

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 38048/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
19 September 2022

In the matter between:

ADV SAYED N.O.
(CURATOR AD LITEM OF J B M[....])

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Van der Schyff J

Introduction

[1] The plaintiff claims in her representative capacity as curatrix ad litem of JB M[...] (JB). JB was injured in a motor vehicle accident in January 2019. He was 12 years old at the time.

[2] At the onset of the proceedings, counsel sought an order to strike the defendant's defence and to proceed on a default basis. The defendant was however represented by the state attorney. Counsel submitted that the state attorney should not be allowed to address the court if the defence is struck. I am of the view that the plaintiff was opportunistic in proceedings with its application to strike the defendant's defence, with the intention to deprive the defendant of the opportunity to make submissions based on the plaintiff's expert evidence in circumstances where the defendant provided the plaintiff with an offer on the morning of the trial, hence eliminating any liability dispute and enabling the plaintiff to proceed with the quantification of general damages. I accordingly dismissed the application to strike the defence.

[3] Since the defendant conceded liability and undertook to issue an undertaking as provided for in s 17(4) of the Road Accident Fund Act 56 of 1996, the issues for determination by this court are the quantification of the plaintiff's claim for loss of income or earning capacity, and general damages. I am of the view that this court has the necessary jurisdiction to deal with the latter issue since the defendant made an offer to the plaintiff, which offer included an award for general damages. The offer, with the amounts concealed, was placed before the court. The defendant thus accepted that the injuries sustained were serious. The offer was, however, not acceptable to the plaintiff, hence the continuance of the trial.

Injuries suffered and the *sequelae* thereof

[4] The injuries suffered by the plaintiff, and the *sequelae* thereof are dealt with in the respective expert witnesses' reports. The content of the respective reports was affirmed by affidavit.

i. Dr. Engelbrecht, an orthopaedic surgeon, consulted with JB in 2020 when he was 14 years old, 17 months after the accident occurred. He noted that the RAF 1 at hand does not document JB's injuries but that the clinical records indicated that JB sustained a head injury with 'intra-cranial haemorrhage' and a skull fracture. The treatment he received was conservative. Dr. Engelbrecht was informed that the plaintiff who participated in athletics and rugby prior to the accident, did not continue with sporting activities after the accident. JB also completed Grade 7 although his marks dropped. He was at the time of the interview in Grade 8. He suffers from anxiety and tends to be aggressive. Dr. Engelbrecht opined that from an orthopaedic view there is no loss of life expectancy due to the accident and the sequelae thereof. Although JB would have suffered acute pain for 7 days after the accident and moderate pain for three to four weeks afterward, Dr. Engelbrecht noted that JB still suffered from post-traumatic headaches by the time he was examined. Dr. Engelbrecht opined that the orthopaedic injuries if taken in isolation, would have very little if any impact on JB's career choice, but suspected that the head injury and sequelae thereof will have a much more significant impact on JB's earning capacity as well as his choice of career in future.

ii. Dr. Smuts, a neurologist, examined JB in February 2021, just over two years after the accident occurred. Dr. Smuts was informed that JB suffers from regular headaches. Although his marks have deteriorated after the accident he has managed to pass every year. JB is reported to be aggressive, and forgetful and he does not have many friends. Dr. Smuts concluded that JB suffered 'at least' a moderate concussive head injury with associated brain injury. He opined that the accident impacted negatively on JB's personality. Although JB is still young, his ability to function and study appears to be compromised.

iii. JB consulted with Dr. Moja, a specialist neurosurgeon during July 2020, one year and 6 months after the accident. JB was 14 years old at the time. Dr. Moja indicated that an injury of the temporal lobes may result in long-term neurocognitive problems, 'more especially poor recent recall memory, and

neuropsychological problems.’ The reported poor concentration, memory loss, and behavioural problems indicate that JB is suffering from residual neurocognitive problems. His risk of developing late post-traumatic epilepsy is above that of the general population.

iv. JB was examined by Dr. Naidoo, a specialist psychiatrist, in July 2020 for purposes of determining whether JB suffered any psychiatric *sequelae* following the accident, and if so, the extent and impact these may have. Dr. Naidoo explained that due consideration must be given to the fact that JB’s brain was developing when the accident occurred and may be considered to have been vulnerable and any future stressors will have a greater impact on his neurological functioning. Dr. Naidoo opined that JB sustained at the least a mild complicated traumatic brain injury and that his risk for neuropsychiatric *sequelae* is increased.

v. Dr. Jonker, a counselling psychologist, interviewed JB in February 2021. Dr. Jonker reports that she has been informed that JB attended school after one week of absence. The mother also reported that she has not received any complaints from his teachers and that JB has been coping at school although he struggles with mathematics. JB reported that he enjoyed attending school and socialising with his friends. The information reported to Dr. Jonker by JB’s mother does not correspond with the information conveyed to other expert witnesses namely that JB is disruptive at school and only returned to school after a prolonged period of absence. Dr. Jonker reported that JB indicated that he slept more and fell asleep during classes. She stated that he also fell asleep at one stage during the interview. Dr. Jonker stated that JB’s assessment results and current functioning should be interpreted against the background of his ‘estimated pre-accident level of functioning’. She stated that given JB’s developmental history and his familial educational and occupational background, his test results were expected to fall in the ‘below average to low average ranges’. However, his results fell in the below average, borderline impaired, and severely impaired ranges. After considering the injuries sustained, she concluded that he appears to have been left with long-term neuropsychological vulnerabilities.

He also presents with posttraumatic stress disorder. She proposed that JB be provided with the necessary psychological support and remedial intervention.

vi. Dr. Seabi, an educational psychologist, interviewed JB during July 2020. His first report is dated January 2021. Although he filed an addendum report in October 2021 it is not evident from the addendum report that he interviewed JB again before providing the addendum report. It needs to be noted that the information conveyed to the respective expert witnesses by JB's father does not correspond completely with the information conveyed by his mother. The contradictions necessitate a cautious interpretation of the reports specifically where the experts relied extensively on the information communicated to them by JB's mother and father respectively. Dr. Seabi reports that JB's test results are indicative of moderate depression. In my view his feelings of depression and hopelessness can, however, also be attributed to his pre-existing socio-economic circumstances, and the fact that his father is an alcoholic who abuses him when he is drunk. I accept that the accident contributed to this position, but pre-existing factors should not be ignored. Dr. Seabi noted that JB demonstrated significant difficulties in most scholastic tests that were presented to him. His scholastic problems included mathematical difficulties, delayed spelling, reading and writing abilities. Dr. Seabi concluded that JB's pre-morbid intellectual ability was within the Low Average to Average range, which is consistent with functioning at a level where he could have progressed through the mainstream school system, matriculated and obtained a higher certificate (NQF 5 level). As a result of the accident, JB would in all likelihood not cope with the demands of senior grades and in all likelihood JB's highest level of education will in all likelihood be Grade 10. Dr. Seabi proposed that JB received psychotherapy, career assessment and counselling, individual remedial therapy, attend extra-lessons, and be placed in a remedial school where his individual needs can be met.

vii. After being provided with JB's school reports Dr. Seabi filed an addendum report. Based on the reports filed he concluded that JB's per-accident

intellectual ability was within the average to high average ranges which is consistent with functioning at a level where he could ultimately have obtained an Honours degree (NQF 8) level. JB's reports reflect the following:

- a) His performance throughout 2014 when he was in grade 2 averaged a '5' that is described as 'beduidende prestasie' and falls within 60-69%;
- b) His performance throughout 2015, when he was in grade 3, averaged a '4' that is described as 'voldoende prestasie' and falls within 50-59%;
- c) The average percentage attained in 2016, when he was in grade 4, is a '4';
- d) No report was provided for 2017 when JB was in grade 5;
- e) The average percentage attained for the first two quarters of 2018 when JB was in grade 6 is a '4'. No final report is provided.
- f) JB's average final mark attained in 2019 when he was in grade 7 is a '3' that is described as 'matige prestasie' and falls within a 40-49%;
- g) JB's average final mark attained in 2020 when he was in grade 8 is a '3' that is described as 'matige prestasie' and falls within a 40-49%;
- h) The average mark obtained for the first two quarters when JB was in grade 9 is a '2' which is described as 'basiese prestasie' and falls within 30-39%.

Although Dr. Seabi highlights the deterioration in JB's performance, he does not, in his report discount the effect that advancing to higher grades where work is more complex, and the changing of schools, also attribute to the deterioration in grades. Dr. Seabi's initial view that JB's pre-morbid intellectual ability was within the Low Average to Average range is to a certain extent supported by Dr. Jonker. Having said that, I agree that JB's involvement in the accident appears to have impacted adversely on his functioning. I do not, however share the view that based on his grade 2 to grade 8 marks it can be postulated on a balance of probabilities that he

would have been able to attain an NQF Level 8 qualification but for the accident.

viii. JB was evaluated by M. Sissison, a clinical psychologist, in July 2020. The clinical psychologist's report does not add value to the existing reports. Mr. Sissison highlights that JB suffers with symptoms of PTSD although he does not meet a full-blown diagnosis. He reiterated that JB sustained neurological, psychological and psychiatric trauma as a result of the accident.

ix. The speech- and language therapist, Ms. Davidhoff evaluated JB when he was 14 years and 7 months old. Ms. Davidhoff identified several speech and language shortcomings. She opined that speech and language training could improve his communication functioning which would improve his self-esteem and increase his confidence.

x. The occupational therapist opined that JB would not reach his pre-accident physical and psychological potential.

Loss of earning capacity

[5] JB's parents are separated. His father moved out of the family home during 2020. JB lives with his mother and sister. His mother is unemployed. His father is a seasonal worker on a fruit farm and his older sister works in a nursery, his youngest sister is a scholar. JB indicated to Dr. Naidoo that he wanted to become a fireman.

[6] Based on the expert reports, and for reasons already alluded to, I accept that JB's pre-intellectual capacity taken together with his socio-economic circumstances and the surrounding environmental factors and family history, would probably have been able to obtain a NQF Level 5 qualification, if not for the accident. In this he would already have surpassed his parents. I find it difficult to accept, however, that

JB is indeed to be regarded as unemployable as a result of this accident. If he receives the proposed intervention he will still be able to progress, but in all likelihood he will pass grade 10 and enter the labour market as an unskilled worker.

[7] The industrial psychologist, Talia Talmud, correctly stated that there are several risk factors when postulating a minor's career path. It has long been stated that 'any enquiry into damages for loss of earning capacity is of its nature speculative because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.'¹ Stratford J explained:

'It [the Court] has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award.'

[8] Because the actuarial calculation provided was based on the proposition that JB would have been able to attain an NQF Level 8 qualification but for the accident, whilst being unemployable having regard to the accident, the calculation as it stands

¹ *Hersman v Shapiro and Company* 1926 TPD 367 at 379.

is of no value to the court because I am of the view that the soundness of the assumptions is questionable for reasons already alluded to above. I thus requested the plaintiff's legal representatives to provide me with actuarial calculations based on the assumption that the plaintiff would, had it not been for the accident, have been able to attain an NQF Level 5 qualification, whilst having regard to the accident he will complete grade 10 and be employed as an unskilled worker until he is 60.

[9] In the circumstances, and I am of the view that it will be fair to both the plaintiff, and the defendant to make a round estimate of an amount which seems to him to be fair and reasonable taking into consideration the mathematical calculations provided. As a result I am of the view that an amount of R7000 000.00 (seven million) is to be awarded for the plaintiff's loss of earning capacity.

General damages

[10] JB's injuries were accepted to be serious injuries and the defendant offered an amount for general damages. In quantifying JB's general damages I take into consideration that he suffered severe pain as a small child. He is still suffering from migraines. He cannot participate in contact sports and has lost his sense of finding joy, at a time in his life when any young boy must be adventurous and partake in sports. Taking into account the case law referred to by counsel representing the plaintiff, I am of the view that it is justified to award an amount of R1 300 000 as general damages.

ORDER

In the result, the following order is granted:

1. The Draft Order marked 'X' dated and signed by me, is made an order of court.

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the plaintiff:

Adv. J. Bam

Instructed by:

Ehlers Attorneys

For the defendant:

Ms. Van Zyl

Instructed by:

State Attorney

Date of the hearing:

25 July 2022

Date of judgment:

19 September 2022