IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

Case No. 05967/05

Date:08/11/2006

In the matter between:

KATE MATHEBULA Plaintiff

and

ROAD ACCIDENT FUND Defendant

PA MEYER, AJ

[1] On the 14th April 2002, S P M ("P"), who was born on the 20th June 1986 and then 15 years and 9 months old, was knocked down by a motor vehicle. P sustained a severe head injury as well as minor injuries to the chest and upper limbs. Acting in her capacity as P's natural mother and guardian, the plaintiff instituted this action against the defendant wherein substantial sums are claimed in respect of damages suffered as a consequence of the accident.

[2] The issue of liability has been resolved between the parties. The plaintiff, in her representative capacity, would be entitled to 80% of any proven damages suffered by P. The remaining issues to be resolved are the quantification of the general damages suffered by P and the quantification of his loss of future earning capacity.

[3] The plaintiff led the evidence of Dr G Marus, a neuro-surgeon, who performed a neurological assessment of P, Mr B Mallinson, a counselling and neuro-psychologist, who performed a neuropsychological assessment of P, and Mr L Linde, an industrial psychologist, who assessed P's employability and earning potential disregarding and having regard to the injuries sustained by him. They confirmed their medico-legal reports in their evidence at the trial. Their evidence was clear and convincing and not rebutted. Occupational therapists who assessed P for the plaintiff and for the defendant, Ms Alison Crosbie and Ms Suzette Murcott, reached agreement on certain issues and a joint minute was prepared by them. The parties agreed to the issues agreed upon by the occupational therapists in their joint minute and they were not called to testify.

General Damages

[4] The relevant hospital records, as interpreted by Dr Marus, show that P was admitted to the Sebokeng Hospital on the 14th April 2002. He had a severe head injury, a minor neck injury and an abrasion of his left elbow. His forehead had swelling of 2 x 1 cm and a 2cm laceration. He initially had a Glasgow Coma Score of 13/15 and was very ill and suffered a period of post traumatic amnesia and confusion of approximately six days. P was discharged from hospital on the 24th April 2002. The relevant hospital records were initially in dispute, but they were subsequently admitted during the course of the trial and I was informed by counsel that it was agreed that the plaintiff did not need to prove them.

[5] Dr Marus explained that the severity of P's concussive head injury and the

sequelae thereof were to be assessed in terms of his initial level of consciousness, length of post traumatic amnesia and, obviously, the neurological findings. P's initial level of consciousness and length of post traumatic amnesia appeared from the hospital records referred to above. A CT scan showed mild cerebral atrophy which, according to Dr Marus, was an indication that there is some loss of cerebral substance. The neurosurgeon accordingly concluded that P has a moderate, bordering on a severe, diffuse brain injury. Dr Marus expressed the opinion that in these circumstances P is expected to have a degree of cognitive impairment and that his neurological deficit will be permanent and ongoing. He was further of the opinion that P's life expectancy has not been reduced as a result of the brain injury.

[6] In terms of the neuropsychological tests that were conducted by Mr Mallinson, P's post accident verbal IQ was measured at 67, which, in the opinion of Mr Mallinson, showed that P is cognitively handicapped, and his performance IQ was measured at 111, which was in the high average or in the very superior range. The 44 IQ difference showed, in the opinion of Mr Mallinson, that P's inate pre-accident intelligence was probably average or above average, and that his verbal abilities are more affected by his brain injury than his non-verbal abilities.

[7] P had passed every year at school, but, after the accident, he failed Grade 10 twice and left during his third attempt. Dr Marus was of the opinion that P's expected cognitive impairment is compatible with his repeated school failures after the accident. Mr Mallinson was also of the opinion that P's inability to progress at school post accident are in keeping with the nature and severity of his brain injury. Mr Mallinson was further of the opinion that, given P's pre-accident level of functioning, had the accident not occurred he would probably have obtained a grade 12 level of education and been capable of some tertiary training. Mr Linde also agreed that, but for the accident, P would probably have completed a Grade 12 level of education in a mainstream school.

He was, however, of the view that P would probably not have pursued tertiary education in the light of his family background and their socio-economic circumstances. No-one in his family has studied further. Dr Mallinson conceded that ability is not the only “ingredient” to pursue tertiary training and that other socio-economic factors also play a role. I accordingly accept Mr Linde’s opinion that P would probably not have pursued tertiary education.

[8] The results of the various neuropsychological tests are, in the opinion of Mr Mallinson, strongly indicative of organic brain dysfunction. The neuropsychological testing revealed a significant difficulty with his working memory, a significant psychomotor slowing on paper and pencil tasks, poor auditory and visual attention resulting in variable performance, very poor planning and organisational ability, difficulty with abstract thinking, and significant learning difficulties, which neuropsychological deficits are in keeping with diffuse brain injury with a prominent frontal lobe component. Mr Mallinson testified that where the test tasks were structured P performed reasonably well, but where they were not structured, he performed badly, which is typical of his diffuse brain injury. He expressed the opinion that P’s neuropsychological deficiencies are permanent and that no further recovery could reasonably be expected.

[9] Mr Mallinson was also of the opinion that, given his cognitive impairment and particularly the presence of adynamia, his poor task initiation, his lack of proper judgment, his poor planning and motivational ability, P requires supervision and care to structure his day and to prevent him from becoming involved in the unsavoury aspects of society. Mr Mallinson suggested that P attends Headway, which organisation is a support group and day care centre for head injured persons. Ms Alison Crosbie and Ms Suzette Murcott agreed on the need for P to receive occupational therapy, to attend a support group for head injured persons, such as Headway, to have a caregiver for the rest of his life for two hours a day to structure and supervise P’s day, and that he requires domestic assistance.

[10] Mr Mallinson was of the opinion that P is physically capable of performing tasks where they are structured, but that it is “extremely unlikely” that P would find employment in any capacity. Ms Alison Crosbie and Ms Suzette Murcott agreed that, taking only his physical capabilities into account, he is best suited for work that falls into the medium work category. They both agreed, however, that his neuropsychological deficiencies would impede him in applying himself in the workplace and that he would require supervision in a structured environment. They also agreed that his ability to sustain work could be compromised, since he may need external motivating factors or prompting to persevere with work, and they deferred to the opinion of the industrial psychologist with regard to P’s pre- and post accident earning potential. Mr Linde expressed the opinion that P has been rendered unemployable for all practical purposes in the formal and informal sector since he will probably not obtain a matric qualification, his medical history may serve as a deterrent for potential employers in the formal employment sector, his lack of motivation and ability to perform certain tasks will probably preclude him from some categories of work, he will require supervision and external motivation even to the extent of motivating him daily to go to work and the extent of such direct supervision required will probably not be tolerated by any employer in the formal and informal employment sectors, and he will probably not be able to perform work that is physically demanding, which type of work would have been the employment opportunities for him had it not been for the accident. Mr Linde expressed the view that the labour market is very competitive and there are many young and healthy individuals with matric qualifications who are unemployed and seeking work. Employers, particularly in the type of businesses where P would have worked but for the accident, are in a position to be selective and are more hesitant to employ persons with difficulties. In giving evidence Mr Linde said that it is not practical for a person with P’s condition to work in a work environment where he needs to be supervised all the time and that such will not be attractive to employers. There is no reason for me to doubt the accuracy of the opinions of Mr Mallinson and that of Mr Linde on this

issue. It requires reiteration that the defendant did not lead any evidence in rebuttal. On the evidence before me I accordingly find that P has been rendered practically unemployable.

[11] In giving evidence, Mr Mallinson expressed the opinion that P's prospects of marriage and his ability to enjoy friendships have been substantially reduced since he has not much to offer a marriage partner, and friends and family lose interest in persons like P.

[12] In response to a question posed to Mr Mallinson by the plaintiff's counsel, Adv GJ Strydom, as to the remaining *"bright side"* of P's life, he replied that it was difficult to imagine anything left for him. I accept that any loss of brain function which is permanent in the life of a young person, like P, denies such person the enjoyment of much that life has to offer. Some of P's losses have been dealt with hereinbefore. P has, however, according to Mr Mallinson, a degree of physical health. His post accident performance IQ was measured to be in the high average or in the very superior range and his brain injury did not affect his non-verbal abilities as much as his verbal abilities. Even though practically unemployable, P is physically capable of performing tasks where they are structured and supervised. The occupational therapists agreed that his physical capabilities enable him to do work that falls into the medium work category. P lives with his father who is caring and supportive of him. Occupational therapy, attending a support group for head injured persons, such as Headway, and a caregiver will further add to the quality of P's life.

[13] Adv Strydom referred me to interviews that P and his parents had had with the expert witnesses and he submitted that the facts conveyed by P and his parents as recorded in the medico-legal reports of Dr Marus, Mr Mallinson and Mr Linde constitute admissible evidence and support Mr Mallinson's aforesaid conclusion. I disagree. P and his parents were not called to testify, even though P and his father attended the hearing briefly. An expert is not entitled,

any more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert witness relies must ordinarily be established during the trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence. (See: *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämp-fung MBH, 1976 (3) SA 352 (A)* at p 371G; *Reckitt & Colman SA (Pty) Ltd v S C Johnson & Son SA (Pty) Ltd 1993 (2) SA 307 (A)* at p 315E); *Lornadawn Investments (Pty) Ltd v Minister van Landbou 1977 (3) SA 618 (T)* at p 623; *Holtzhauzen v Roodt 1997 (4) SA 766 (W)* at p 772). P's life, on the admissible evidence before me, has not been reduced to a life of uselessness. I, in any event, do not believe that the information conveyed to the expert witnesses by P and his parents, as recorded in the medico-legal reports, detracts from this finding.

[14] Adv Strydom submitted that an award of R600, 000.00 for general damages would be fair and reasonable in the circumstances. Adv Shepstone submitted that the award for general damages should not exceed R250, 000.00. Both counsel referred me to various awards made in other cases. It will serve no useful purpose for me to refer herein to the awards made in mere vaguely comparable cases (See: *Capital Alliance Co Ltd v Richter 1963 (4) SA 901 (AD)* at p 908).

[15] A comparable case, which, in my view, is broadly similar to the matter before me, is the unreported judgment of *Sishange v Road Accident Fund (Case No. 04/30501)*, which was delivered on 23 June 2006. In that case, Claassen J, awarded the sum of R425, 000.00 general damages in circumstances where a minor child, who was 5 years and 5 months old at the time of the collision, sustained a severe brain injury with a fractured skull as well as a fracture of the mandible and injury to her left leg. She was rendered unconscious and confined to the intensive care unit for approximately 3 weeks with a Glasgow Coma Score of 6/15, and thereafter in the paediatric ward for approximately 2 months. She

suffered from permanent neuropsychological and cognitive deficits. Pre-accident she participated in sport, was probably of high intelligence, and would probably have obtained matric exemption, achieved a three year national diploma, entered the open labour market at the Patterson B4 level, and progressed through the C band into the B band, but, as a result of the accident in question, she presented with moodiness and aggression towards her siblings, limped, played no sport, could not live on her own, was dependent upon the full-time care of her mother, her marital prospects had been substantially reduced, her ability to enjoy lasting and fulfilling relationships with other human beings had been dramatically reduced, it was improbable that she would matriculated and she was functionally unemployable.

[16] My assessment of the general damages in all the circumstances of the present case is R400, 000.00.

Loss of future earning capacity

[17] Mr Linde expressed the opinion that P would probably have been looking for work for a period of six months to a year after school and his pre-accident employment opportunities would have revolved around physical and unskilled employment at the lower levels of the open labour market in small or medium sized businesses where he would have received wages determined by the appropriate bargaining council. Various alternatives would probably have been available for him and two likely scenarios in the motor vehicle and building industries were postulated by Mr Linde since P's father is an unqualified builder and welder and P expressed the desire to work with his hands in the carpentry or engineering fields.

[18] P would, in the opinion of Mr Linde, probably have secured work as an Operative Grade 4 or 5 employee in the motor industry, such as an auto-electrician's or mechanic's assistant, and his salary would have escalated

within a period of 3 to 4 years to that of a Grade 6 level employee, such as a clutch and brake operative or wheel alignment worker, and, after another three to four years, to that of a Grade 7 level employee, such as an operative engine assembler, which level would probably have been his ceiling. Mr Linde suggested that P would probably have entered the building industry as a Tradesman Class 4 employee and he would probably have escalated to a Tradesman Class 2 employee, such as a bricklayer, within three to four year intervals, which would probably have been his ceiling. Mr Linde considered it unlikely that P would have been registered as an artisan since formal qualifications are required for such registration. P would, in the opinion of Mr Linde, probably have been able to work until the usual retirement age of 65 years in the motor industry and 60 years in the building industry since work within the building industry is much more physical.

[19] Mr Linde explained in his evidence that the Patterson income scales are substantially higher than the minimum wages prescribed by the Bargaining Councils, and that they are based on an extensive survey of the remuneration structures of larger companies. The reality in South Africa, according to Mr Linde, is that people working for smaller and medium sized companies do not earn on the Patterson scales. The Gauteng Bargaining Council for the building industry was not functioning and Mr Linde therefore used the minimum wages obtained from the Building Industry Bargaining Council Cape of Good Hope even though he considered salaries in Johannesburg to be higher than in the Western Cape, and he used the Collective Main Agreement for the Motor Industry Bargaining Council for making assumptions of P's level of earnings. Mr Linde suggested that the average of the two scenarios should be used as P's potential income since many employment options would probably have been available to him. Mr Linde also emphasized that an employee might be able to earn significantly higher than the minimum wages on which he based his assumptions depending on the remuneration policy and strategy of a particular business and the performance of the employee, and that P would probably not have been kept

at the minimum wages as he progressed in his employment, but that there were no data or surveys available to calculate such increases. Mr Linde therefore suggested in his evidence that a 5% increase every 5 years be used.

[20] Actuarial calculations by Mr G Jacobson were performed in line with the two scenarios postulated by Mr Linde in the motor and building industries. The parties were agreed on the calculations performed by the actuary, except for the contingencies which are to apply. The value of P's income but for the accident was calculated at R1,105,196.00, or R1,179,029.00 if an additional 5% annual increase was added to the minimum salaries in the motor industry, and R952,475.00, or R1,016,855.00 if an additional 5% annual increase was added to the minimum salaries in the building industry.

[21] Mr Linde's assumptions seem to me to be reasonable and probable and I shall accordingly apply such assumptions. The suggested 5% increase every 5 years until retirement age will not result in a substantial increase of the award and I cannot exclude the reasonable possibility that with time P would have earned above the minimum prescribed wages. The actuary's calculations based on such assumptions amount to a capitalised gross loss of future earning capacity in the sum of R1 097 942.00.

[22] The actuary's calculations have taken future inflation and taxation into account. A deduction should also be made for unforeseen contingencies, such as sickness, unemployment, possible errors in the estimation of his future earnings, retiring age or life expectancy, and the general hazards of life. Adv Strydom submitted that a 10% contingency deduction should be applied, which he supported on the grounds that Mr Linde had adopted a conservative approach in assuming minimum wages and that he did not take into account the possibility of P obtaining a tertiary qualification, of P obtaining work at a larger company and of P earning at the higher Patterson scales. Increases above the minimum wages have been taken into account in the capitalised gross loss of R1 097

942.00, but I do not believe that the prospects of P having obtained a tertiary qualification but for the accident, or of having obtained work at a larger company and of earning at the higher Patterson scales were established as a matter of probability. Adv Shepstone contended for a 20% contingency deduction and referred to factors such as the high level of unemployment in this country and P's youth when the accident occurred. Both counsel referred me to various guidelines as regards general contingencies that were helpful to me in determining the contingency deduction to be applied. The rate of any contingency deduction ultimately depends upon the circumstances and facts of each case (*Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A)* at pp 116H – 117A). I consider a factor of 20% to be appropriate and right in the circumstances of this matter. P was only 15 years and 9 months of age when the accident occurred and he will be exposed to the vicissitudes of life for a very long period of time.

[23] The amount to be awarded for loss of future earning capacity is accordingly the sum of R1 097 942.00 minus a 20% contingency deduction, which amounts to R878 353.60.

Order

[24] Counsel were *ad idem* that any funds awarded to the plaintiff in her representative capacity should be suitably protected and Adv Shepstone did not take issue with the wording of the order proposed to by Adv Strydom. At the commencement of the trial the defendant undertook to furnish the plaintiff with an undertaking in respect of P's future medical and related expenses in terms of the provisions of section 17(4)(a) of the Road Accident Fund Act 56 of 1996. Counsel were also *ad idem* that this undertaking should form part of the order I make.

[25] The amounts determined in respect of general damages and loss of future

earning capacity fall to be reduced in accordance with the apportionment of liability agreed upon between the parties. The plaintiff is entitled to R320 000.00 in respect of general damages, which is equivalent to 80% of R400, 000.00, and to R702 682.88 in respect of loss of future earning capacity, which is equivalent to 80% of R R878 353.60.

[26] In the result the following order is made:

1. The defendant is ordered to pay to the plaintiff the sum of R1, 022,628.80.
2. The defendant is ordered to furnish the plaintiff, in her representative capacity, with an Undertaking in terms of the provisions of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, limited to 80% of the costs of the future accommodation of S P M, in a hospital or nursing home or treatment of or rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle accident which occurred on the 14th April 2002;
3. The Undertaking referred to in paragraph 2 above will include payment of:
    3.1 the reasonable costs in respect of the creation of a trust to be formed, and of the appointment of trustees;
    3.2 the costs of the trustees to administer the capital amount to be paid to the plaintiff, as well as the costs of administering the aforesaid statutory undertaking, which costs are to be determined in accordance with the prescribed tariffs applicable to a *curator bonis* in terms of the provisions of the Administration of Estates Act 66 of 1965;
    3.3 the costs of furnishing security by the trustees and obtaining of an annual security bond to meet the requirements of the Master of the High Court in terms of section 77 of the Administration of

Estates Act 66 of 1965, if so requested by the Master.

4. The defendant is ordered to pay the plaintiff's costs, including the qualifying fees of Dr G Marus (neurosurgeon), Mr B Mallinson (neuro-psychologist), Ms A Crosby (occupational therapist), Dr LJ van Niekerk (educational psychologist), Mr L Linde (industrial psychologist) and Mr G Jacobson (consulting actuary) and the reasonable day fees of Dr G Marus (neurosurgeon), Mr B Mallinson (neuro-psychologist), Ms A Crosby (occupational therapist), and Mr L Linde (industrial psychologist).

PA MEYER

ACTING JUDGE OF THE HIGH COURT