. Wolberg (neurologist);
 - vi. T. Mtetwa (clinical psychologist);
 - vii. Dr E. Du Plessis (educational psychologist);
 - viii. Ms V. Gaydon (educational psychologist);
 - ix. Ms A. Hofmeyer (neuropsychologist);
 - x. Dr L. Berkowitz (plastic & reconstructive surgeon);
 - xi. Dr B. Van Onselen (ophthalmologist);
 - xii. F. Ganchi (audiologist & speech pathologist);
 - xiii. Dr G. Allan (specialist ear, nose and throat surgeon);
 - xiv. T. Ncwane (occupational therapist);
 - xv. Ms N. Doorasamy (occupational therapist);

xvi. Ms M. Shein (industrial psychologist), and

xvii. Mr Namir Waisberg (actuary consulting).

- f) the Plaintiff is urged, within 3 (three) months from the date on which the capital amount referred to in a) hereof is paid, to consider taking steps within the confines of the law towards the protection and/or the financial management of the funds of the minor child, including through the creation of a trust, costs of the creation and administration of which are to be paid by the Defendant, whilst catering for the immediate and continuous needs of the minor child;
- g) it is recorded that the Plaintiff and the Plaintiff's Attorneys entered into a contingency fee agreement.

Khashane La M. Manamela
Acting Judge of the High Court

Date of Hearing : 26 November 2021

Date of Judgment : 28 April 2022

Appearances:

For the Plaintiff : Adv A Nell

Instructed by : Moss & Associates Attorneys, Johannesburg
c/o Hills Incorporated, Pretoria

For the Defendant : No appearance