

IN THE HIGH COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL DIVISION)CASE NO: 837/2006DATE: 15 NOVEMBER 2007

5 In the matter between:

MORONTE MEJA OBO S MPETSHENI PLAINTIFF

and

THE ROAD ACCIDENT FUND DEFENDANT

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JUDGMENTGOODMAN, AJ:

15 The plaintiff in this matter sues in her capacity as a guardian of the minor child Siyanda Mpetsheni, to whom I shall refer in this judgment as the minor.

20 The claim arose out of a motor vehicle accident in which the minor was involved as a passenger in the vehicle. This accident took place on 8 February 2002. The minor at the time was 12 years of age.

25 The defendant, the Road Accident Fund, defended the matter and, in addition to a plea on the merits, delivered a special

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plea in which it alleged that the plaintiff did not comply with certain regulations in relation to the Act.

As far as the defences on the merits are concerned, the allegations in relation to the motor vehicle collision were put in dispute, as were the issues of negligence, injuries sustained by the minor and any damages as might have been sustained.

At the commencement of the hearing, the parties indicated to me that agreement had been reached on a number of issues. The parties handed up a written document signed by the attorneys entitled "Admissions". In this document the defendant indicated it had conceded the merits of the claim insofar as the collision was concerned and admitted that it was liable to compensate the plaintiff or the minor for 100% of her proven or agreed damages. In addition, the defendant provided an undertaking in terms of section 17.4(a) of the Road Accident Fund Act 56 of 1996, colloquially referred to in matters of this sort as the undertaking. It was further admitted that the plaintiff had complied with all the statutory provisions as pleaded in her particulars of claim.

As far as specific aspects of the minor's injuries were concerned, there was an admission from the defendant that the minor's scarring had been correctly described by Dr Marx, one

of the experts whose evidence was subsequently adduced by the plaintiff, in 4.3 and 4.4 of his medico-legal report dated 23 April 2007.

5 The Court was accordingly asked to adjudicate only upon the aspect of general damages.

What transpired in the collision was described in two of the expert reports, that filed by Dr Marx and that filed by 10 Ms Burke, as well as elaborated upon by the minor when she gave her evidence. Essentially she was a rear seat passenger in a taxi vehicle, which vehicle was struck from behind by another vehicle which was apparently in the act of overtaking. The driver from behind apparently struck the 15 vehicle in which the minor was travelling three times. This caused her vehicle, or the vehicle in which she was travelling, to be knocked over a bridge into shallow water. The car landed upside-down and the minor, together with others in the vehicle, were trapped in the vehicle. A bystander knocked out 20 the rear window and assisted the minor in escaping from the vehicle.

The minor was taken by ambulance to the Khayelitsha Day 25 Hospital where lacerations on her body were cleaned,

bandages were applied to the wounds, but she was left to walk home, which took approximately 25 minutes. What the plaintiff alleged on behalf of the minor child in the particulars of claim is that the minor sustained a laceration of the left elbow, a laceration of the left thigh and multiple other lacerations, and in addition alleged that details of the injuries would appear from the relevant medical and expert reports which would be delivered in due course.

10 What was claimed from the defendant were three categories of claims. First of all, estimated past hospital and medical expenses amounting only to R300,00, estimated future medical and related expenses in an amount of R100 000,00, and general damages in the amount of R100 000,00. Although the  
15 prayers in the particulars of claim refer to a payment of damages in the sum of R160 300,00, the total, as I have indicated, amounts to R200 300,00.

The undertaking which I have referred to covers the first two  
20 categories of claims. It is accordingly only the question of general damages which falls to be assessed.

The nature of the minor's physical injuries appears from the reports of Dr Marx and Ms Burke, both of whom confirm their  
25 respective reports and in respect of both of whom only limited

cross-examination was posed.

From Dr Marx's report, and I quote from paragraph 6 thereof, the following appears:-

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"The minor experienced lacerations to her left elbow, her left upper thigh and her right knee. The scars on her left thigh bother her to the extent that she tries not to expose her thighs."

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Then Dr Marx described an anterior chest pain and upper back pain with shortness of breath. As it transpired during the course of his evidence and as reflected in his report, he stated it was unlikely that this was related in any way to the trauma arising from the accident.

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As far as the specifics disclosed to Dr Marx on a clinical examination are concerned, he described the scars on the left arm as being three, measuring one centimetre by a half a centimetre, situated behind the left elbow. These were slightly kiloid in nature and depigmented, but cosmetically reasonable. In the lower limbs there was a one centimetre by one centimetre circular scar over the front of the right knee. There was a further two centimetre by one centimetre scar and a linear three centimetre by a half a centimetre scar on the

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front of the left thigh. It appeared that it was this latter scar which was the most significant of all the sequelae of the lacerations sustained during the collision.

5 Dr Marx described the minor from a psychological point of view in the sense that he found there was no magnification of her symptoms, she displayed no abnormal illness, but was of good credibility.

10 He recommended plastic surgical revision of the scars on the front of her left thigh. He felt that the appearance could be improved as these were not kiloid scars, and undertaking to cover the costs of this scar revision in his view would amount, cost-wise, to no more than six or eight thousand rand. He  
15 ventured the view that this could be done under a local anaesthetic and probably as an out-patient. Although an orthopaedic surgeon, Dr Marx claimed that he had plastic reconstructive surgery experience and this was not put in dispute.

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He assessed the general damages of the minor from the physical point of view as having been a very frightening experience for a young girl. He found, however, that the chest discomfort could not be attributed to the accident.

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From a psychological point of view, his discussions with the minor's grandmother, the plaintiff, confirmed that the minor was nervous in traffic and on the roads. This was corroborated both by Ms Burke, as well as the minor herself.

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Although the minor complained of chest pain and shortness of breath, upon the examination which Dr Marx conducted in April 2007, he could not find that this was in any way related to the collision. He was satisfied that where clinical records reflecting treatment obtained by the minor on the day of the collision and three days later on 11 February 2002 referred to the fact that she was complaining of a painful chest, he considered this to be entirely appropriate in the sense that often there were delayed feelings of bruising and aches and pains. However, he felt that if there had been a rib fracture, of which there was no satisfactory evidence, this would have cleared up in a matter of weeks.

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Dr Marx did indicate that as far as his examination and investigation of the minor was concerned, she was certainly aware of the unsightly appearance of the scars on her left thigh and no longer wore shorts or bathing costumes. That was certainly her evidence in court and also was not challenged under cross-examination.

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The second witness, after the second expert witness called by the plaintiff, was Ms Burke. She examined, assessed the minor on the two dates in August 2007. She gave extensive views on what she had ascertained from such an assessment, including the minor's functioning after the accident, which exhibit considerable achievements at school. She has, however, given birth to a son as a result of a relationship with a Grade 12 pupil. She herself is now in Grade 11.

10 Ms Burke found that the current functioning of the minor was that she could not run as fast as she used to, because she develops chest pain, she cannot carry heavy things, because it hurts her chest and back, but no other difficulties were indicated from a physical point of view. The minor herself indicated in her evidence that she no longer participated in school athletics, which is something that she did partake in prior to the accident.

15 The upshot of Ms Burke's finding was that she considered there to have been a few minutes of post-traumatic amnesia indicated by the minor. She found that the symptoms displayed by the minor were entirely consistent with post-traumatic stress syndrome. She referred in particular to what she called clusters of factors, such as recurrent dreams, the re-living of the event, feelings of drowning and choking, all of

which - and avoidance of particular stimuli, such as driving in a motor vehicle - she found all of these to be symptomatic of a post-traumatic stress disorder, rather than simple irritability similar to that experienced by many adolescents and teenagers. She felt that if it had simply been a question of irritability, the mood disorder would not have displayed itself by having the other clusters or factors to which I have made reference.

10 She gave an assessment that she had no impression whatsoever that the minor exaggerated her symptoms, nor did her family members. Ms Burke indicated she spoke to the grandmother, namely the plaintiff, on two occasions, and there was no suggestion of an exaggeration of symptoms.

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Her recommendation was that the patient receive a psychiatric assessment and counselling. She considered that medication was probably necessary, and as far as psychiatric assessment was concerned, three or four sessions would provide adequately, whereas counselling for perhaps six months once a week could also be requisite. In addition, she felt that counselling would assist the minor's attitude towards plastic surgery. During her evidence, the minor indicated an unwillingness to undergo plastic surgery, even although the prospects are that it may be beneficial to the major scarring

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that she still has on her upper thigh. It was stated by the minor that she was scared of this particular procedure. Ms Burke's evidence was this too would be assisted were counselling to be addressed.

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Ms Burke was very firm that there had been a psychological fall-off resulting from the collision and the sequelae. While these sequelae had no particular impact on her physical functioning, certainly there was a psychological effect in the form of the mood disorder described. This could in no way, according to her, be attributable merely to the hurly-burly of life and the onerous responsibilities that she was confronted with, for instance by having a baby and by being at school at the same time. The injuries and the trauma, according to Ms Burke, certainly made the minor vulnerable and this perhaps could also explain her seeking an inappropriate sexual relationship when she was still at a young age, which in turn resulted in her pregnancy and giving birth.

As far as an assessment of the minor is concerned, she gave evidence slightly tentatively but again with no suggestion of any exaggeration of her features or of the problems that had ensued. She was articulate and is obviously comfortable in speaking English. Generally her evidence was not expansive and no doubt the plaintiff's legal representatives felt that

sufficient had been placed before the Court and would be placed before the Court in the form of the expert evidence.

The approach from the defendant was to contest any suggestion that the back and chest pains that the minor is now suffering from was in any way attributable to the collision. I am in agreement with that approach. The only expert competent to make an assessment in that regard, Dr Marx, was of a similar view and accordingly one cannot find that the present chest and back pains are in any way attributable to the accident. That, however, does not detract from the fact that there was some chest bruising or chest pains resulting from the accident which is described in the clinical notes of 11 February 2002.

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As far as the minor's moodiness is concerned, the defence did attempt to suggest that this was a result of a typical adolescent or teenage experience. I am satisfied on the basis of Ms Burke's evidence that indeed the minor suffered from a post-traumatic stress disorder, not of any major consequence, but certainly one that does require treatment as recommended by Ms Burke, and I find such recommendation appropriate in the circumstances.

25 It is quite clear that for a 12 year old to have experienced what

she did, the accident itself, the vehicle overturning, lying in a pool of water, be it a river or a stream, being hauled through a window which was broken by a bystander, sustaining lacerations either as a result of the collision or as a result of climbing through the broken window, all must have been extremely traumatic for her. There is no suggestion that she was catered for by any adults at the time, although certainly taken to the day hospital. She was apparently left to walk home on her own. I accept that it is something that she was able to do and suggests that she was not in an unfit state to do so. However, for a child of that age to be obliged to undergo that kind of experience and then be left to walk home, which journey took approximately 25 minutes, must have been of some significance to her psyche. That has no doubt continued to affect her and I am satisfied that the evidence of Ms Burke satisfactorily describes what are sequelae as a result of the collision and injuries, both physical and psychic as experienced from that collision.

Turning to the issue which I am required to assess, namely appropriate compensation by way of general damages, Mr Du Toit, who appeared for the plaintiff, referred me to certain cases which are naturally of some interest and some help. They are, however, different in nature from the present case, as most cases indeed are. The three cases he referred

to in particular were Mwedzi v The Minister of Police, Swartz v The Minister of Police, and Majiet v Santam, all of them reported in the learned work of Corbett and Buchanan. The first two cases handed down awards which in today's terms amounted to R29 000,00 each, while in the Majiet case an award of some R65 000,00 was made. The latter, however, related to psychological injuries sustained by a mother on witnessing the death of her minor child, something quite different from that with which we are today confronted.

10 Mr Du Toit then submitted that an award of general damages in the amount of R50 000,00 would be reasonable in the present matter.

Ms Coetzee naturally sought to highlight certain of the aspects of the evidence. I have already referred to the fact that she relied upon the minor's having been able to walk home by herself after the accident. That, in my view, is a double-edged sword, both beneficial aspects thereof in favour of the plaintiff, as well as negative aspects, and similarly with regard

20 to the defendant.

Ms Coetzee further suggested that the minor had not suffered any loss of amenities of life. Clearly the inability to partake in athletics is one of them, but in general the minor does seem to be a fully functioning individual, with rich potential which one

hopes one day will fully be realised.

Ms Coetzee then referred me in turn to three cases, that of Richter, Van der Westhuizen and Jooste, respectively 1963, 1979 and 1975 cases. These naturally were in small amounts even translated in today's terms, and Ms Coetzee at the conclusion of her submissions on the quantum suggested that R20 000,00 was appropriate.

It is of course in all cases difficult to equate particular facts of this specific case with those facts in the decided cases. A comparison with cases of considerable vintage equally is difficult to apply and I am mindful of the sentiments expressed in the decision of The Road Accident Fund v Marunga, 2003(5) SA 164 (SA). In that decision, The Honourable Judge Navsa, J A made reference to an earlier decision of Wright v Multi-Lateral Vehicle Accident Fund, 1997 in which Broom D J P stated the following:-

"I consider that when having regard to previous awards, one must recognise that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising

standards of living and the recognition that our awards in the past have been significantly lower than those in most other countries.”

5 The Supreme Court of Appeal in the Merunga decision relied upon and endorsed this particular sentiment. It applied it to the facts of that case, emphasising in particular the curtailment of that plaintiff’s enjoyment of life and the fact that the injuries had occurred when he ought to have been, as I  
10 quote, “in the full bloom of youth”.

Such a consideration is certainly applicable in the present instance, and even more so the minor in this case was a young girl, 12 years of age, she is now approaching the full bloom of  
15 her youth with the legacy of a lasting impairment. I do accept that that impairment, both the physical aspects and the psychological, can be alleviated and one hopes will, with appropriate treatment, be alleviated. That should be addressed in relation to the undertaking that has been given.

20 I have to consider an appropriate award to recompense her for that loss which she has sustained, both from a pain and suffering point of view and psychologically up to now and for the future, to the extent that she will have to await the culmination of the treatment. Certainly for a woman and a  
25 young girl, the nature of the disfigurement that she has

sustained is something of consequence to her. It was not suggested to her that she was being unreasonable in not wishing to wear a bathing costume or not wishing to display the scars on her upper thighs to friends, although she indicated that family members and some of her girl friends had in fact seen the scarring. She did, however, indicate that the father of her child, with whom she maintained a good relationship, had not seen such scars.

10 In all the circumstances, I have obviously the obligation to be fair to the minor child, to the plaintiff suing on her behalf, as well as to the defendant, I cannot arbitrarily make awards to ensure benefits which are out of proportion to the damages that have been sustained. However, in the nature of things, one's assessment may strike the observer as being arbitrary. I hope in this case that my assessment of the amount will not be so. It is a position somewhere between what the plaintiff's representative suggested and what the defendant's representative suggested.

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The figure that I have in mind and which I shall award in respect of the general damages, taking all aspects into account, including what I consider to be the probability that, both psychologically and physically the minor's suffering will be alleviated through appropriate treatment, is the sum

R30 000.00.

As far as costs are concerned, the plaintiff sought an order that the defendant pay the plaintiff's costs, including the qualifying expenses of the two experts whose evidence was adduced, namely Dr Marx and Ms Burke, and that such costs be on the high court scale.

The defendant, in turn, argued first that the plaintiff be ordered, in the event that I should make an order with regard to the quantum which falls within the magistrate's court jurisdiction, the plaintiff's legal representatives pay the defendant's costs of suit. Ms Coetzee was unable to refer me to any authority for such proposition and I indeed know of none. As far as I am aware, the approach adopted by Courts when a party sues in the high court and an eventual award is made within the magistrate's court jurisdiction, is to award that party magistrate's court costs unless there is good reason for an exercise of a discretion, making an award of high court costs.

Ms Coetzee, in the alternative, did ask that the costs to be awarded to the plaintiff be those on the magistrate's court scale. I did pose the question whether at any stage the defendant had suggested that the matter be transferred to the

magistrate's court. No such suggestion had ever been made. I referred in the earlier part of my judgment to the wide-ranging nature of the disputes that were evident on the papers and on the pleadings, both in relation to the special plea as well as the disputes on the merits pertaining to the minor's injuries, sequelae and damages. There is nothing before me to suggest that the concessions which the defendant made which were incorporated in the document entitled "Admissions" were made some time ago, or that the undertaking that was put forward was made equally a lengthy period of time ago. It would appear that these admissions and the agreement reached took place either at the doors of the court or subsequent to the first date on which the matter was enrolled, which was this past Monday. The parties had to await Tuesday before a judge was allocated.

Having considered all the relevant issues pertaining to costs, the fact that an undertaking has been given in relation to future treatment and accommodation and the like which the minor may incur for the purposes of alleviating the sequelae of the injuries, together with the amount of R30 000,00 which I propose to award in respect of the quantum of damages, I consider it appropriate that the plaintiff did in fact proceed in the high court. As indicated, her original claim was R200 000,00, that of course does not redound to the plaintiff's

benefit. Nevertheless I am satisfied that it is appropriate that high court costs be the relevant scale.

In the circumstances the order I make is the following: THE  
5 DEFENDANT IS OBLIGED TO PAY TO THE PLAINTIFF THE  
SUM OF R30 000,00 (THIRTY THOUSAND RAND) IN  
RESPECT OF THE GENERAL DAMAGES THAT HAVE BEEN  
CLAIMED.

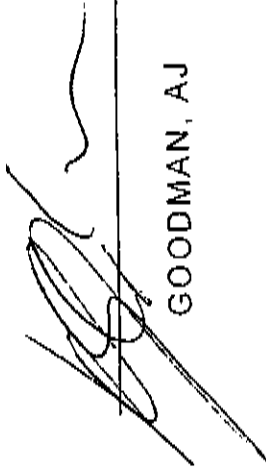
10 Second, THE DEFENDANT SHALL PAY THE COSTS OF THE  
PLAINTIFF, INCLUDING THE COSTS RELATING TO THE  
QUALIFYING FEES OF DR MARX AND MS BURKE.

It is so ordered.

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The Court will adjourn.

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GOODMAN, AJ