



## **NORTH WEST HIGH COURT, MAFIKENG**

CASE NO. 1104/2010

In the matter between:

**CHRISTOPHER BAKANG MOKGOTHU  
o.b.o. BRENDON KEAObAKA PAUL**

PLAINTIFF

and

**MEC OF EDUCATION NORTH WEST PROVINCIAL  
GOVERNMENT**

DEFENDANT

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### **JUDGMENT**

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**GUTTA J.**

#### **A. INTRODUCTION**

- [1] This is an action in which the plaintiff, who is cited in his personal and representative capacity, claims damages against the MEC for Education, North West Provincial Government, arising from bodily injuries sustained by his minor son, Brendon Keaobaka Paul ("the minor") when a steel gate at Moeti Primary School fell on the minor who was a learner at the school.

- [2] The parties settled the merits and on 24 October 2011 an order in terms of which the defendant is liable to pay 100% of the plaintiff's proven or agreed damages was granted by this Court.
- [3] Hence, the matter proceeded before me on quantum only, with three heads of damages for determination being: general damages, future medical treatment and future loss of earnings.
- [4] No witnesses for either party were called as the parties, at the commencement of the proceedings, agreed that the medico-legal reports of the various experts filed on behalf of the plaintiff and the defendant as well as the joint minutes of the industrial psychologists, the educational psychologist and the neurologists be admitted as evidence. The only issue in dispute is the quantum. The content of the expert reports were not disputed.
- [5] The plaintiff sought leave to amend the particulars of claim in so far as the quantum is concerned, which amendment was not opposed and the Court granted the amendment.
- [6] The facts briefly are that on 14 October 2009 at Moeti Primary School, the minor child who was 6–7 years old and in Grade 1 was injured when a gate came off its rails and fell on him. He was initially taken to a clinic near the school and then transferred to the Vryburg Private Hospital, where he was admitted for treatment until 17 October 2009. The minor child sustained the following injuries:

- 6.1 head injury;
- 6.2 back injury;
- 6.3 chest injury.

[7] It is common cause that the minor child suffered a mild to moderate head injury that resulted in a brain injury with concomitant post-traumatic neurological deficits. Post-accident, the minor child experienced learning difficulties which necessitated him repeating Grade 1 three times. Presently, he is in Grade 2.

## **B. GENERAL DAMAGES**

[8] The joint minute prepared by the plaintiff's and the defendant's educational psychologists is relevant when determining the quantum for general damages and is repeated herein. Both psychologists agree on the following:

### **"1. HISTORY OF INJURY**

Brendon Paul Mokhutu sustained a head injury at the Moete Primary Scholl on 2009-10-14. He was 6:09 years old at the time and in Grade 1.

### **2. INJURIES SUSTAINED**

Brendon Paul Mokhutu suffered a mild to moderate head injury that resulted in a brain injury with posttraumatic neurological deficits. He definitely displays various symptoms of a TBI (Traumatic Brain Injury) that resulted in varying degrees of permanent neurocognitive, neuropsychological and neurobehavioural sequelae which manifest in scholastic difficulties (reading, writing, spelling and maths), impaired visual/auditory processing speed,

memory difficulties (short-term, long-term and working memory) as well as attention and concentration difficulties.

### 3. CLINICAL FINDINGS REGARDING PRESENT FUNCTIONING

The incident has compromised Brendon Paul Mokhutu on all levels of functioning. Although he is of average to above average intellectual potential, he will need intensive help from a multi-modal therapy team (Neurologist, Educational/Counselling Psychologist, Remedial Therapist, Speech Therapist and Occupational Therapist) to develop his potential. He is not capable to function independently at present and will need intensive therapy to develop skills to function at an independent level in the future."

[9] In the joint minute of the neurologists, Professor D.S. Magazi and Dr J.A. Smuts, agree, *inter alia*, that:

9.1 The minor child sustained a concussive head injury of a moderate severity.

9.2 The minor child suffers from vascular headaches, which can be classified a post-traumatic headache.

[10] Counsel for the plaintiff, Mr Holland-Müter, referred the Court to the following cases in respect of the head injury:

10.1 ***Nhlapo v Mutual & Federal Insurance Company 1995 (4) QOD B3-B32 (W)***, where the Court awarded R45 000.00 for general damages, the equivalent for 2012 (*Quantum Yearbook* by Robert J. Koch) is R189 000.00. A nine years old boy suffered a global brain injury with unconsciousness for between four to seven days and post-

traumatic amnesia for one week to one month. His school performance initially deteriorated, he failed Standard 2 but later stabilized. Sequelae included bedwetting, headaches and loss of hearing in the left ear, mild left facial paralysis, poor organizational skills and difficulty in sequencing thought and handling normal information.

10.2 ***Hayward v Protea Versekeringsmaatskappy Bpk 1985 (3) QOD 588 (C)***, R25 000.00 was awarded, the equivalent for 2012 is R221 000.00. (Multiple injuries and distinguishable.)

10.3 ***Nkomo v President Insurance 1992 (4) QOD A4-82 (W)***, R60 000.00 was awarded, the equivalent for 2012 is R227 000.00. (Injuries not serious and distinguishable.)

10.4 ***Jenneker N.O v Marine & Trade Insurance Co Ltd 1978 (2) QOD 771 (SE)***, R10 000.00 was awarded, the equivalent for 2012 is R257 000.00. (Injuries not serious and distinguishable.)

[11] Mr Holland-Müter submitted that the plaintiff is seeking between R210 000.00 and R235 000.00 for general damages.

[12] Mr Chwaro, counsel for the defendant, referred the Court to the following cases:

12.1 ***Mautla v Road Accident Fund 2001 (5) C & B B3-1 (T)***, R90 000.00 was awarded, the equivalent for 2012 is R169 000.00. The patient was

4½ years old at the time of the collision. He suffered a head injury, diffuse axonal injury and fracture at the base of the skull, causing mild permanent brain damage, but leading to severe psychological consequences, *inter alia*, a permanent inability to perform academically at superior levels of IQ. The child was unable to perform commensurately at school, having failed twice and still performing below the level of his potential and age and would probably in remedial school attain no higher than Grade 9.

- 12.2 ***Bikawuli v Road Accident Fund 2009 (6) QOD B4-17 (ECB)***, R135 000.00 was awarded, the equivalent for 2012 is R156 000.00. A 16 years old boy suffered a traumatic brain injury of moderate severity, resulting in cognitive deficit, behavioural changes, dizziness, memory impairment, fatigue and headaches. His employment prospects were adversely affected.
- 12.3 ***Fries v Road Accident Fund 2002 (5) C & B B4-88 (C)***, R100 000.00 was awarded, the equivalent for 2012 is R172 000.00. (Distinguishable, 63 Years old male who suffered a mild to moderate head injury.)
- 12.4 ***Mathews v Road Accident Fund 2003 (5) C & B B4-173 (AF)***, R100 000.00 was awarded, the equivalent for 2012 is R162 000.00. 14 Years old girl who suffered a mild diffuse brain injury leading to behaviour and personality changes, daily headaches and speech and language difficulty. Considered unemployable.

[13] Mr Chwaro submitted that an appropriate award in respect of general damages is an amount between R130 000.00 and R160 000.00.

[14] Further cases that I have considered are the following:

14.1 ***Babe v Road Accident Fund 2009 JDR 1172 (GNP) unreported.***

14.2 ***Ngema v Road Accident Fund [2009] JOL 24008 KZP***, an 8 years old who commenced Grade 1.

14.3 ***Kunene v Road Accident Fund 2011 JDR 1805 (GSJ) unreported.***

14.4 ***Makupula v Road Accident Fund 2010 JDR 0394 (ECM) unreported.*** A 5 years old boy sustained a mild to moderate diffuse axonal concussive brain injury. As a result thereof he suffered from neurocognitive deficits associated with attention deficit, hyperactive disorder, memory dysfunction, uncooperative and aggressive behaviour, poor concentration, poor executive functioning and poor scholastic performance and was unemployable on the open labour market. R300 000.00 was awarded for general damages.

[15] The Court, when assessing general damages, looks at the extent of the injuries sustained and the sequelae thereof and is often guided by previous cases, which provide a useful guideline and a starting point. The Court must then consider the facts and evidence of the case before it when arriving at a quantum that is fair and reasonable.

- [16] As Nugent JA stated in *Minister of Safety & Security v Seymour* 2006 (6) SA 320 (SCA) at paragraph 17:

“The assessment of award of general damages with reference to awards made in previous cases is fraught with difficulty. The fact of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that.”

- [17] I have considered the nature of the injuries sustained by the minor child and the sequelae thereto, the effect thereon on his day to day life and future life expectancy, including his educational and vocational prospects. I have also considered the pattern of awards in other earlier cases.

- [18] Although neither party addressed the Court on the granting of a conservative or modern approach in awarding of compensation, I have taken cognisance of the Supreme Court of Appeal's caution against the exercise of judicial discretion in the fixing of general damages through blind reliance on the tendency towards higher awards. See *P E Jongh v Du Pisani* [2004] 2 All SA 565 (SCA).

- [19] Consequently, a sum of R195 000.00 is, in my view, a fair and adequate compensation to be awarded under the head of general damages.

### C. FUTURE MEDICAL TREATMENT

- [20] Mr Holland-Müter referred the Court to the value of medical expenses in



both the plaintiff and the defendant's actuarial reports. He submitted that the defendant's actuary, Mr Gregory Whittaker, did not make provision for neurological therapy and medication. The plaintiff's actuary, Mr Gerhard Jacobson, made provision for a one-off fee for physical therapy, medication and consultation with psychiatrist in the amount of R16 416.00 and for concerta medication if needed yearly for 12 years from the age of 9 years to the age of 18 years and antidepressants from the age of 9 years to the age of 14 years.

- [21] Mr Chwaro conceded that the costing for the neurologist was not quantified. He also submitted that provision should be made for physical therapy, medication and consultation with a psychiatrist. However, he submitted that concerta medication and anti-depressants should be excluded because of Dr Smuts' remarks, namely, "only if needed".
- [22] Mr Holland-Müter submitted that the defendant made no provision for remedial lessons in primary and high school, and for occupational therapy, while the plaintiff's expert, Ms P. Erasmus, included remedial lessons, therapy and counseling totaling R498 796.00.
- [23] Mr Chwaro submitted that the costs for remedial education were high and could be circumvented by placing the minor child in a boarding school specializing in remedial education. He tendered on behalf of the department to cover all the costs for the boarding school, including transport.

[24] Mr Holland-Müter submitted that there is no specialized school in close vicinity to where the minor child resides and it was not in the best interest of the minor child to remove him from his family and safe environment and place him in unfamiliar surroundings.

[25] Mr Holland-Müter conceded that item 9 provided by Ms Erasmus for extra maths lessons in the amount of R129 223.00 could be excluded from the calculation.

[26] Mr Holland-Müter submitted that the Court should add the plaintiff and the defendant's actuarial calculations together in arriving at the quantum for future medical expenses, namely

The defendant's -	R139 403.00
The plaintiff's -	R498 796.00 (R628 019.00 less R129 223.00)
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	R638 199.00
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[27] Mr Chwaro submitted that the defendant's value for future medical expenses in the amount R139 403.00, included psychotherapy and parental guidance and is duplicated by the plaintiff who made provision for therapy and family counseling.

## **ANALYSIS**

[28] In both the plaintiff and the defendant's quantum for future medical expenses, certain costings have been excluded, for example, the

defendant omitted the costing for the neurologist, remedial lessons, while the plaintiff omitted transport costs for individual psychotherapy and parental guidance, totaling R24 131.00.

[29] I agree with Mr Chwaro that there is also a duplication of the defendant's expenses in relation to individual therapy and family counseling/guidance, provided by the plaintiff.

[30] Accordingly, in arriving at the quantum for future medical expenses, I have relied on the plaintiff's estimation of R628 019.00, less items 9 (extra maths classes) R129 223.00, plus transport costs of R24 131.00 and arrive at an amount of R522 927.00.

[31] I am also of the view that contingency should be made for medical expenses if needed as provided by Dr Smuts, in the amount of R55 167.00.

[32] Furthermore, it is common cause that the minor child requires specialized/remedial education. It was brought to my attention that the issue of the minor child attending a specialized school was never discussed with the plaintiff. Further, the experts' reports provide no assistance on the psychological impact that this may have on the minor child. In view of the fact that the child, who is still very young, would be required to leave his protected environment where his mother cares for him, to attend a specialized school in another area, is in my view, not at this stage in the minor child's best interest.

[33] The defendant's own expert, Dr Swanepoel, stated that the minor child has sustained varying degrees of permanent neurocognitive and neuropsychological sequelae and from the report it is apparent that the minor child's mother plays a significant role in his life. She says:

"From a psychological point of view and independent functioning which suggests age-inappropriate behaviour and level of development, there is cause for concern. His mother reports that she has to supervise his dressing and he is not able to prepare any food for himself. He is totally incapable of working independently and long hours are spent with his school work and he still struggles."

#### **D. LOSS OF FUTURE INCOME**

[34] Both parties' industrial psychologists, S. Vos and C.J. Nel, prepared a joint minute, wherein they agreed on the following:

##### **"Pre-incident**

That the minor child was a slow learner prior to the incident and was likely to have attained a Grade 12 school qualification. According to Vos, the minor child would have entered the labour market in the unskilled worker category, earning an A2/3 Paterson Scale, reaching B3/4 Paterson Scale at the age of 45 years. Nel opines that the minor child would have entered the non-corporate labour market initially earning below the lower quantile and medium earning of semi-skilled workers and progressing to a level between this medium and upper quantile. They both agree that he could work until the normal retirement age.

**Post-incident**

Vos opined that the minor child will be limited to lower levelled employment, which does not demand high levels of concentration, mental feasibility and agility or working against stringent timelines. They both agree that he will be restricted to employment which is structured, routine and supervised in nature. According to Vos, these types of employment generally fall within the ambit of an unskilled worker who would secure employment on the median quantile earnings of an unskilled non-corporate worker and need the acre of his career at upper quantile earnings of an unskilled non-corporate worker. Nel opined that the minor child would likely enter the open labour market at a level of income equivalent to the lower quantile and progress but not exceed the median quantile by age 45."

- [35] The defendant's actuary, Mr Whittaker, in his post-accident calculation assumed that the minor child would only be eligible for employment from 01 January 2023 and made provision for a 6 year period of unemployment. Hence, he assumed that the minor child's entry into employment will be in 2029 at a salary of R14 800.00, which salary was erroneously calculated on the 2012 rate. Mr Chwaro conceded that Mr Whittaker should have adjusted the salary for 2029.
- [36] Mr Holland-Müter further submitted that Mr Whittaker had already made provision for any unemployment after school in the general contingency deductions of 25% and should not have deducted the period of 6 years.
- [37] I am in agreement with Mr Holland-Müter that provision for any period of unemployment would be catered for in the contingency deduction. I

have relied on the plaintiff's actuary's, Mr Jacobson's calculation. Mr Jacobson presented two scenarios, namely, employment in the formal sector and employment in the non-corporate sector.

- [38] In support of employment in the formal sector, Mr Holland-Müter relied on Dr Swanepoel's, the educational psychologist's, report. Dr Swanepoel opined that the type and severity of the head injury suffered by the minor child has resulted in varying degrees of permanent neuro-cognitive and neuro-cognitive sequelae and that although the minor child is of average to above average intelligence, he is incapable of utilizing his potential. He stated that:

"Had it not been for the brain injury, . . . he would have been able to obtain a grade 12 with ease and even tertiary qualification at a university. With the deficits he is displaying post the accident, he may be able to obtain a Grade 12 (standard grade) in specialized education, . . . he is not a candidate for main-stream education."

Mr Holland-Müter submitted that the two scenarios presented by Mr Jacobson cannot exclude tertiary education and that the Court should add both scenario 1 and 2 and half it or take 1/3 of the total to arrive at loss of future income.

- [39] Mr Chwaro submitted that the plaintiff's actuary's contingency deduction, having regard to the accident, should be 20% instead of 30%. This would cater for the 6 year period of unemployment.

**ANALYSIS**

[40] Although both the industrial psychologists were of the view that the minor child before the accident would have attained Grade 12, they both opined as stated *supra*, that he would have entered the non-corporate labour market. Dr Swanepoel is the only expert that opined that the minor child would have obtained a Grade 12 with ease and even tertiary qualifications. She arrived at this conclusion from the test data used to assess the minor child.

[41] I cannot ignore the evidence of the defendant's own expert and accepts that there is a probability that the minor child before the incident may have found employment in the formal sector. Having said that, I will accept the 1/3 calculation as proposed by Mr Holland-Müter, namely, R517 675.33.

**E. COSTS**

[42] Costs follow the result.

**F. TRUST**

[43] Mr Holland-Müter submitted that the plaintiff has prepared a trust deed wherein the minor child's parents are trustees. A copy of the trust document and the acceptance of office of the trustees was presented to the Court. The document has been lodged at the Master's Office

and they are awaiting final registration and the letter of authority. Accordingly, the plaintiff sought, *inter alia*, the establishment of the trust and further that until such time that the trustees are able to take control of the capital sum and to deal with same in terms of the trust deed, the plaintiff's attorney of record are authorized and ordered to make reasonable payments to satisfy the needs of the minor child.

## **G. ORDER**

[44] Accordingly, I make the following order:

1. The defendant shall pay to the plaintiff the sum of R1 290 769.33 in full and final settlement, which payment will be made on or before 30 September 2012 to the trust account of:

Abel Bester Incorporated  
First National Bank, Vryburg  
Account No. 54160364533  
Branch Code 240-201

2. The defendant shall pay to the plaintiff's taxed or agreed party and party costs on the High Court scale.
3. Costs to be paid by the defendant shall include, but not be limited to the following:
  - 3.1 The costs of senior/junior counsel;



3.2 The costs of the reports and the reasonable reservation, preparation and qualifying fees (if any) of the following experts:

3.2.1 S Vos;

3.2.2. Elsabe Swanepoel;

3.3.3 Dr J.A. Smuts;

3.3.4 Petro Erasmus;

3.3.5 Elzeth Jacobs;

3.3.6 Lenmarie Stanton;

3.3.7 Dr Kobus De Wet;

3.3.8 Michelle Beneke.

3.3 The costs of obtaining the actuarial reports from the actuary, Mr G.W. Jacobson;

3.4 The reasonable travel expenses in transporting the plaintiff to the plaintiff's own experts and the defendant's experts.

4. A Trust, known as the MOKGOTHU FAMILY TRUST ("the Trust"), has been established to control and administer the capital amount on behalf of the minor child, BRENDON KEAOBAKA PAUL ("the Minor"). Copies of the trust deed and letter of authority in respect of the Trust are annexed hereto, marked as Annexures "B1" and "B2".

5. The question whether the trustees of the Trust, Christopher Bakang Mokgothu and Boitumelo Barbara Mokgothu ("the Trustees") should be obliged to furnish security to the satisfaction of the Master of the High Court of South Africa, should the Master of the High Court deem it necessary that security be furnished for the assets of the Trust is left entirely in the hands of the Master of the High Court in terms of Section 6 of the Trust Property Control Act 57 of 1988.
6. The costs of the furnishing of security by the Trustees administering the funds on behalf of the Minor, if so directed by the Master of the High Court, be paid by the plaintiff.
7. The plaintiff's attorney shall, after deduction of their attorney/client fees, the attorney/client fees of their correspondents and all disbursements (inclusive of counsel's fees and fees of experts) pay the balance of the monies due to the plaintiff to the Trust.
8. Until such time as the Trustees are able to keep control of the capital sum and to deal with same in terms of the trust deed, the plaintiff's attorneys of record are authorised and ordered to make reasonable payments to satisfy any of the needs of the Minor that may arise and which are required in order to satisfy any reasonable need for treatment, care, aids or equipment that may arise in the interim.

9. The plaintiff shall pay the costs of the establishment of the Trust.

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N. GUTTA  
**JUDGE OF THE HIGH COURT**

**APPEARANCES**

DATE OF HEARING : 03 AUGUST 2012  
DATE OF JUDGMENT : 30 AUGUST 2012

COUNSEL FOR PLAINTIFF : ADV J. HOLLAND-MÜTER  
COUNSEL FOR DEFENDANT : ADV O.K. CHWARO

ATTORNEYS FOR PLAINTIFF : BOTHA COETZER SMITH  
(Instructed by ABEL BESTER INC.)  
ATTORNEYS FOR DEFENDANT : THE STATE ATTORNEY