

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

CASE NO: 73104/2016

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 16 October 2023

E van der Schyff

In the matter between:

M[...] V[...] obo L[...]

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Van der Schyff J

Introduction

- [1] The matter was allocated to me in the trial court. Merits have previously been settled in favour of the plaintiff. An undertaking was provided for future medical expenses in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996. The issues of general damages and loss of earnings or earning capacity remain in dispute. Since the defendant has not acknowledged that the injuries suffered are serious injuries, the issue of general damages cannot be dealt with by this court, and stands to be postponed *sine die*. This court is only seized with quantifying the plaintiff's claim for loss of earning capacity.

- [2] Despite a notice of set down being served at the respondent's place of business, there was no appearance on behalf of the respondent, and the matter proceeded in the defendant's absence.
- [3] The plaintiff instituted the claim in her representative capacity as the minor's mother. In this judgment, any reference to 'the plaintiff' is a reference to the minor.

Claim for loss of earning capacity

- [4] Despite the plaintiff's claim being characterised by counsel as a claim for 'Past & Future Loss of Earnings/Income,' it is obvious that the claim is a claim for loss of earning capacity. Since the plaintiff was nine years old when he suffered the injuries, he does not have a claim for past loss of income.
- [5] The plaintiff was nine years old when he was run over by a car in 2016. He suffered a mild traumatic brain injury and multiple abrasions to the scalp, left elbow, lumbar area, and left buttock. When he arrived at the hospital, his GCS was 15/15. His mother reported that he was confused after the accident for a short period of time, although the plaintiff informed the neurosurgeon that he was unconscious. A CT scan of his brain taken on his arrival at the hospital did not reveal any abnormality. The neurosurgeon opines that the plaintiff suffered moderate neurocognitive deficits because of the accident. This negatively impairs his learning abilities. The educational psychologist agrees and opines that where the plaintiff would pre-morbidly have been able to achieve an NQF 7 level of education, he will, in all probability, now only obtain an NQF Level 6 qualification.
- [6] The plaintiff is currently in Grade 11. His school reports indicate that his average scholastic performance is better than the academic performance of his peers, although his marks are not high. I trust that his parents will heed the educational psychologist's advice that the plaintiff be provided with remedial intervention, as this will enhance his academic progress.

- [7] It is notoriously difficult to quantify claims for loss of earning capacity where minors are injured. The court does not possess clairvoyant powers and must be guided by well-substantiated opinions of expert witnesses in quantifying claims for loss of earning capacity. The court is not bound to calculations made by actuaries, although the court should generally take cognisance of the calculations and the basis on which it was made as a guiding principle.
- [8] *In casu*, I am uncomfortable with the postulation that the plaintiff will enter the labour market on an unskilled level. The evidence clearly indicates that he will be able to obtain a Diploma. The plaintiff clearly is part of a family that recognises the value of further education. He is currently outperforming his peers, although his marks are average, as evidenced by the fact that almost all his grades exceed the average grade percentage. There is no indication as to whether he is currently receiving remedial intervention as proposed by the experts. As a result, I am of the view that the actuarial calculation constitutes but a broad guideline.
- [9] In quantifying the plaintiff's claim for loss of earning capacity, I had regard to the actuary's calculations that I regard as conservative regarding the post-morbid scenario, the expert evidence, and the principle that a court must endeavor to achieve a fair balance in considering awards, as explained by Holmes J in *Pitt v Economic Insurance Co Ltd*:¹
- ‘The court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense.’
- [10] In the result, I am of the view that an amount of R2 000 000.00 (two million) is an amount that will sufficiently compensate the plaintiff's loss of earning capacity whilst not being over-generous.

ORDER

In the result, the following order is granted:

¹ 1957 (3) SA 284 (N).

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 emailed to the parties/their legal representatives.

For the plaintiff:	Adv. JDB Themane
Instructed by:	B.B. Mkhonto Attorneys
Date of the hearing:	18 August 2023
Date of judgment:	16 October 2023